

14-0845

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,
Plaintiffs,

v.

MATIN, et al.,
Defendants.

Civil Action No. 81-MISC-585
Judge Louis H. Bloom

2014 JUN -3 AM 9:34
KAWHA COUNTY CIRCUIT COURT

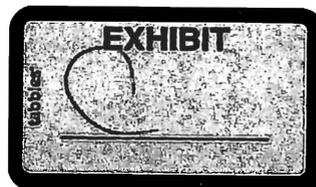
ORDER

On April 24 and 29, 2014, the Petitioners and the Respondents appeared for an evidentiary hearing to address issues of under-staffing and patient care at Mildred Mitchell Bateman Hospital (Bateman) and William R. Sharpe, Jr., Hospital (Sharpe) (collectively, the Hospitals). Specifically, the Court received evidence on the high number of staff vacancies at both hospitals, the Respondent's reliance on mandatory overtime, the hiring of temporary and contract workers to fill staff vacancies, and the effect of the staffing problems on patient care. The Court additionally heard evidence on the Respondents' failure to work with the Division of Personnel to offer competitive wages as a means to recruit and retain full-time employees. Finally, the Court received evidence on the Respondents' continued failure to implement the terms of this Court's 2009 *Agreed Order* with regard to pay-increases for certain direct care classifications. After reviewing the evidence presented, the Court finds and concludes as follows:

FINDINGS OF FACT

Staffing Vacancies

1. Bateman and Sharpe each have a significant number of on-going staffing vacancies in direct care positions, which include Health Service Trainees, Health Service



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Workers, Health Service Assistants, Licensed Practical Nurses (LPNs), and Registered Nurses (RNs).

2. Reports generated by the Respondents established that, in the months of February and March 2014, there were an average of forty-eight (48) vacant positions at Sharpe and forty-four (41) vacant positions at Bateman.¹

3. Bateman Chief Executive Officer (CEO), Craig Richards, testified that Bateman is "habitually short of staff" and has been so for a "number of years."²

4. At Sharpe, the vast majority of the vacancies are in positions that provide direct care to patients. For example, for the first three weeks of March 2014, twenty-one (21) of the forty-eight (48) vacant positions at Sharpe were Health Service Trainee/Worker/Assistant positions, five (5) were LPN positions, and twelve (12) were RN positions. Thus, of the forty-eight (48) vacancies, thirty-eight (38) vacancies were in positions that provide direct care to hospital patients. Notably, five (5) of the remaining ten (10) vacant positions were for psychologists, a pharmacist and an EKG/EEG Technician; while these positions are not designated as "direct care positions" by the Respondents, the nature of these positions is such that the vacancies would also directly affect the care of patients.³

Mandatory Overtime

5. The Respondents consistently require large amounts of mandatory overtime from direct care employees at Sharpe and Bateman.⁴ The Bureau of Behavioral Health and Health

¹ Pet. Ex. 11.

² Hr'g Tr. 33:22-24, 34:1-2, Apr. 24 and 29, 2014.

³ *Id.*

⁴ Pet. Ex. 16.

Facilities (BHHF) Commissioner, Victoria Jones, testified that the use of overtime at Bateman and Sharpe is significant, routine, and consistent.⁵

6. Charts generated by the Respondents indicate that direct care employees at Sharpe were required to work 664.75 hours of mandatory overtime during the week of February 23 to March 2, 2014, and 558 hours of mandatory overtime during the week of March 9 to March 16, 2014.⁶ During those same two weeks at Bateman, direct care employees were required to work 273 hours and 218 hours of mandatory overtime, respectively.⁷ Notably, employees also worked large numbers of voluntary overtime hours during these weeks as well.⁸

7. Sharpe Health Services Assistant, Jamie Beaton, testified that hospital employees are required to work large amounts of overtime, which can be either voluntary or mandatory.⁹ If a worker refuses to work assigned mandatory overtime, it is considered a basis for termination.¹⁰ Employees who do not “volunteer” for overtime have their overtime hours assigned to them; employees who “volunteer” for overtime hours, while still required to work overtime, are able to retain some control over their schedule.¹¹

8. Direct care employees are sometimes required to work twelve to sixteen hour shifts, two to three days in a row.¹²

9. A report generated by Sharpe Hospital titled *Present and Future Staffing Needs* states, in its *Executive Summary*, that “mandatory and voluntary overtime is being used to meet

⁵ Hr’g Tr. 228:3–12.

⁶ Pet. Ex. 16.

⁷ *Id.*

⁸ *Id.*

⁹ Hr’g Tr. 13:1–4.

¹⁰ Hr’g Tr. 13:13–18.

¹¹ Hr’g Tr. 13:4–12.

¹² Hr’g Tr. 12:1–6, 13:19–24.

the acuity levels on the patients' units. The use of mandatory and voluntary overtime is causing turn-over and morale issues."¹³

Temporary Employees and Contract Workers

10. Rather than hiring additional full-time employees, the Respondents employ large numbers of temporary employees and contract workers to fill the vacancies at Sharpe and Bateman.

11. The Respondents hire temporary employees to work a set number of hours (either 720 or 1000) within a one year period.¹⁴ Temporary employees are required to work overtime; thus, a temporary employee typically works between three and five months at one of the Hospitals.¹⁵ Of those three to five months, approximately one month is spent in training.¹⁶

12. The Respondents hire contract workers through contract agencies for periods of thirteen weeks at a time, although the period can be extended if the contract worker agrees to stay for another thirteen weeks.¹⁷ Contract workers also spend approximately one month of their three month commitment in training.¹⁸

13. The Respondents pay out-of-state contracting agencies millions of dollars per year to employ contract workers.¹⁹ On average, the Respondents pay \$53.27 an hour per contract RN, \$37.73 an hour per contract LPN, and \$39.00 an hour per contract Health Service Worker.²⁰ These amounts are significantly greater than the Respondents' expenditures on fulltime employees in the same positions, even when benefits are included in the calculation.²¹ For

¹³ Pet. Ex. 21.

¹⁴ Hr'g Tr. 40:2-6.

¹⁵ Hr'g Tr. 40:7-16.

¹⁶ Hr'g Tr. 41:6-24, 42:1.

¹⁷ Hr'g Tr. 40:20-24.

¹⁸ Hr'g Tr. 41:6-24, 42:1.

¹⁹ Pet. Ex. 15.

²⁰ *Id.*

²¹ Pet. Exs. 13 & 14.

example, a Health Service Worker making \$22,992 annually, which barely exceeds the average salary for a Health Service Worker employed at Sharpe Hospital,²² costs the Respondents a total of \$15.71 per hour, benefits included.²³ Similarly, an LPN making \$31,284, very close to the average salary for LPNs employed by the Respondents, costs the department a total of \$21.18 per hour, benefits included.²⁴ Thus, the Respondents pay significantly more per contract employee than per fulltime employee.

Failure to Offer Competitive Wages

14. The Respondents' inability to recruit and retain employees, particularly for direct care positions, is caused by their failure to offer competitive salaries.

15. The base starting annual salaries for the categories of direct care workers at the Hospitals are as follows:

	<u>Annual</u>	<u>Hourly</u>
Health Service Trainee:	\$18,552	\$8.92
Health Service Worker:	\$19,488	\$9.37
Health Service Assistant:	\$20,472	\$9.84
Licensed Practical Nurse:	\$25,804	\$12.40
Registered Nurse 1:	\$34,248	\$16.47
Registered Nurse 2:	\$36,312	\$17.46
Registered Nurse 3:	\$40,542	\$19.49
Registered Nurse 4:	\$45,812	\$22.03 ²⁵

In addition, full time employees are offered benefits that include health care, paid leave, and retirement, which amount to approximately 40% of the employees' salary.²⁶

16. More often than not, the Respondents hire employees at or very near the base salary.²⁷ While an employee's starting salary may be increased incrementally based on prior experience, the Respondents have implemented an internal policy that a new employee's starting

²² Pet. Ex. 18.

²³ Pet. Ex. 13.

²⁴ *Id.*

²⁵ Pet. Exs. 3, 4, 13, 14.

²⁶ Hr'g Tr. 217:6; Pet. Ex. 14.

²⁷ Pet. Exs. 13 & 14.

salary may never be more than the average salary of other employees in the same position, regardless of the number of years of experience.²⁸ Consequently, starting salaries for direct care workers are not competitive, which significantly hinders the recruitment of fulltime staff.²⁹

17. Furthermore, direct care workers hired by the Respondents do not receive raises, regardless of years of service, unless the Legislature and Governor issue an across-the-board pay raise for all employees.³⁰ The Respondents' failure to provide periodic raises or salary increases to direct care employees results in those positions being non-competitive and vacant.³¹

18. Cabell Huntington Hospital, a market competitor to Bateman, pays its similar classes of employees significantly higher starting salaries. The minimum starting salaries for the comparable positions, as well as the average hourly rate paid for that position, are as follows:

	<u>Min. Annual</u>	<u>Min. Hourly</u>	<u>Ave. Hourly</u>
Nursing Assistant:	\$29,369	\$14.12	\$16.43
Licensed Practical Nurse:	\$35,838	\$17.23	\$21.36
Registered Nurse:	\$50,273	\$24.17	\$30.66 ³²

In addition, each employee also receives fringe benefits that amount to approximately 40% of the annual salary for each position.³³ Moreover, Cabell Huntington Hospital employees are given a cost of living increase each year, as well as raises pursuant to a step-system based on years of service.³⁴

19. The average hourly wage for a nursing assistant, which would be comparable to a Health Service Worker, at six major hospitals in the Huntington, West Virginia, area in 2013 was \$13.34; likewise, the average hourly wage for an LPN was \$17.06, and the average hourly wage

²⁸ Hr'g Tr. 94:17-95:12, 149:21-150:4; Pet. Ex. 7.

²⁹ Hr'g Tr. 31:11-24, 32:7-11, 83:19-20.

³⁰ Hr'g Tr. 86:11-24.

³¹ Hr'g Tr. 231:14-24.

³² Pet. Ex. 5; Trans 113:17-115:15.

³³ Pet. Ex. 5; Hr'g Tr. 115:16-116:10.

³⁴ Hr'g Tr. 116:15-117:22.

for an RN was \$27.29.³⁵ The average wages are reviewed by the participating hospitals each year, and each year the average wage increases.³⁶

20. The Respondents have the ability to request permission from the DOP to issue special hiring rates, hiring incentives, and retention incentives.³⁷ While the DOP's policies generally cap starting salaries of new employees at the "market rate" provided by the DOP,

[a]t the request of the appointing authority, the Director of Personnel may authorize an original appointment above the market rate of the classification, not to exceed the maximum rate, if it has been established that the classification is critical to the agency's mission and that the market rate is insufficient for recruitment of applicants.³⁸

Furthermore, "an appointing authority may recommend an in-range salary adjustment of up to 10% of current salary to all employees in a job class for which documented salary non-competitiveness has been established."³⁹ Such an increase is called a "retention incentive."⁴⁰ Recruitment incentives are similarly available under the DOP policies.⁴¹

21. The Respondents have not made any requests to the DOP to increase starting salaries above the base salary, much less above the market rate, to issue other recruitment incentives, or to provide retention incentives to hospital employees since 2009.⁴²

Failure to Implement Special Starting Salaries for Health Service Employees

22. The base starting rates for the three classifications of health service employees are the same base starting rates that were in effect on February 1, 2009—prior to the 2009 *Agreed Order*.⁴³ The three classes of health service employees have not been issued a special hiring rate

³⁵ Trans 124:22–126:1.

³⁶ Hr'g Tr. 129:19–130:6.

³⁷ Hr'g Tr. 240:1–7.

³⁸ Pet. Ex. 7 at (III)(A)(2).

³⁹ *Id.* at (D)(2).

⁴⁰ *Id.*

⁴¹ *Id.* at (D)(6).

⁴² Hr'g Tr. 71:9–24, 240:8–10.

⁴³ Pet. Ex. 3 & 4.

because the Respondents never requested a special hiring rate for those classes of employees.⁴⁴ The Respondents continue to hire individuals in those three classifications at pre-2009 *Agreed Order* base rates.⁴⁵

Impact of Under-staffing on Patient Care

23. The quality of patient care is diminishing as a result of the staffing shortages at Sharpe and Bateman.

24. Sharpe employee Jamie Beaton, a Health Services Assistant, testified that having to work back-to-back overtime shifts means that “oftentimes, you’re not up to par to do your job. Obviously staff morale has been affected by this big time, so ultimately that affects patient care.”⁴⁶

25. Bateman CEO Craig Richards testified that, as a result of having to train new temporary and contract workers every few months, more time is devoted to the training of employees than the care of patients.⁴⁷ He further admitted that high staff turnover, caused by the use of temporary and contract workers, can negatively impact patient care because “some patients do build relationships with staff, and they actually gain familiarity with them.”⁴⁸

26. In addition, patients have been unable to access community integration opportunities as a result of chronic under-staffing. In the month of January 2014, no patients participated in any community integration outings at Bateman.⁴⁹ In February 2014, a total of six patients at Bateman received one community integration outing.⁵⁰

⁴⁴ Hr’g Tr. 104:6–7, 240:11–15.

⁴⁵ Pet. Exs. 13 & 14; Hr’g Tr. 247:19–248:7.

⁴⁶ Hr’g Tr. 14:18–22.

⁴⁷ Hr’g Tr. 41:19–24, 42:1.

⁴⁸ Hr’g Tr. 42:8–15.

⁴⁹ Pet. Ex. 1.

⁵⁰ Pet. Ex. 2.

27. Commissioner Jones testified that Sharpe struggles to comply with its community integration requirements, and that “[c]ommunity integration is one area that suffers because of vacant positions. . . .”⁵¹

28. CEO Richards testified that Bateman is not complying with the requirement that patients receive community integration and that the “primary reason would be the limitation of the number of staff that we have available to attend those community integration outings with patients who are found to be eligible to participate in community integration activities.”⁵²

29. Because Bateman does not comply with community integration requirements, the hospital is not evaluating patients to determine whether they should be eligible to receive community integration services.⁵³

30. Community integration is an essential component of patient care that ensures patients do not become institutionalized and are able to reintegrate into a community-based setting as quickly as possible.⁵⁴

CONCLUSIONS OF LAW

31. The 2009 *Agreed Order* states that “DHHR shall provide for increased pay for direct care workers at Bateman and Sharpe 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.)”⁵⁵ The *Order* further provides that “DHHR will use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent contexts.”⁵⁶ The Respondents’

⁵¹ Hr’g Tr. 248:20–23, 249:22–23.

⁵² Hr’g Tr. 29:8–19.

⁵³ Hr’g Tr. 54:6–14.

⁵⁴ Hr’g Tr. 28:17–24.

⁵⁵ 2009 *Agreed Order* ¶ 10(a).

⁵⁶ 2009 *Agreed Order* ¶ 10(b).

consistent reliance on mandatory overtime and continued employment of numerous contract workers and temporary employees violates these provisions of this Court's 2009 *Agreed Order*.

32. The Respondents have taken no steps to offer competitive market wages in order to recruit and retain full time employees, as required by paragraph 10 of the 2009 *Agreed Order* and West Virginia Code § 5-5-4a.

33. The Respondents have failed to comply with the terms of the 2009 *Agreed Order* and subsequent December 18, 2012, *Order*, which require a special starting salary for the three classes of direct care employees, as set forth in Attachment B to the 2009 *Agreed Order*.

34. The Respondents have violated the standards of patient care, as required by West Virginia Code of State Rules sections 64-59-1 to -20 and the 2009 *Agreed Order* paragraph 10(d), by failing to provide community integration activities as required by West Virginia C.S.R. § 64-59-14.4.

35. The Respondents' violation of patient care requirements is caused by the Respondents' failure to maintain adequate and appropriate fulltime staffing at the Hospitals.

WHEREUPON, the Court hereby ORDERS as follows:

a. The Respondents, in consultation with the Petitioners and the Court Monitor, must develop 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; and (3) discontinue the reliance on temporary employees and contract workers to fill the vacant positions. Among other things, the 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 doing so, the Respondents shall consider prevailing market wages in the respective market areas for the two *Hospitals*.

The Plan Must
further include requests to the Division of Personnel for retention incentives to encourage retention of existing hospital employees. The plan must provide a schedule for future proposals to the Division of Personnel to ensure that base salaries remain competitive and that additional retention incentives are distributed. Finally, the plan must be submitted to the Court on or before June 11, 2014.

b. The Respondents must 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 of 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.

c. The Respondents must provide community integration opportunities to all eligible patients at both hospitals. As required by the Court Monitor's recommendations issued on March 26, 2014, the Respondents must develop policies and procedures for community integration, which correspond between the two Hospitals and which adhere to West Virginia C.S.R. § 64-59-14.

The Clerk is hereby DIRECTED to forward a certified copy of this Order to all counsel of record and to the Office of the Court Monitor.

ENTERED this 2 day of June, 2014.


Louis H. Bloom, Judge

6/13/14
Certified copies sent by
D. Sudbeck
J. Foster
Milnes
Clerk

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,
Petitioners,

v.

Civil Action No. 81-MIS-585
Judge Louis H. Bloom

FILED
CARY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
JUN 27 PM 1:56

MATIN, et al.,
Respondents.

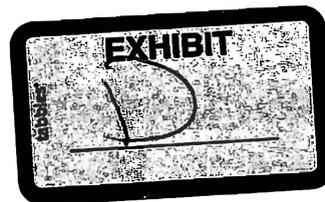
ORDER

On June 3, 2014, the Court entered an *Order* requiring the Respondents to consult with the Petitioners and the Court Monitor in developing 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; and (3) discontinue the reliance on temporary employees and contract workers to fill the vacant positions” with other specific directives. The Court ordered the Respondents to submit the plan to the Court on June 11, 2014. The parties convened for a hearing before the Court on June 11, 2014, and failed to present a plan that complies with the Court’s *Order*.

FINDINGS OF FACT

1. The findings of fact contained in the *Order* entered by the Court on June 3, 2014, are hereby adopted and incorporated into this instant *Order*. Additionally, the Court makes the following findings.

2. For years, the Respondents have jeopardized the vulnerable populations at Mildred Mitchell Bateman and William R. Sharpe Memorial, Jr., hospitals (collectively, the Hospitals) despite numerous *Orders* from this Court. What follows is a glimpse of the Court’s three-decade long monitoring of the Hospitals.



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3. This mandamus action was originally filed in this Court on June 23, 1981, by a group of patients at the Huntington State Hospital, which has since been renamed Mildred Bateman Hospital. Justice Richard Neely began his opinion with a vivid description: "Once again this Court's attention must be focused on the 'Dickensian Squalor of unconscionable magnitudes' of West Virginia's mental institutions."¹ Lacking the time and expertise necessary to reorganize West Virginia's mental health care delivery system, the West Virginia Supreme Court transferred the matter to this Court to monitor the case.²

4. On March 27, 2002, the Court removed the case from its active docket, stating that it would continue to consider major non-implementation issues going forward through an "ombudsman" process.³ While the case was removed from the active docket, the Court received reports from the Ombudsman for Behavioral Health (Ombudsman) and continued to hold hearings on the progress the parties were making on unresolved issues.

5. On July 3, 2008, the ombudsman for Behavioral Health issued a report informing the Court of severe overcrowding at Bateman. Specifically, the Ombudsman reported that Bateman was operating at a census in excess of its certified capacity and that, as a result, the hospital was suffering various problems in performing its duty to care for patients.

6. Because the Ombudsman Report raised significant issues regarding the Respondent's failure to comply with W. Va. Code § 27-5-9, and with approval from the West Virginia Supreme Court of Appeals,⁴ on August 28, 2008, the Court determined that a full evidentiary

¹ *E.H. v. Matin*, 168 W. Va. 248, 284 S.E.2d 232 (1981).

² *Id.* at 259, 237-38.

³ *See Order*, Mar. 27, 2002, Civil Action No. 81-MISC-585.

⁴ *See ex rel. Mattn v. Bloom*, 223 W. Va. 379, 674 S.E.2d 240 (2009).

hearing was warranted and reopened the case.⁵ On April 24 and 27, 2009, the Court conducted evidentiary hearings to determine the Respondent's compliance with said Code section.

7. At the hearing on April 24, 2009, the then-Chief Executive Officer of Bateman Hospital, Mary Beth Carlisle, testified: "And we have consistent vacancies in nursing and in direct care."⁶ Ms. Carlisle attributed the vacancies to low pay, among other things, stating: "Our pay is not competitive with the private sector."⁷ Ms. Carlisle also testified that, in contravention of W. Va. Code St. R. § 64-59-14, Bateman was not providing community integration services for its patients.⁸

8. At the hearing on April 24, 2009, the Bateman Hospital Clinical Director, Dr. Shahid Masood, testified that psychiatric patients were being fed or injected with sedatives to quell the increased anxiety and stimulus caused by the overcrowding.⁹

9. At the April 2009 hearing, witnesses for both parties agreed that overcrowding was caused by dramatic reduction in available community services for individuals suffering from mental illness.¹⁰ The evidence showed that the West Virginia Department of Health and Human Resources' failure to reimburse community service providers resulted in decreased community services, including day treatment, case management, and basic living skills.¹¹ As a result of the reduction in community services, the number of involuntary commitments increased far beyond capacity.¹²

10. Based on the evidence presented at the hearing on April 24 and 27, 2009, the Court entered an *Order Regarding Case Management Services* on August 7, 2009. The Court

⁵ W. Va. Code § 27-5-9 establishes the rights of clients of State-operated mental health facilities.

⁶ Carlisle Test., Hr'g Tr. 21:11-12, Apr. 24, 2009.

⁷ *Id.* at 24:12-13.

⁸ *Id.* at 71-72.

⁹ Masood Test., Hr'g Tr. 89-92, Apr. 24, 2009.

¹⁰ Hr'g Tr. 75-76, 98-100, 161-162, 201, 359, Apr. 24 and 27, 2009; Pl.'s exs. 16, 18; Resp't's ex. 2.

¹¹ Hr'g Tr. 102, 165-68, 205, 229, 296, 362; Pl.'s exs. 16, 18.

¹² Hr'g Tr. 98-100, 127, 359; Pl.'s ex. 3-5.

concluded, *inter alia*: “Without the provision of community services, Bateman and Sharp Hospitals will continue to suffer from overcrowding and violations of patients’ rights established by W. Va. Code § 27-5-9 will continue to occur. . . . The evidence presented reflects that clients’ rights are being violated because individuals are being kept in inpatient, locked institutional facilities, despite readiness for discharge into the community, based on the lack of community services.” The Court ordered the parties to remedy the issues raised at the hearing.

11. On July 2, 2009, the Court entered an *Agreed Order* requiring the Respondents to increase the pay of direct care staff in order to “(i) . . . 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).” The Court further ordered the Respondents to “use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent contexts.”

12. On July 19, 2011, the parties presented testimony on the Respondent’s progress regarding overcrowding, understaffing, and inhumane living conditions at the Hospitals. The evidence presented at the hearing showed that both hospitals continued to be overcrowded, resulting in patients being housed on temporary cots in small, windowless classrooms with no access to bathrooms or closets.¹³ The evidence showed that the Hospitals continued to suffer vacancies and continued to utilize voluntary and mandatory overtime to maintain a minimum level of staffing for the protection of staff and patients.¹⁴ The Court concluded, “Overcrowding of the state psychiatric facilities continues to violate state law, regulations, and the Orders entered in this case.”¹⁵

¹³ See Hr’g Tr. 60, July 19, 2011.

¹⁴ See Order, Aug. 19, 2011, Civil Action No. 81-MISC-585.

¹⁵ *Id.*

13. On December 9 and 13, 2011, the Court again heard testimony regarding overcrowding, understaffing, and inhuman living conditions at the Hospitals. The evidence presented at the hearing showed that both Hospitals continued to have vacancies in direct care positions.¹⁶ The evidence showed that overcrowding continued to diminish the level of care and community integration opportunities available to the patients.¹⁷ Further, patients continued to be housed in rooms not fit for habitation.¹⁸

14. On October 17, 2012, the Court heard testimony with regard to understaffing and the Respondents' failure to comply with the Court's July 2, 2009, *Order* regarding pay raises necessary to retain and recruit direct care staff. The Respondents admitted that they had not complied with the 2009 *Order*.¹⁹ Therefore, on December 11, 2012, the Court again ordered the Respondents to comply with the *Order*.

15. Despite the Court's *Orders*, many of the same problems that have run rampant since 2009 persist today. As laid out in the Court's June 3, 2014, *Order*, patients at the Hospitals are suffering from inadequate direct care and lacking community integration opportunities. The Hospitals have failed to recruit and retain direct care staff, failed to comply with Court *Orders* regarding pay raises for direct care workers, failed to offer community integration services, and have consequently failed to provide adequate direct care to patients at the Hospitals.

16. The June 3, 2014, *Order* directed the Respondents to develop a short-term and long-term plan to address and remedy the problems identified, and on June 11, 2014, the parties appeared to propose their plans. After hearing the proposed plans, the Court finds that the Respondents have failed to make any reasonable efforts to submit a viable plan in compliance with the Court's

¹⁶ Hr'g Tr. 48, 67, Dec. 9, 2011; Pl.'s ex. 6.

¹⁷ Hr'g Tr. 24-25, Dec. 9, 2011.

¹⁸ *Id.* at 343-344.

¹⁹ Hr'g Tr. 72, Oct. 17, 2012.

Order. By failing to comply with the Court's *Orders* and by failing to remedy issues that have plagued the Hospitals for years, the Respondents continue to neglect and disregard the safety and welfare of West Virginia's psychiatric patients.

CONCLUSIONS OF LAW

17. The conclusions of law contained in the Court's June 3, 2014, *Order* are adopted and incorporated here. Additionally, the Court makes the following conclusions of law:

18. Pursuant to W. Va. Code § 27-5-9, "[e]ach patient of a mental health facility receiving services from the facility shall receive care and treatment that is suited to his or her needs and administered in a skillful, safe and humane manner with full respect for his or her dignity and personal integrity."

19. Under W. Va. Code § 64-12-17, West Virginia psychiatric hospitals must comply with 42 C.F.R. § 482.62, which provides that psychiatric must have "adequate numbers of qualified professional and supportive staff . . . [and] adequate numbers of registered nurses, licensed practical nurses, and mental health workers."

20. Under W. Va. Code § 61-5-26, a court may "issue attachment for contempt and punish . . . the following cases: . . . (d) disobedience to or resistance of any officer of the court, juror, witness, or other person, to any lawful process, judgment, decree or order of the said court. . . . No court shall impose a fine for contempt, unless the defendant be present in court, or shall have been served with a rule of the court to show cause, on some certain day, and shall have failed to appear and show cause." The West Virginia Supreme Court has recognized that "W. Va. Code § 61-5-26 provides the circuit court with the power to hold in contempt any person disobeying a lawful order issued in a case in which the court has jurisdiction and venue is proper."²⁰

²⁰ *State ex rel. Dodrill v. Scott*, 177 W. Va. 452, 352 S.E.2d 741 (1986). *Cf. Alexander v. Hill*, 707 F.2d 780, 784 (4th Cir. 1983) (Finding that a district court did not abuse its discretion when it required North Carolina's Secretary

21. Under West Virginia law, “[t]he appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order.”²¹

22. The Court finds and concludes the Respondents have flagrantly and continuously failed to comply with the law and the Court’s *Orders* and are therefore held in contempt. Specifically, the Court finds and concludes that the Respondents disobeyed the Court’s *Order* entered on June 3, 2014, requiring the Respondents to develop a plan to remedy the issues identified in the *Order*. The Court finds and concludes that the Respondents may purge their contempt by developing a plan subject to Court approval that complies with the objectives laid out in the June 3, 2014, *Order*.

DECISION

Accordingly, the Court does **ORDER** the Respondents to forthwith reduce the number of patients at the Hospitals such that the Hospitals are adequately staffed. This solution will temporarily alleviate the understaffing of direct care workers at the Hospitals until the Respondents submit a plan approved by the Court, in accordance with the Court’s *Order* entered on June 3, 2014, that addresses and resolves: (1) the number of staff vacancies at the Hospitals; (2) excessive mandatory overtime; and (3) the reliance on temporary employees and contract workers to fill the vacant positions. The Court does further **ORDER** the parties to appear for a show cause hearing on July 15, 2014, at 9:30 a.m. on the Respondents’ impending sanctions for contempt of the June 3, 2014, *Order* and prior *Orders*. The Commissioner for the Bureau for

of Human Resources to comply with law and imposed a sanction for any failure to comply, the Fourth Circuit stated, “We all are expected to abide fully by the law, and expose ourselves to sanctions whenever we failed to do so.”)

²¹ Syl. pt. 3. *State ex rel. Robinson v. Michael*, 166 W. Va. 660, 276 S.E.2d 812, 813 (1981).

Behavioral Health and Health Facilities, Victoria L. Jones, and the Secretary of the Department of Health and Human Resources, Karen L. Bowling, are hereby **ORDERED** to appear at said hearing.

The Clerk is **DIRECTED** to forward a certified copy of this *Order* to all counsel of record and the Office of the Court Monitor at the following addresses:

James Wegman, Asst. Attorney General
Allen Campbell, Asst. Attorney General
Bureau of Behavioral Health and Health Facilities
Department of Health and Human Resources
350 Capitol Street, Room 350
Charleston, WV 25301

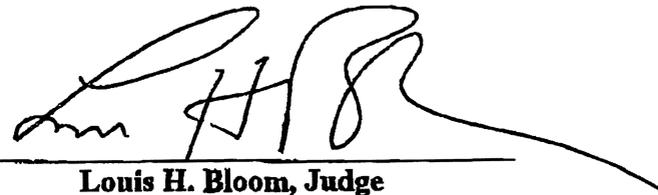
Daniel Greear
West Virginia Office of the Attorney General
State Capitol Building 1, Room E-26
Charleston, WV 25305

David Sudbeck
Office of the Court Monitor
State Capitol Complex, Building 6, Room 850
Charleston, WV 25305

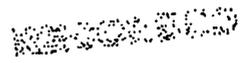
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1207 Quarrier Street, Ste. 400
Charleston, WV 25301

Jennifer Wagner
Daniel Hedges
Mountain State Justice
1031 Quarrier Street, Ste. 200
Charleston, WV 25301

ENTERED this 27th day of June 2014.


Louis H. Bloom, Judge

Date: 6/27/14
Certified copies sent to:
— counsel of record
— parties
— other as needed
(Please indicate)
By: certified/1st class mail
— fax
— hand delivery
— interdepartmental
Other diligences accomplished:
H. L. ...
Deputy Circuit Clerk



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,
Petitioners,

v.

MATIN, et al.,
Respondents.

Civil Action No. 81-MISC-585
Judge Louis H. Bloom

2014 AUG 13 PM 1:09
KANAWHA COUNTY CIRCUIT COURT

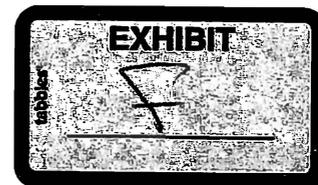
ORDER

On August 1, 2014, the parties appeared pursuant to this Court's June 27, 2014 *Order*, which held the Respondents in contempt of court for failing to comply with this Court's June 3, 2014, *Order* and prior *Orders*, and directed the Respondents to show cause as to why they should not be sanctioned. Upon appearing on August 1, 2014, the Respondents presented a plan to the Court which substantially complies with the Court's June 3, 2014, *Order*. The Respondents represented that, with the Court's approval, they would implement the proposed plan forthwith. Accordingly and consistent with the *Oral Ruling* made on August 1, 2014, the Court approves of the plan submitted by the Respondents on August 1, 2014, and finds that the Respondents have purged themselves of the contempt so long as they execute their proposed plan.

FINDINGS OF FACT

1. The findings of fact contained in the *Orders* entered by the Court on June 3, 2014, and June 27, 2014, are hereby adopted and incorporated into this instant *Order*. Additionally, the Court makes the following findings.

2. The Respondents have presented a proposed plan to bring the two state psychiatric hospitals, Mildred Mitchell Bateman (Bateman) and William R. Sharpe, Jr. (Sharpe)



(collectively Hospitals), into compliance with the staffing requirements set forth in the 2009 *Agreed Order*.¹

3. The plan developed by the Respondents utilizes the West Virginia Division of Personnel's Pay Plan Implementation Policy to implement recruitment and retention incentives to address the ongoing vacancies in direct care positions at the two hospitals.²

4. To implement the recruitment and retention plan, the Respondents propose to undertake two market studies, one in each hospital's geographic area, to determine the market wages and market compensation packages offered by major hospitals (defined as having bed counts of 100 beds or greater) in the market areas for each of the two hospitals.³

5. In a letter addressed to the Director of the Division of Personnel, submitted with Respondents' plan, the Respondents indicate that they will obtain market wage and compensation package data for the respective geographic areas for the Hospitals from the major hospitals "from whom the information for the market is available to the DHHR/BHMF."⁴

6. During the August 1, 2014 hearing, the Respondents acknowledged that some of the major hospitals in the respective geographic areas are likely to be in states bordering West Virginia, and the Respondents are unsure whether wage and compensation package information can be obtained from those hospitals. Counsel for the Respondents represented, however, that the Respondents would make reasonable efforts to obtain such data from the major hospitals in neighboring states that fall within the two market study geographic areas.⁵

¹ See *Respondents' Proposal to Address Recruitment Issues at Mildred Mitchell Bateman and William R. Sharpe, Jr., Hospitals*, Aug. 1, 2014, Hr'g ex. 1.

² *Id.*

³ *Id.*

⁴ *Id.* at 1.

⁵ See August 1, 2014, Hr'g Tr. 28:4-24.

7. The Respondents further testified that the market study would clearly set forth the data being analyzed by listing the value of wages with and without benefits and the value of each component of the benefits so that comparisons are clear and unambiguous.⁶

8. Counsel for the Respondents represented that “if the Court so orders and desires us to move forward, we’re prepared to do that pursuant to the Court’s instruction, and we have attempted to do that to the best of our ability, and that’s all I would say with respect to the plan.”⁷ In response, the Court emphasized: “moving in the direction as the Department has outlined appears to be within their means and within their power to begin to move on at a deliberate pace, and I think that solves the problem that I have with the prior plans. . . . [T]his [plan] needs to be implemented with deliberate speed.”⁸

9. The Respondents did not object to the Court’s approval of the proposed plan. Rather, the Respondents requested that, based on their submission of the proposed plan and representations as to its implementation, the Court purge the contempt *Order* entered on June 27, 2014.⁹

10. Ongoing vacancies and the Respondents’ continued reliance on mandatory overtime and contract employees at the Hospitals violate the terms of the 2009 *Agreed Order* and raise serious concerns related to the care of patients who are among the State’s most vulnerable populations. As such, prompt implementation of the Respondents’ plan is necessary.

CONCLUSIONS OF LAW

11. The plan developed by the Respondents, as presented at the August 1, 2014, hearing, substantially complies with this Court’s *Orders* of June 3, 2014 and June 27, 2014, by utilizing

⁶ *See id.* at 33:14–34:17.

⁷ *Id.* at 40:11–16.

⁸ *Id.* at 43:13–17, 44:8–9.

⁹ *Id.* at 45:23–46:1.

currently existing Division of Personnel policies and procedures to immediately and effectively address the staffing vacancies and the related reliance on mandatory overtime and temporary/contract workers to bring the Hospitals into compliance with the 2009 *Agreed Order*.

12. Specifically, the proposed plan presents an appropriate method by which the Respondents can (1) significantly reduce the number of direct care staffing vacancies at Sharpe and Bateman Hospitals; (2) discontinue the Respondents' practice of requiring direct care employees to work mandatory overtime, except in exceptional and infrequent contexts; and (3) discontinue the Respondents' reliance on temporary employees and contract workers to fill the vacant positions, except in exceptional and infrequent contexts.¹⁰

13. The Respondents may wish to pursue other solutions which would require legislation to implement. Nothing in this *Order* or any prior *Orders* of this Court impedes the ability of the Legislature to change the manner in which the Hospitals are operated, nor do the *Orders* prohibit the Respondents from seeking such legislative action.

14. Until such time as the Legislature changes the law, however, the current plan, which utilizes the current legal structure to address the ongoing violations of the 2009 *Agreed Order*, should be implemented without delay or disruption.

DECISION

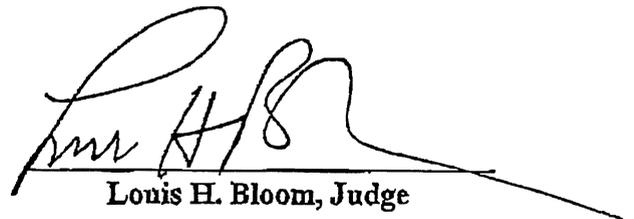
Accordingly, the Court hereby **ORDERS** that the Respondents are purged of contempt so long as the Respondents immediately implement the plan as they proposed, including the stipulations made at the hearing that (1) the Respondents will make reasonable efforts to obtain wage and compensation information from all major hospitals in the respective radiuses—a fifty mile radius of Bateman Hospital and a seventy-five mile radius of Sharpe Hospital—containing

¹⁰ See July 2, 2009, *Agreed Order*, ¶ 10(a)–(b).

those hospitals in neighboring states; (2) the Respondents will clearly set forth the data being analyzed in the market survey, including a breakout of the wages with and without benefits and a value of each component of the benefits; (3) the Respondents will submit the findings of the market survey, including the data relied upon to the Petitioners, the Court Monitor, and the Court upon its completion; (4) the Respondents shall provide a status report to the Court at the hearing scheduled for September 17, 2014, regarding implementation of the plan; and (5) that Department of Health and Human Resources Secretary Karen Bowling, Bureau for Behavioral Health and Health Facilities Commissioner Victoria Jones, and Governor Earl Ray Tomblin's Chief of Staff, Charles Lorensen, shall appear in person at the September 17, 2014, hearing.

The Clerk is hereby **DIRECTED** to forward a certified copy of this *Order* to all counsel of record and to the Office of the Court Monitor.

ENTERED this 13 day of August 2014.


 Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
 COUNTY OF KANAWHA, SS
 I, CATHY S. GATSON, CLERK OF SAID COUNTY
 AND IN SAID STATE DO HEREBY CERTIFY
 IS A TRUE COPY FROM THE ORIGINAL
 FILED IN CASE NO. 14-00000000000000000000
 DAY OF _____ 2014
 C. Ebers

8/13/14 }
 Certified copies sent to:
 ___ counsel
 ___ parties
 ___ other
 By: C. Greear }
 J. Eegman } faxed
 P. Milnes } &
 D. Sudbeck } mailed
 T. Bowling }
 C. Ebers }

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

E.H., et al.,
Petitioners,

v.

Civil Action No. 81-MISC-585
Judge Louis H. Bloom

MATIN, et al.,
Respondents.

ORDER

Pending before the Court is an *Amended Motion for Stay and Entry of Partial Final Judgment (Motion)* filed by the Respondent, West Virginia Department of Health and Human Resources (Respondents or DHHR), on August 11, 2014. The Respondents move the Court to stay its *Orders* entered on June 2 and 27, 2014, and declare them to be final judgments so the Respondents can appeal the *Orders*. The Respondents also intend to appeal the Court's *Oral Order* given at a hearing on August 1, 2014, regarding the Respondents' prompt implementation of the Respondent's plan to resolve a number of problems that have plagued the Hospitals for years, including (1) a high number of staff vacancies, (2) excessive mandatory overtime, and (3) excessive reliance on temporary employees and contract workers to fill vacant positions. On June 2 and 27, 2014, as well as by *Agreed Order* dated July 2, 2009, the Court ordered the Respondents to resolve these issues.¹

FINDINGS OF FACT

1. For years, the Respondents have jeopardized the vulnerable populations at Mildred Mitchell Bateman and William R. Sharpe Memorial, Jr., hospitals (collectively, the Hospitals) despite numerous Orders from this Court.

¹ See *Order*, June 2, 2014 (filed June 3, 2014); see also *Order*, June 27, 2014; *Agreed Order*, July 2, 2009.



2. This mandamus action was originally filed in this Court on June 23, 1981, by a group of patients at the Huntington State Hospital, which has since been renamed Mildred Bateman Hospital. Justice Richard Neely began his opinion with a vivid description: “Once again this Court’s attention must be focused on the ‘Dickensian Squalor of unconscionable magnitudes’ of West Virginia’s mental institutions.”² Lacking the time and expertise necessary to reorganize West Virginia’s mental health care delivery system, the West Virginia Supreme Court transferred the matter to this Court to monitor the case.³

3. On July 3, 2008, the ombudsman for Behavioral Health issued a report informing the Court of severe overcrowding at Bateman. Specifically, the Ombudsman reported that Bateman was operating at a census in excess of its certified capacity and that, as a result, the hospital was suffering various problems in performing its duty to care for patients.

4. Because the Ombudsman Report raised significant issues regarding the Respondent’s failure to comply with W. Va. Code § 27-5-9, on August 28, 2008, the Court determined that a full evidentiary hearing was warranted and reopened the case.⁴ The Respondents appealed the Court’s decision to reopen the case, filing a writ of prohibition against the Court. In denying the writ, the West Virginia Supreme Court noted:

The regular staff suffers from extremely low morale due to forced overtime and working with unqualified temporary workers with questionable backgrounds. . . . [M]any of the same issues that were present in 1981 at the time of the *Matin I* decision continue to be problems today . . . These issues include . . . numerous staffing issues described above.⁵

² *E.H. v. Matin*, 168 W. Va. 248, 284 S.E.2d 232 (1981).

³ *Id.* at 259, 237–38.

⁴ W. Va. Code § 27-5-9 establishes the rights of clients of State-operated mental health facilities.

⁵ *See ex rel. Matin v. Bloom*, 223 W. Va. 379, 384, 385, 674 S.E.2d 240, 245, 246 (2009).

5. With approval from the West Virginia Supreme Court of Appeals, on April 24 and 27, 2009, the Court conducted evidentiary hearings to determine the Respondent's compliance with W. Va. Code § 27-5-9. At the hearing on April 24, 2009, the Bateman Hospital Clinical Director, Dr. Shahid Masood, testified that psychiatric patients were being fed or injected with sedatives to quell the increased anxiety and stimulus caused by the overcrowding.⁶

6. At the April 2009 hearing, witnesses for both parties agreed that overcrowding was caused by dramatic reduction in available community services for individuals suffering from mental illness.⁷ The evidence showed that the West Virginia Department of Health and Human Resources' failure to reimburse community service providers resulted in decreased community services, including day treatment, case management, and basic living skills.⁸ As a result of the reduction in community services, the number of involuntary commitments increased far beyond capacity.⁹

7. Based on the evidence presented at the hearing on April 24 and 27, 2009, the Court entered an *Order Regarding Case Management Services* on August 7, 2009. The Court concluded, *inter alia*: "Without the provision of community services, Bateman and Sharp Hospitals will continue to suffer from overcrowding and violations of patients' rights established by W. Va. Code § 27-5-9 will continue to occur. . . . The evidence presented reflects that clients' rights are being violated because individuals are being kept in inpatient, locked institutional facilities, despite readiness for discharge into the community, based on the lack of community services." The Court ordered the parties to remedy the issues raised at the hearing.

⁶ Masood Test., Hr'g Tr. 89-92, Apr. 24, 2009.

⁷ Hr'g Tr. 75-76, 98-100, 161-162, 201, 359, Apr. 24 and 27, 2009; Pl.'s exs. 16, 18; Resp't's ex. 2.

⁸ Hr'g Tr. 102, 165-68, 205, 229, 296, 362; Pl.'s exs. 16, 18.

⁹ Hr'g Tr. 98-100, 127, 359; Pl.'s ex. 3-5.

8. On July 2, 2009, the Court entered an *Agreed Order* requiring the Respondents to increase the pay of direct care staff in order to “(i) . . . 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).” The Court further ordered the Respondents to “use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent contexts.”

9. On July 19, 2011, the parties presented testimony on the Respondent’s progress regarding overcrowding, understaffing, and inhumane living conditions at the Hospitals. The evidence presented at the hearing showed that both Hospitals continued to be overcrowded, resulting in patients being housed on temporary cots in small, windowless rooms with no access to bathrooms or closets.¹⁰ The evidence showed that the Hospitals continued to suffer vacancies and continued to utilize voluntary and mandatory overtime to maintain a minimum level of staffing for the protection of staff and patients.¹¹ The Court concluded, “Overcrowding of the state psychiatric facilities continues to violate state law, regulations, and the Orders entered in this case.”¹²

10. On December 9 and 13, 2011, the Court again heard testimony regarding overcrowding, understaffing, and inhumane living conditions at the Hospitals. The evidence presented at the hearing showed that both Hospitals continued to have vacancies in direct care positions.¹³ The evidence showed that overcrowding continued to diminish the level of care and community

¹⁰ See Hr’g Tr. 60, July 19, 2011.

¹¹ See *Order*, Aug. 19, 2011, Civil Action No. 81-MISC-585.

¹² *Id.*

¹³ Hr’g Tr. 48, 67, Dec. 9, 2011; PL’s ex. 6.

integration opportunities available to the patients.¹⁴ Further, patients continued to be housed in rooms not fit for habitation.¹⁵

11. On October 17, 2012, the Court heard testimony with regard to understaffing and the Respondents' failure to comply with the Court's July 2, 2009, *Order* regarding pay raises necessary to retain and recruit direct care staff. The Respondents admitted that they had not complied with the 2009 *Order*.¹⁶ Therefore, on December 11, 2012, the Court again ordered the Respondents to comply with the *Order*.

12. Many of the same problems that have run rampant since 2009 persist today. As laid out in the Court's June 3, 2014, *Order*, patients at the Hospitals are suffering from inadequate direct care and lacking community integration opportunities. The Hospitals have failed to recruit and retain direct care staff, failed to comply with Court *Orders* regarding pay raises for direct care workers, failed to offer community integration services, and have consequently failed to provide adequate direct care to patients at the Hospitals.¹⁷

13. The June 3, 2014, *Order* directed the Respondents to develop a short-term and long-term plan to address and remedy the problems identified, and on June 11, 2014, the parties appeared to propose their plans. After hearing the proposed plans, the Court found that the Respondents had failed to make any reasonable efforts to submit a viable plan in compliance with the Court's *Order*. By failing to comply with the Court's *Orders* and by failing to remedy issues that have plagued the Hospitals for years, the Respondents continued to neglect and disregarded the safety and welfare of West Virginia's psychiatric patients.

¹⁴ Hr'g Tr. 24-25, Dec. 9, 2011.

¹⁵ *Id.* at 343-344.

¹⁶ Hr'g Tr. 72, Oct. 17, 2012.

¹⁷ *See Order*, June 2, 2014.

14. On June 27, 2014, this Court entered an *Order* finding the Respondents in contempt of its prior *Orders* because the Respondents had failed to develop a viable plan to alleviate the problems of understaffing, temporary employees, and excessive mandatory overtime, which are many of the same problems that the West Virginia Supreme Court agreed needed to be addressed in 2009 and which are problems that this Court has, since 2009, ordered the Respondents to resolve.

15. On August 1, 2014, the parties appeared for a show cause hearing on impending contempt sanctions. At the hearing, the Respondents submitted and expounded upon a plan that this Court considered a viable resolution of the aforesaid problems. As a result, the Court commended the parties, declared that the Respondents' contempt had been purged upon adoption by the court and implementation of the Respondents' plan with deliberate speed, and issued no sanctions. Now, the Respondents attempt to revoke their plan via appeal.

16. At the August 1 hearing, Interim Director for the Office of Human Resources Management, Monica Robinson, testified to the specifics of the plan, including an annual market study to insure that employees at the Hospitals are paid competitive salaries as well as cooperation with the Division of Personnel.¹⁸

17. Markedly, no one from the DHHR objected to the plan. At the August 1 hearing, Mr. Daniel Greear, counsel for the Respondents, represented to the Court that "if the Court so orders and desires us to move forward, we're prepared to do that pursuant to the Court's instruction, and we have attempted to do that to the best of our ability, and that's all I would say with respect to the plan."¹⁹ Further, the Court emphasized: "moving in the direction as the Department has outlined appears to be within their means and within their power to begin to move on at a

¹⁸ Robinson Test., Hr'g Tr. 11, Aug. 1, 2014.

¹⁹ Hr'g Tr. 40:9-16, Aug. 1, 2014.

deliberate pace, and I think that solves the problem that I have with the prior plans. . . . [T]his [plan] needs to be implemented with deliberate speed.”²⁰ However, the Respondent’s written plan submitted to the Court on July 29, 2014, and again on August 1, 2014, states that the “DHHR/BHMF [Department of Behavioral Health and Health Facilities] continues to object to the selection of this plan over its other plans.”

DISCUSSION

18. In considering the *Motion*, the Court analyzes the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.²¹

19. Notwithstanding Respondents’ support for and agreeability with their own plan apparent at the August 1, 2014, hearing, the Respondents now contest their plan. The Respondents assert that a stay is necessary and that these factors are satisfied because (1) separation of powers forbids the Court to order a party to implement an administrative plan; (2) implementation of their plan will cause them injury by interfering with the constitutional powers to manage the Hospitals; (3) a stay would require no changes to current patient care; and (4) the public interest supports the DHHR in its management of the Hospitals.²² The Court disagrees for the following reasons.

20. With regard to the first factor, the West Virginia Supreme Court of Appeals in 1981 ordered this Court to monitor the Respondents compliance with state law to ensure that the

²⁰ *Id.* at 43:13–17, 44:8–9.

²¹ *Nken v. Holder*, 556 U.S. 418, 426 (2009); W. Va. R. Civ. P. 62(i); W. Va. R. App. P. 28(a).

vulnerable populations at the Hospitals were provided quality care.²³ Further, in 1993, the West Virginia Supreme Court of Appeals confirmed that continued monitoring by this Court was warranted.²⁴ In the 1981 decision, the West Virginia Supreme Court anticipated a separation of powers issue and addressed it in a footnote:

Elsewhere a question has arisen concerning the financial implications of the enforcement of the legal rights of mental patients. The question has usually been phrased in terms of separation of powers since orders according mental patients decent treatment imply a reallocation of State budgets, which may deprive the Legislature of its right to establish priorities for State funds. The definitive answer to this objection to Court intrusion into the area of mental health has been provided by the case of *Wyatt v. Aderholt*, 503 F.2d 1305, 1314-15, (5th Cir. 1974) where the court said:

It goes without saying that state legislatures are ordinarily free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights. And it is the essence of our holding that the provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional. That being the case, the state may not fail to provide treatment for budgetary reasons alone...²⁵

In 2009, the West Virginia Supreme Court confirmed that the separation of powers doctrine was not violated by this Court ordering the Respondents to comply with state law, namely W. Va. Code § 27-5-9.²⁶ This Court's *Orders* entered on June 2 and 27, 2014, and July 2, 2009, ordered

²³ *E.H. v. Matin*, 168 W. Va. 248, 284 S.E.2d 232 (1981).

²⁴ *State ex rel. Matin v. Bloom*, 223 W. Va. 379, 674 S.E.2d 240 (2009).

²⁵ *E.H. v. Matin*, 168 W. Va. 248, 284 S.E.2d 232, n.2 (1981).

²⁶ *State ex rel. Matin v. Bloom*, 223 W. Va. 379, 674 S.E.2d 240 (2009).

the Respondents to comply with W. Va. Code § 27-5-9 and its administrative counterpart, W. Va. Code St. R. § 64-59-1 through § 64-59-21. Accordingly, this Court is of the opinion that the separation of powers doctrine is not violated here.

21. With regard to the second factor, the Respondents have not identified a cognizable injury. The Respondents assert that immediate implementation of their plan will interfere with their “constitutional powers to direct . . . the management of the state hospitals” and cause “contractual or reliance interests for staff members.” Implementing a plan, drafted and agreed-upon by the Respondents, that resolves the issues of understaffing, mandatory overtime, and reliance on temporary direct care workers by offering direct care workers sufficient pay does not interfere with the Respondents’ “constitutional powers.” With regard to the latter argument, it is axiomatic and in the best interest of the Hospitals and its patients that direct care workers will rely on sufficient pay. Further, because the plan consists of several intermediate steps necessary for the plan’s full-execution, including market-studies and cooperation with the West Virginia Division of Personnel, the Court finds that current implementation of the Respondents’ plan will not prejudice the Respondents. Accordingly, the Court is of the opinion that the Respondents will not suffer irreparable injury by implementing its own plan.

22. With regard to the third factor, the Court has chronicled in its prior *Orders* and above the serious risk of harm accompanied by problems of understaffing, temporary employees, and mandatory overtime. The Court is of the opinion that delaying execution of the Respondents’ plan will exacerbate these existing, persistent problems.

23. With regard to the fourth factor, the Court identifies the public’s need for state hospitals that provide quality care to vulnerable populations as pronounced and repeated in this Court’s prior *Orders* and the above-mentioned West Virginia Supreme Court decisions. Having

considered the pertinent factors, the Court is of the opinion that the Respondents' *Motion* should be denied.

CONCLUSIONS OF LAW

24. The Court recognizes that a party must raise his or her objection contemporaneously with the Court's ruling to which it relates or be forever barred from appealing the ruling.²⁷

25. In considering a motion for stay pending appeal, a Court must consider the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."²⁸

26. The Court finds and concludes that the Respondents have not satisfied the requisite elements for the issuance of a stay pending appeal.

DECISION

Accordingly, the Court does hereby **ORDER** that the Defendant's request for a stay be **DENIED**. The Court does hereby **DECLARE** that this Court's June 2 and 27, 2014, *Orders* as well as its *Oral Order* given on August 1, 2014, with regard to the Respondents plan are **NOT FINAL** as said *Orders* continue to address the same problems that have existed since 2009. The Clerk is **DIRECTED** to send a certified copy and fax forthwith a copy of this *Order Denying Motion for Stay* to the counsel of record and to the Office of the Court Monitor.

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²⁷ *State v. Whittaker*, 221 W. Va. 117, 131, 650 S.E.2d 216, 230 (2007); *John v. Ringer*, 2014 WL 2404303 (W. Va. 2014); *See syl., Smith v. Holloway Const. Co.*, 169 W. Va. 722, 289 S.E.2d 230 (1982).

²⁸ *Nken v. Holder*, 556 U.S. 418, 426 (2009); W. Va. R. Civ. P. 62(f); W. Va. R. App. P. 28(a).

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ENTERED this 13 day of August 2014.


Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS
DAY OF _____ 2014.
Cathy S. Gatson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

8/13/14
Date: _____
Certified _____
by: D. Green } faxed
L. Milnes }
J. Wegman } mailed
D. Sudbeck }

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

E.H., et al.,
Petitioners,

2014 AUG 20 PM 3:01

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

Civil Action No. 81-MISC-585
Judge Louis H. Bloom

MATIN, et al.,
Respondents.

ORDER AMENDING AUGUST 14, 2014, ORDER

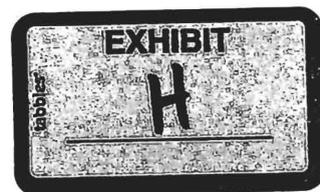
Pending before the Court is a *Motion for Reconsideration* filed on August 19, 2014, by the Respondents, the West Virginia Department of Health and Human Resources' Bureau for Behavioral Health and Health Facilities (Respondents or DHHR). In the *Motion* and its attachments, the Respondents take issue with the wording of two portions of the *Order* entered by this Court on August 14, 2014. First, the Respondents contend that DHHR did not agree to "implement the plan forthwith" as the *Order* states.¹ The *Order* explains:

Counsel for the Respondents represented that "if the Court so orders and desires us to move forward, we're prepared to do that pursuant to the Court's instruction, and we have attempted to do that to the best of our ability, and that's all I would say with respect to the plan." In response, the Court emphasized: "moving in the direction as the Department has outlined appears to be within their means and within their power to begin to move on at a deliberate pace, and I think that solves the problem that I have with the prior plans. . . . [T]his [plan] needs to be implemented with deliberate speed. . . ." The Respondents did not object to the Court's approval of the proposed plan."²

With regard to the Respondents' first contention, the Court is satisfied with its *Order* and denies this part of the *Motion*.

¹ August 14, 2014, *Order* at 1.

² *Id.* at ¶¶ 8-9 (internal citations omitted).



Second, the Respondents assert that the Court failed to acknowledge a portion of their proposed plan that reads, "proposal of this administrative plan in order to comply with the Court's Order should not be construed as DHHR/BHMF acquiescence to this plan." With regard to the Respondents' second contention, the Court grants this part of the *Motion*.

Accordingly, the Court does **GRANT, IN PART**, the Respondents' *Motion* and does **AMEND** paragraph nine of the August 14, 2014, *Order* to state:

The Respondents' proposed plan submitted to the Court on July 29, 2014, states, "proposal of this administrative plan in order to comply with the Court's Order should not be construed as DHHR/BHMF acquiescence to this plan." However, the Respondents did not object to the Court's approval of the proposed plan at the August 1, 2014, hearing. Rather, the Respondents requested that, based on their submission of the proposed plan and representations as to its implementation, the Court purge the contempt *Order* entered on June 27, 2014.

The Clerk is **DIRECTED** to send a certified copy of this *Order Amending August 14, 2014*, *Order* to the parties and counsel of record.

ENTERED this 20 day of August 2014.

Date: 8/20/14
Certified copies sent to:
 counsel of record DG, JW, DS
 parties RM
 other (please indicate)
By: certified/1st class mail
 fax
 hand delivery
 interdepartmental
Other directives accomplished:
[Signature]
Deputy Circuit Clerk

[Signature]
Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20
DAY OF August 2014
[Signature] CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA