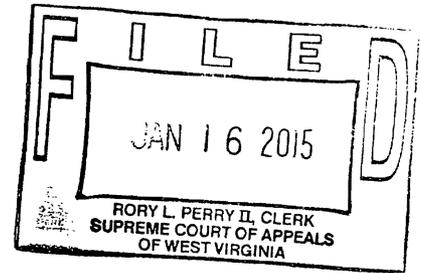


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0845

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



Petitioners,

v.

E.H., et al.,

Respondents.

BRIEF OF RESPONDENTS E.H., ET AL.

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INTRODUCTION

In its second of three appeals lodged in 2014, Petitioner Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities (“DHHR”) again challenges the circuit court’s authority to enforce a prior consent order of the parties, characterizing the circuit court’s order on appeal as violating the separation of powers and invading the province of the executive and legislative branches, despite this Court’s prior holdings in this case rejecting the same DHHR arguments and finding that the circuit court has just such authority. If this sounds familiar, it is because two of the three assignments of error raised by DHHR in the instant appeal are identical to the errors it raised in another pending appeal, Supreme Court Appeal Number 14-0664. In this appeal, however, DHHR adds a third assignment of error concerning the finality, or lack thereof, of the circuit court orders being appealed.

Over five years ago, DHHR voluntarily agreed to remedy certain serious problems with the staffing of its two state psychiatric hospitals, Mildred Mitchell Bateman Hospital in Huntington (“Bateman”) and William R. Sharpe, Jr. Hospital in Weston (“Sharpe”). DHHR undertook this agreement in order to come into compliance with its obligation to protect and care for patients under section 27-5-9 of the West Virginia Code. It is undisputed that the exact same problems, leading to the same statutory violations, persist to date. Not only has DHHR failed to comply with the agreements it entered in 2009, as well as numerous court orders attempting to enforce those agreements, it has failed to take any steps on its own to bring itself into compliance with the court orders or the law over the past five years. Because the orders at issue in this appeal are merely the latest attempts by the circuit court to compel DHHR to comply with the agreements it made five years ago, the circuit court did not exceed its authority when it directed DHHR to develop a plan utilizing existing state policies and procedures to meet its obligations as quickly as possible.

Pursuant to its Notice of Appeal filed on August 25, 2014, DHHR is challenging the circuit court's orders of August 1, 2014, and August 13, 2014. (See Pet. for Appeal, Aug. 25, 2014, at 2.) The three assignments of error raised within the body of the appeal, however, appear to expand the scope of the appeal to encompass the circuit court order entered on June 2, 2014 ("2014 Enforcement Order"), which is the subject of DHHR's prior appeal, Supreme Court No. 14-0664. For example, DHHR's second assignment of error challenges the circuit court's order contained in subparagraph (b) of 2014 Enforcement Order, directing DHHR to retroactively increase pay to certain classes of health service employees. The 2014 Enforcement Order is the only circuit court order addressing that issue; that issue was not addressed in the August 1, 2014, or August 13, 2014, orders which DHHR purports to challenge in the instant appeal. Similarly, in its third assignment of error, DHHR argues that the June 2, 2014, Enforcement Order is a "final judgment" and, thus, can be reviewed on appeal. DHHR makes this argument despite not designating that order as one of the "judgments" being appealed. Thus, Respondents herein respectfully submit that the issues raised in DHHR's second and third assignments of error are improperly raised in this appeal and should be dismissed. Nevertheless, Respondents herein will address all of the issues raised by DHHR, so as not to waive any arguments.

STATEMENT OF THE CASE

I. Background

This action was originally filed by the petitioners below as an original jurisdiction petition for mandamus, in response to egregious violations of section 27-5-9 of the West Virginia Code, regarding the unnecessary institutionalization of West Virginians with mental disabilities in abhorrent conditions in the state psychiatric facilities. See E.H. v. Matin, 168 W. Va. 248, 284 S.E.2d 232 (1981) (Matin I). In response to this Court's ruling, in October 1983, the parties agreed

and the court adopted the West Virginia Behavioral Health System Plan, to be implemented by DHHR with oversight by the court, ensuring protection of patient rights and provision of appropriate treatment. See E.H. v. Matin, 189 W. Va. 102, 104, 428 S.E.2d 523, 525 (1993) (Matin II). In 1993, after ten years of implementation, DHHR appealed a ruling by the circuit court halting construction of a hospital. Id. In Matin II, this Court held that the circuit court did not have the authority to halt the construction of a hospital when the Legislature had already explicitly appropriated funds for the hospital's construction. Id. at 105, 428 S.E.2d at 526. The Court further determined, in a subsequent opinion, that continued court monitoring of DHHR's delivery of services was necessary. E.H. v. Matin, 189 W. Va. 445, 432 S.E.2d 207 (1993) (Matin III).

Court monitoring continued until 2002 to ensure DHHR's compliance with its statutory duties. State ex rel. Matin v. Bloom, 223 W. Va. 379, 382, 674 S.E.2d 240, 243 (2009) (Matin IV). In 2002, the court, by agreement of the parties, dissolved the office of the court monitor and removed the case from the active docket; it retained, however, authority to re-open the case should certain unresolved issues remain problematic. Id. at 383, 674 S.E.2d at 244. At the request of the then-Secretary of DHHR, an Office of the Ombudsman was created within DHHR to assist with continued compliance. Id.

In 2008, the Ombudsman issued a report revealing that, among other problems, DHHR's treatment and care of patients at Sharpe and Bateman hospitals was suffering as a result of severely inadequate staffing and patient overcrowding. Matin IV, 223 W. Va. at 383, 674 S.E.2d at 244. In a separate report issued around the same time, the Ombudsman found that DHHR had failed to establish a system of care for West Virginians suffering from traumatic brain injuries, which DHHR had agreed to in a 2007 consent order. Id. As a result of the Ombudsman's reports, the circuit court re-opened the case and scheduled an evidentiary hearing. See id. at 384, 674 S.E.2d at 245. DHHR

objected to the circuit court's re-opening of the case, and filed a writ of prohibition with this Court arguing that the circuit court had exceeded its authority and was encroaching on the authority of the legislative and executive branches. Id. at 384-85, 674 S.E.2d at 245-46.

Ruling that the circuit court was within its authority, this Court expressed alarm regarding the reports of serious staffing problems being faced by the two state psychiatric hospitals:

[t]he regular staff suffers from extremely low morale due to forced overtime and working with unqualified temporary workers with questionable backgrounds. Specifically, the term 'Dickensian Squalor' that Justice Neely used to describe the hospital in 1981 is an apt description of the hospital that emerges from the Ombudsman's July 3, 2008 report.

Matin IV, 223 W. Va. at 384, 674 S.E.2d at 245. Ultimately, this Court refused to issue the writ, holding that "the circuit court has the power to ensure that patients are receiving treatment guaranteed to them under W. Va. Code § 27-5-9. The circuit court also has the power to enforce a Consent Order it previously issued." Id. at 381, 674 S.E.2d 242.

II. 2009 Evidentiary Hearings and Agreed Order

In April 2009, following this Court's decision in Matin IV, the circuit court conducted a two-day evidentiary hearing. During the hearing, Dr. Shahid Masood, the clinical director of Bateman Hospital, testified that staffing vacancies were causing "unsustainable" working hours for clinical staff. (App. 1671.) He testified that using temporary workers was not an efficient use of resources because "by the time they are trained, it is time for them to leave." (App. 1682.) He stated that increasing salaries would be an "extremely effective" method of recruiting additional employees. (App. 1683.) He further testified that as a result of the overcrowding and understaffing, hospital patients were suffering from increased levels of anxiety, which resulted in those patients being given increased amounts of sedative medications. (App. 1676-78.)

In the same hearing, Mary Beth Carlisle, the Chief Executive Officer of Bateman Hospital testified that the hospital suffered from “consistent vacancies in nursing and in direct care” and, to address that problem, “we work folks overtime, and we use temporary staff.” (App. 1645.) She further testified that recruiting and retaining direct care staff was difficult because “[o]ur pay is not competitive with the private sector. And folks have to work a lot of overtime.” (App. 1648.) She stated that requiring staff to work long hours to compensate for staffing shortages contributed to problems with patient care. (App. 1660.) She admitted that, as a result of the staffing shortages, patients were not receiving community integration trips as required by section 64-59-14.4 of the West Virginia Code of State Rules. (App. 1662-63.) She provided several recommendations for correcting the staffing problems, including “increas[ing] salaries for staff to the local prevailing wage . . . increas[ing] the number of full time employees . . . discontinu[ing] the use of 90 day temporary employees [and] eliminat[ing] mandated overtime . . .” (App. 1660-1661.)

Following the evidentiary hearing, the circuit court ordered the parties to mediation, during which the parties reached a variety of agreements. Those agreements, memorialized in the 2009 Agreed Order, included the following to address the staffing problems:

10. Facilities:

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

(App. 4.) Attachment B, as referenced in paragraph 10(a) of the Agreed Order, sets forth a chart listing the various classifications of direct care employees,¹ the number of positions for each classification, the proposed salary increase, and the total funding DHHR would need to implement the increase. (App. 6.)

The parties were not, however, able to reach an agreement regarding implementation of a system of care for people with traumatic brain injury (TBI) to effectuate two prior consent orders in which DHHR had agreed to provide TBI services. As a result, the circuit court issued an order specifically requiring DHHR to apply to the federal government to obtain a Medicaid waiver for TBI and to affirmatively request that the Legislature establish a TBI trust fund to meet additional unmet needs. DHHR appealed this order, arguing that it usurped its authority and violated the separation of powers doctrine because the order did not allow DHHR to decide on its own method of providing care for those with TBI. This Court disagreed, holding that “the separation of powers doctrine . . . [is] not implicated in this case. Rather this case concerns the enforcement of two consent orders entered into and agreed to by the DHHR.” E.H. v. Matin, No. 35505 (W. Va. Supreme Court, April 1, 2011) (memorandum decision) (Matin V).

III. 2011 Enforcement Proceedings

In July 2011, the circuit court conducted an evidentiary hearing regarding DHHR’s compliance with the 2009 Agreed Order. (App. 1684.) In an order entered following the hearing on August 18, 2011, the circuit court found that both hospitals continued to have problems with overcrowding, resulting in violations of patient rights, and that “there continue to be staffing

¹ The direct care positions designated to receive increased pay pursuant to Attachment B include three health service employee classifications (similar in nature to a nurse’s aide), seven nursing classifications, and psychiatrists.

vacancies and the hospitals continue to utilize voluntary and mandatory overtime to maintain a minimum level of staffing for the protection of staff and patients.” (App. 1687.)

Thereafter, on December 9, 2011, the circuit court conducted another evidentiary hearing on this issue. At that hearing, documents from Bateman Hospital established that, from January 2011 through November 2011, the hospital had an average of twenty-eight vacancies in direct care positions on any given day. (App. 1694-95, 1699.) Similarly, the Clinical Director from Sharpe Hospital testified that Sharpe Hospital also had persistent vacancies in direct care staff and, in addition, had required roughly 40,000 hours of overtime from its direct care employees during 2011. (App. 1697.) Accordingly, the evidence presented at that hearing clearly demonstrated that DHHR continued to be operating its hospitals in violation of its agreements set forth in the 2009 Agreed Order.

IV. 2012 Enforcement Proceedings

In the summer of 2012, it became apparent that DHHR had failed to comply with its agreement in the 2009 Agreed Order regarding increasing salaries for the lowest-paid classifications of direct care workers. (App. 8-10; 33-35.) While DHHR had increased the salaries for registered nurses and psychiatrists by at least as much as was provided for in Attachment B to the 2009 Agreed Order, it had not increased salaries for health service employees. (App. 12.) Rather, DHHR had implemented a three percent raise for those health service employees who had already been in their position for three years or longer. (Id.) Contrary to the representations made on page four of DHHR’s opening brief, the three percent raises received by the few health service employees who actually qualified for them were substantially less than the \$1,000-\$2,000 dollar pay increases

required for those positions in the 2009 Agreed Order.² (App. 50.) Accordingly, Respondents herein requested that the circuit court enforce DHHR's pay raise commitments in the 2009 Agreed Order. (App. 8-10, 33-35.)

On October 17, 2012, the circuit court conducted an evidentiary hearing on the matter. During that hearing, Victoria Jones, the Acting Commissioner for the Bureau of Behavioral Health and Health Facilities, testified that the three classifications of health service employees did not receive the pay increases that were provided for in the 2009 Agreed Order. (App. 85.) She further admitted that, with regard to pay increases for the health service employees, "[w]e have not complied with the Court order as written." (App. 92.)

On December 11, 2012, the circuit court entered an order directing DHHR to "comply with Item number 10(a) regarding increased pay for direct care workers at Bateman and Sharpe Hospitals of the Agreed Order entered by this Court on July 2, 2009." (App. 120.) The circuit court clarified that "said increases shall be for the exact amount listed in 'Attachment B' under the Proposed Increase column," and that "this pay increase shall be . . . implemented on or before January 1, 2013." (*Id.*) The circuit court did not require DHHR to apply the higher salaries retroactively back to 2009, but rather directed that the new salaries be implemented going forward. (*Id.*)

DHHR moved the circuit court to alter or amend its judgment and to stay its order pending the reconsideration, and the circuit court conducted a hearing on those motions on December 14,

² Notably, rather than cite to the evidentiary record, DHHR repeatedly cites to its own prior briefing, making unsupported and factually inaccurate assertions. (See Pet. Br. 4, 6, 8, 11, 12.) Indeed, DHHR's representation on page four of its brief is clearly erroneous given that the average salary for these employees is in the low \$20,000 range (App. 572-584.); a three percent raise for a salary of \$20,000 is roughly \$600.00, nowhere close to the \$2,000 required by the 2009 Agreed Order. (App. 6.) Indeed, for a health service worker to have received \$2,000 pursuant to a three percent raise, that employee would have had to have been already making roughly \$65,000, an amount that exceeds the salaries of even the most highly paid nurses at the two hospitals.

2012. (App. 122.) On December 18, 2012, the circuit court denied DHHR's motion and ordered that "employees in the LPN and Health Service Trainees, Workers, and Assistants classifications employed *on or after January 1, 2013*, are entitled to pay raises effective January 1, 2013, as provided in the Order entered December 11, 2012. . . ." (App. 143) (emphasis added). DHHR did not appeal the circuit court's orders.

V. April 2014 Enforcement Proceedings

In the fall of 2013 and spring of 2014, Respondents herein (petitioners below) raised concerns with DHHR and the court monitor regarding the worsening staffing vacancies at the two state hospitals, which were continuing to adversely affect patient treatment, and DHHR's continued reliance on mandatory overtime and temporary and contract workers to address those staffing vacancies in violation of the 2009 Agreed Order. (App. 145-48; 168-73.) The circuit court conducted evidentiary hearings on the issues on April 24 and 29, 2014, during which the evidence presented established that (1) significant vacancies exist in direct care positions at both state hospitals, to the detriment of patient treatment and care; (2) DHHR is hiring expensive temporary and contract workers, and relying on costly mandatory overtime, to compensate for those vacancies; (3) DHHR had undertaken no steps to remedy these problems; and (4) DHHR had failed to comply with the December 18, 2012, order enforcing the 2009 Agreed Order, by failing to implement new starting salaries for health service employees. At the hearings, the only proposed solution for these deficiencies that was raised by any witness was to increase staff salaries.

DHHR did not dispute the evidence presented at the April 2014 hearings establishing that both hospitals continue to suffer from high numbers of vacancies in the direct care classifications. Indeed, DHHR's own documents showed that each of the two state hospitals averaged between forty and fifty vacancies per month, most of which were in direct care positions. (App. 1811-26.) The

Chief Executive Officer of Bateman Hospital, Craig Richards, testified that Bateman Hospital is “habitually short on staff,” and has been “for a number of years.” (App. 279-80.) He further admitted that, as was occurring in 2009, patients at Bateman were not receiving legally required community integration outings (i.e. therapeutically necessary supervised trips into the community),³ because “we do not have enough staff to provide that.” (App. 277.)

DHHR further did not contest that it continues to require large amounts of mandatory overtime from direct care employees at Sharpe and Bateman. (App. 259, 1847-63.) The Commissioner for the Bureau for Behavioral Health and Health Facilities, Victoria Jones, testified that the use of overtime at Bateman and Sharpe is significant, routine and consistent. (App. 474.) DHHR documents established that direct care employees at Sharpe were required to work approximately six hundred hours of mandatory overtime a week, in addition to the overtime being worked voluntarily.⁴ (App. 1851, 1857.) A Health Service Assistant from Sharpe Hospital, Jamie Beaton, testified that direct care employees are sometimes required to work twelve to sixteen hour shifts, two to three days in a row. (App. 258-59.) He further testified that mandating overtime causes hardships to employees, which ultimately leads to low morale and high staff turnover. (App. 260-61.) A report generated by Sharpe Hospital entitled “Present and Future Staffing Needs” states

³ Community integration outings are therapeutically necessary to prepare patients for discharge into a community setting and to prevent the patient from becoming “institutionalized,” or losing their ability to act independently and appropriately outside of the institutional setting. Eligible patients are required to be offered multiple community trips each month. W. Va. Code R. § 64-59-14.4.

⁴ When DHHR needs additional employees to work a given shift in order to ensure enough staff are on the units, it first asks for volunteers; if not enough staff is willing to work over for that shift, DHHR then mandates certain employees to stay and fill the gap. (App. 258-59.) Refusal to work mandated overtime is grounds for termination. (App. 259.)

that “[m]andatory and voluntary overtime is being used to meet the acuity levels on the patients units. This is stressing staff leading to turn-over and morale issues.” (App. 1878.)

Furthermore, DHHR did not dispute that it continues to engage large numbers of temporary state employees and private, out-of-state contract workers to fill the vacancies at Sharpe and Bateman Hospitals. (App. 285-86.) Both contract and temporary workers are hired for short periods of time, roughly three to five months, of which one month is spent in training. (App. 286-88.) Bateman CEO Craig Richards testified that, because of their quick turn-over, a lot of time is spent training temporary employees that could otherwise be devoted to patient care, and that frequent turnover can be disruptive to patient care. (*Id.*) Moreover, DHHR is paying out-of-state contracting agencies millions of dollars a year to employ short-term contract workers at a higher cost than the cost of hiring additional full time employees, even at an increased salary. (App. 459-60, 470, 824-25, 1834-46.)

Importantly, ample evidence was introduced during the April 2014 evidentiary hearings that at least one major cause of DHHR’s inability to recruit and retain direct care employees is its failure to offer competitive wages and retention incentives. Ginny Fitzwater, the Director of Human Resources for BHHF testified that “I believe that offering a competitive salary would assist us in recruiting employees.” (App. 329.) BHHF Commissioner Jones testified that DHHR’s failure to provide periodic raises or salary increases to the direct care employees results in those positions being non-competitive and hurts DHHR’s ability to retain employees. (App. 477.) Bateman Hospital CEO Richards testified that he had problems recruiting direct care staff because Bateman competes with many other large hospitals in the Huntington area, and he agreed that having the ability to pay a competitive salary would help address staffing vacancies at his hospital. (App. 277, 296-97.) Indeed, the evidence established that market competitors in the Bateman Hospital area pay

significantly higher salaries for comparable positions, offer annual cost of living increases, and offer other opportunities for pay raises, all of which make those hospitals more attractive to applicants. (App. 359-63, 1713, 1737.) Similarly, the “Present and Future Staffing Needs” report states that “[e]mployees are being lost to other state agencies that are paying higher wages.” (App. 1878.)⁵

Despite the overwhelming evidence that DHHR has continued to operate in violation of the 2009 Agreed Order for the past five years, the evidence presented at the April 2014 hearings established that DHHR has taken no steps to rectify these problems without court intervention. (App. 396-97, 404-05, 481-82.) Testimony further established that an agency such as DHHR has the ability to increase pay for state employees through higher starting salaries and through periodic retention incentives, pursuant to the established Division of Personnel policies and procedures.⁶ (See App. 277, 289-91, 327-337, 395-96, 1795-1800.) Indeed, the circuit court heard evidence that other state agencies faced with staffing crises have petitioned the Division of Personnel for special hiring

⁵ DHHR contends that offering better wages to recruit more full time employees will not reduce the need for mandatory overtime, because overtime results from employee “call-offs,” i.e. the use of sick and personal leave by employees, which will not be reduced. (Pet. Br. 6.) While minimal amounts of mandatory overtime may always be expected and are allowed pursuant to the 2009 Agreed Order, the circuit court pointed out, and DHHR’s own documents establish, that hiring additional staff in anticipation of staff call-offs does, in fact, significantly reduce the use of mandatory overtime. (See App. 474-75, 840, 1902-03 n. 1.)

⁶ As state employees, the wages and benefits for the direct care workers at the state psychiatric hospitals are set by the West Virginia Division of Personnel. (App. 563; 564-51.) Each class of employee is assigned to a salary grade by the Division of Personnel, and must be paid at least the minimum for that grade. (*Id.*; App. 327.) While an employee’s starting salary may be increased incrementally based on prior qualifying experience, DHHR has implemented an internal policy that a new employee’s starting salary may never be more than the average salary of other employees in the same position, regardless of the number of years of experience. (App. 327, 340-41.) DHHR almost always hires employees at or very near the minimum salary. (App. 572-84.) Furthermore, direct care workers hired by DHHR do not receive raises, regardless of years of service, unless the Legislature and Governor issue an across-the-board pay raise for all employees, or unless DHHR obtains permission from the Board of Personnel to provide a “retention incentive.” (App. 332, 336-37.)

rates and retention incentives to address these problems. (App. 402-04, 1801-06.) In contrast, other than when ordered by the circuit court, DHHR had never requested to increase starting salaries for direct care employees or implement retention incentives to help retain employees. (App. 396-97, 404-05, 481-82.) Despite years of knowledge that it was violating its obligations under the 2009 Agreed Order, DHHR presented no proposal to promptly and systemically address its failures at the April 2014 hearings.

Finally, the circuit court directed DHHR to produce certain documents during the hearing on April 24, 2014. As a result, counsel for Respondents discovered that DHHR had never complied with the circuit court's prior orders from 2012 regarding new starting salaries for the lowest paid direct care workers. (App. 411.) Specifically, the documents produced by DHHR at the circuit court's request demonstrated that DHHR had never implemented a special starting salary for the health service employee classifications and, thus, continued to hire those employees at the same starting salary as it had prior to the December 2012 orders (and prior to the 2009 Agreed Order). (App. 572-584.) In other words, when DHHR gave the required salary increases to the existing employees as of January 1, 2013, it completely disregarded the circuit court's directive that the increase be put in place for those "employed on *or after* January 1, 2013. . . ." (App. 143) (emphasis added).

Upon questioning, Commissioner Jones confirmed that DHHR had never requested a special hiring rate for the health service employee classifications and that the salaries for new hires in those classifications were determined using the pre-2009 Agreed Order minimum salaries. (App. 439-446.) Based on DHHR's own documents, it is clear that numerous Health Service Trainee employees hired since January 1, 2013, are being paid the minimum salary of \$18,552, the same minimum salary that was in place before the 2009 Agreed Order. (App. 441-43.) Commissioner

Jones acknowledged that the order explicitly states that it applies to those employed *on or after* January 1, 2013. (App. 488.)

VI. June 2, 2014, Enforcement Order

On June 2, 2014, the circuit court entered an order addressing the issues raised in the April 2014 evidentiary hearings (“2014 Enforcement Order”). (App. 235-46.) After a thorough finding of facts, the circuit court concluded that DHHR is in violation of the 2009 Agreed Order, because it continues to rely on temporary and contract workers to fill vacant full time positions, require excessive amounts of mandatory overtime, and fail to provide adequate patient treatment and care, including failing to meet the minimum requirements set forth in section 64-59-14.4 of the West Virginia Code of State Rules. (App. 243-44.) As a result, the circuit court ordered, in subparagraph (a) of the Enforcement Order, that DHHR 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 full time direct care employees. In doing so, the [DHHR] 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.

(App. 244-45.)

The circuit court additionally addressed DHHR’s failure to comply with its December 18, 2012, order requiring new special starting salaries for the three classes of health service employees and LPNs. In paragraph 22 of the 2014 Enforcement Order, the circuit court found that

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. The three classes of health service employees have not been issued a special hiring rate because the Respondents never requested a special hiring rate for those classes of employees. The Respondents continue to hire individuals in those three classifications at pre-2009 Agreed Order base rates.

(App. 241-42.) The circuit court concluded that “[t]he 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.” (App. 244.) It therefore ordered, in subparagraph (b) of the 2014 Enforcement Order, that DHHR immediately implement a special starting salary for the three categories of health service employees for new hires going forward, and that DHHR retroactively compensate those employees who were entitled to the higher starting salaries since January 1, 2013, but to which the higher salaries were denied. (App. 245.)

This order was appealed in DHHR’s Supreme Court Appeal No. 14-0664; it was not listed as being among the orders on appeal in the instant appeal.

VII. June 27, 2014 Contempt Order

Despite the circuit court’s clear directive in the 2014 Enforcement Order that DHHR develop a remedial plan using existing Division of Personnel policies and procedures to immediately address recruitment and retention of hospital employees, DHHR presented to the circuit court three long-term proposals, all of which would be subject to legislative approval and would take years to implement. (App. 594, 597-636.) None of these proposals had been raised during the evidentiary hearings as possible solutions, and no evidence had been presented as to their efficacy. The circuit court found that the three proposals presented by DHHR did not conform with its directive to develop a remedial plan that could be immediately implemented to address years of delay and staffing deficiencies. (App. 708-09.) In an order issued on June 27, 2014, the circuit court reviewed DHHR’s five year

history of failing to comply with the 2009 Agreed Order and subsequent orders, and found that “[b]y failing to comply with the Court’s Orders and by failing to remedy issues that have plagued the Hospitals for years, the [DHHR] continue[s] to neglect and disregard the safety and welfare of West Virginia’s psychiatric patients.” (App. 709.) Consequently, the circuit court held DHHR in contempt of those orders, and directed that DHHR could remedy the contempt by presenting a remedial plan that could be immediately implemented.

VIII. August 1, 2014, Order Purging Contempt

Following the circuit court’s contempt order, DHHR developed a plan to increase salaries for direct care workers at Sharpe and Bateman Hospitals in order to become competitive with prevailing market wages in the respective areas. DHHR additionally included periodic retention incentives for employees who remain employed in their classification for three or more years. The plan developed by DHHR utilized existing Division of Personnel policies and procedures. Nothing in the plan required legislative approval.

On July 29, 2014, DHHR submitted the plan in writing to the circuit court, and the court conducted a hearing on August 1, 2014. (App. 729.) At that hearing, the circuit court found that DHHR’s proposed plan was an appropriate immediate remedy and purged DHHR of contempt. (App. 1075-76.) In so doing, the circuit court made clear that, should DHHR desire to move forward with asking the Legislature to approve one of its other, long term plans, the circuit court was not impeding its ability to do so. (App. 1072-75.) The court explained:

The [DHHR] 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 [DHHR] from seeking such legislative action.

(App. 1270; see also App. 1072-75.) Consequently, the circuit court made it very clear to DHHR that it was in no way preventing DHHR from pursuing long-term legislative changes to the manner in which the hospitals are administered. Rather, the 2014 Enforcement Order, as well as the subsequent June 27, 2014, Order, simply required DHHR to develop and implement a short-term solution utilizing existing policies and procedures to address on-going, serious violations of the 2009 Agreed Order that—at the present moment—are negatively impacting patient treatment and care and causing ongoing violations of patients’ rights.

On June 13, 2014, the circuit court entered a written order reflecting its rulings of August 1, 2014. (App. 1267-71.) In that Order, the circuit court purged DHHR of contempt as a result of its presentation of its proposed plan utilized existing Division of Personnel policies and procedures to address ongoing staffing vacancies, reiterated that DHHR was free to seek legislative approval of any other plan it desires, but clarified that “[u]ntil 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.” (App. 1270.) It is from these orders—entered orally on August 1, 2014, and set forth in writing on August 13, 2014—that DHHR now appeals.

IX. August 13, 2014 Order Refusing to Designate Prior Orders as Final Judgments

On August 11, 2014, DHHR filed a motion with the circuit court, asking the circuit court to designate its prior orders of June 2, 2014, June 27, 2014, and August 1, 2014 as “final judgments” for purposes of appeal. (App. 1221.) On August 13, 2014, the circuit court denied that motion, as well as a request to stay those orders. (App. 1299-1309.) In so doing, the circuit court first noted that “[f]or years, [DHHR has] jeopardized the vulnerable populations at Mildred Mitchell Bateman and William R. Sharpe Memorial, Jr. Hospitals . . . despite numerous Orders from this Court.” (App.

1299.) The circuit court then reviewed the long history of staffing problems in the state hospitals, which resulted in violations of “state law, regulations, and the Orders entered in this case,” as well as DHHR’s 2009 agreement to remedy those violations, and its consistent failure since 2009 to do so. (App. 1302.) Because the 2014 orders DHHR sought to have declared to be final judgments merely “continue to address the same problems that have existed since 2009,” the circuit court denied the motion. (App. 1308.)

X. DHHR’s Implementation of its Recruitment and Retention Plan

Following the circuit court’s refusal to stay implementation of the recruitment and retention plan, on August 13, 2014, DHHR sought an emergency stay from this Court. This Court denied that motion, and DHHR has proceeded to take the necessary steps to implement the plan it developed. Specifically, on October 10, 2014, the State Personnel Board conducted a special meeting, at which time it approved the plan presented by DHHR. (App. 1639.) Thereafter, at a hearing on October 14, 2014, DHHR represented to the Court that the required market studies had been completed, new salary ranges had been established, and new starting salaries and raises to existing employees were expected to be implemented by January 1, 2015. (App. 1560, 1565-79, 1584-85.) DHHR further represented that it expects to be able to pay for the increased salaries through savings in expenditures currently paid to short-term contract employees. (App. 1599-1602, 1617-18.)

SUMMARY OF ARGUMENT

The issues raised in this appeal by DHHR challenge the circuit court’s inherent authority to enforce its own prior orders, including the 2009 Agreed Order entered into voluntarily by DHHR. As previously noted, first two assignments of error are identical to those raised in its Supreme Court Appeal No. 14-0664, and have already been fully briefed therein. Moreover, all three assignments of error challenge the June 2, 2014 Enforcement Order, which is not among the orders designated

as being appealed in this appeal. (See Pet. Notice of Appeal at 2, Aug. 25, 2014.) Nevertheless, to avoid waiving any arguments, Respondents address each assignment of error in turn.

In its first assignment of error, DHHR appeals the circuit court's order directing DHHR to develop a remedial plan to address long-standing staffing problems at Sharpe and Bateman hospitals in order to bring DHHR into compliance with the 2009 Agreed Order and subsequent order purging DHHR of contempt as a result of DHHR's development of a plan to immediately address the ongoing staffing vacancies. Contrary to DHHR's assertions, the circuit court was well within its discretion to order DHHR to remedy its non-compliance with its prior agreements by directing DHHR to develop its own plan using existing state policies and procedures to immediately address the staffing vacancies. Accordingly, this Court should affirm the circuit court's orders directing DHHR to develop a remedial plan to bring its hospitals into compliance with its prior agreements and state law.

In its second assignment of error, DHHR appeals subparagraph (b) of the 2014 Enforcement Order, in which the circuit court directed DHHR to comply with an order dated December 18, 2012, by implementing a special starting salary for certain health care workers at the two state psychiatric hospitals. Specifically, the circuit court order from 2012 clearly states that "employees in the LPN and Health Service Trainees, Workers, and Assistants classifications *employed on or after* January 1, 2013, are entitled to pay raises effective January 1, 2013" DHHR implemented pay raises for those employees who were already employed on January 1, 2013, but refused to implement the new starting salary for those hired after that date, notwithstanding its admissions that its failure to do so violated both the 2009 Agreed Order and the December 18, 2012, Order. As has already been fully briefed in Appeal No. 14-0664, the circuit court has the inherent authority to enforce its own prior orders, and the evidence is undisputed that DHHR is in violation of the 2009 Agreed Order and

December 18, 2012, Order. Accordingly, this Court should affirm the circuit court's ruling on this basis.

Finally, DHHR appeals the circuit court's August 13, 2014, Order refusing to certify its prior orders as final judgments. DHHR contends that it should be permitted to appeal the 2014 Enforcement Order as well as subsequent orders entered in August 2014 despite their interlocutory nature, because the orders approximate a final judgment and/or meet the requirements of the collateral order doctrine. Because, as the circuit court held below, these orders do not constitute final judgments, this Court should affirm the circuit court's refusal to designate these orders as such and should dismiss this appeal for lack of jurisdiction.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents respectfully submit that this case is appropriate for oral argument under Rule of Appellate Procedure 19(a), as it presents a narrow issue of settled law concerning the circuit court's authority to enforce its prior orders. While the legal issue is narrow and settled, the facts and procedural history are quite complicated and oral argument may assist the Court in developing a clear understanding of the issues. Respondents respectfully suggest that the issues on appeal may be appropriately addressed through a memorandum decision.

ARGUMENT

I. Standard of Review

It is undisputed that none of the orders being appealed herein are "final judgments" in the traditional sense, given that the litigation continues below and that the circuit court has not designated them as such. (App. 1299.) As a general matter, this Court only has jurisdiction to hear appeals from final judgments. See, e.g., Coleman v. Sopher, 194 W. Va. 90, 94, 459 S.E.2d 367, 371 (1995) ("The usual prerequisite for our appellate jurisdiction is a final judgment, final in respect

that it ends the case.”). DHHR contends, however, that appellate jurisdiction exists in this case because the orders approximate final judgments and/or meet the standard of the collateral order doctrine. Respondents disagree, and urge the Court to dismiss the appeal for lack of jurisdiction on this basis.

Should this Court determine that the orders below are “final” for purposes of this appeal, however, this Court reviews a circuit court’s final order under an abuse of discretion standard. Syl. Pt. 1, Burgess v. Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996). Findings of fact are only overturned if they are “clearly erroneous,” whereas questions of law are reviewed de novo. Id. “In this Court’s review of a lower court determination, this Court may not overturn a finding simply because it would have decided the case differently, and this Court must affirm ‘[i]f the [circuit] court’s account of the evidence is plausible in light of the record viewed in its entirety[.]’” Francis v. Bryson, 217 W. Va. 432, 436, 618 S.E.2d 441, 445 (2005) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)). This Court may not make credibility determinations based on the record; rather, the circuit court, which heard the testimony first hand, is in the best position to make these determinations. Id. (citing Michael D.C. v. Wanda L.C., 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997)). Further,

[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.

State ex rel. Evans v. Robinson, 197 W. Va. 482, 486, 475 S.E.2d 858, 862 (1996) (quoting syl. pt. 2, Waco Equip. v. B.C. Hale Const., 387 W. Va. 381, 387 S.E.2d 848 (1989)). Because the circuit court’s rulings below are clearly supported by the evidence in the record, and because the circuit

court is vested with inherent authority to enforce both consent orders and its own prior orders, the circuit court has not abused its discretion and the challenged orders should be affirmed.

II. The circuit court did not exceed its authority by directing DHHR to develop a remedial plan using existing state policies and procedures to immediately bring DHHR into compliance with its own prior agreements, the circuit court's prior orders, and state law, and the challenged orders should be affirmed.

DHHR appeals the circuit court's orders requiring DHHR to abide by its earlier agreements.⁷

To support its appeal, DHHR raises the same stale arguments that have been repeatedly rejected by this Court. The circuit court's orders simply enforce DHHR's own earlier agreement to avoid the use of temporary workers and mandatory overtime in staffing its hospitals, so as to provide adequate and appropriate treatment to patients pursuant to its obligations under section 27-5-9 of the West Virginia Code. The challenged orders were issued after five years of continued violations by DHHR with no attempts to remedy its noncompliance. As a result, DHHR's arguments should be rejected and the circuit court's orders should be upheld.

A. The circuit court appropriately ordered a remedy for DHHR's undisputed breaches of its agreements to provide adequate care at its facilities.

DHHR does not dispute that it has consistently and completely failed to comply with its 2009 agreement to end its reliance on mandatory overtime and contract and temporary workers in the state psychiatric hospitals. Rather, its only argument is that the remedy ordered by the circuit court for DHHR's breach of its obligations is improper. Despite DHHR's attempts to distract with

⁷ As previously noted, the only orders designated by DHHR for appeal in the instant appeal were the circuit court's orders dated August 1, 2014 and August 13, 2014. (Pet. Notice of Appeal, Aug. 25, 2014, at 2.) Nevertheless, the focus of DHHR's briefing is on its challenge to subparagraph (a) of the June 2, 2014 Enforcement Order. While Respondents object to DHHR's attempt to challenge the June 2, 2014 Enforcement Order despite not having listed it as among the orders being appealed in its Notice of Appeal, Respondents are addressing all issues raised by DHHR, so as not to waive any arguments. See W. Va. R. App. P. 10(d).

constitutional arguments, this is an issue of straightforward contract law. As this Court has repeatedly explained, consent orders—like settlements—must be interpreted and enforced as contracts. See Matin V, No. 35505 (W. Va. Apr. 1, 2011); Matin IV, 223 W. Va. at 386, 674 S.E. 2d at 247; Syl. Pt. 1, Seal v. Gwinn, 119 W. Va. 19, 191 S.E. 860 (1937). Indeed, “the policy of the law is to encourage settlements.” Evans, 197 W. Va. at 485, 475 S.E.2d at 861 (internal quotations omitted). After determining that a party has breached a consent order, the court has the responsibility to fashion an appropriate remedy. A remedy might be equitable in nature, such as ordering specific performance on the contract. See Thomas v. Bd. of Educ. of McDowell Co., 181 W. Va. 514, 518, 383 S.E.2d 318, 322 (1989); see also Messer v. Huntington Anesthesia Group, Inc., 222 W. Va. 410, 420, 664 S.E.2d 751, 761 (2008) (awarding attorney fees as equitable relief in enforcement of settlement). On the other hand, a remedy might require the payment of damages. Thomas, 181 W. Va. at 518, 383 S.E.2d at 322. It is up to the sound discretion of the court to devise the appropriate remedy. See, e.g., id.

Despite DHHR’s assertions to the contrary, this Court has repeatedly held *in this case* that DHHR is required to comply with its own prior agreements and, in the absence of doing so, the circuit court is authorized to order an appropriate remedy. In 2009, DHHR argued that the circuit court did not have authority to revisit whether DHHR had complied with its agreement to implement programs to support individuals with traumatic brain injury (“TBI”). In response, this Court held that the circuit court not only had authority to take evidence on the issue, it also had the authority to “enter such orders and decrees as may be necessary to enforce” DHHR’s prior agreements. Matin IV, 223 W. Va. at 386, 674 S.E.2d at 247 (quoting Seal, 119 W. Va. 19, 191 S.E. 860, at syl. pt. 1). When the circuit court did just that, by ordering that DHHR apply for and implement a TBI Medicaid Waiver program and a TBI trust fund, DHHR again appealed. In its appeal, DHHR asserted

(mirroring its present arguments) that the court violated the separation of powers doctrine and usurped executive and legislative authority by improperly mandating a specific remedy to DHHR's breach of its agreements; like here, DHHR argued that the court's remedy was improper because it was not "purely ministerial." (Pet. Br. 18; compare with Matin V, No. 35505, Pet Br. 10 (asserting that "the order removed the decision making process from [DHHR]".)) This Court conclusively rejected those arguments and upheld the circuit court's creation of an appropriate remedy. The Court held: "The Court finds the DHHR's assignments of error to be devoid of merit. It is the Court's opinion that the separation of powers doctrine . . . [is] not implicated in this case. Rather, this case concerns the enforcement of two consent orders entered into and agreed to by the DHHR." Matin V, No. 35505 at 2-3 (W. Va. Apr. 1, 2011) (quoting Bragg v. Robertson, 83 F. Supp. 2d 713, 717 (S.D.W. Va. 2000); syl. pt. 1, Sanders v. Roselawn Mem. Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)).

The instant matter is identical. Here, the circuit court determined that DHHR manifestly failed to fulfill its obligations under the 2009 Agreed Order, including that it failed to offer competitive wages and salaries to recruit and retain full time employees; that it failed to comply with its specific agreement to provide increased starting salaries for direct care workers; that staffing shortages have led to violations of patient rights as established by legislative rule; and that it relied heavily on mandatory overtime and temporary workers to staff its hospitals. (App. 243-44.) In response to *five years* of DHHR's repeated breaches of the 2009 Agreed Order and refusal to take any action or develop any solution to the ongoing breaches, the circuit court issued an order requiring that DHHR take the actions necessary to perform on its agreements. Specifically, closely tracking the language of the 2009 Agreed Order, the court ordered that DHHR develop a plan to reduce staff vacancies, discontinue the use of mandatory overtime except in exceptional circumstances, and

discontinue reliance on temporary and contract workers. (App. 4, 244-45.) In order to ensure that DHHR complied with its agreements in a timely fashion, the court specified that DHHR use currently available options, although it did not preclude the use of other methods in the future. (App. 244-45, 1072-75, 1270.) These remedies do no more than enforce the commitments voluntarily undertaken by DHHR to appropriately staff its hospitals with full time employees and ultimately provide adequate care to its patients. (See App. 4.)

In short, because the 2014 Enforcement Order, as well as subsequent August 1 and August 13, 2014 orders, merely require that DHHR comply as quickly as possible with its prior agreements, they are proper and should be affirmed.

B. Enforcement of the Agreed Order supports the executive branch's decision to enter binding agreements and does not violate the separation of powers.

DHHR raises again the same argument that this Court has rejected repeatedly in this case, asserting that the circuit court's enforcement of the consent order somehow violates the separation of powers doctrine. See Matin IV, 223 W. Va. 379, 674 S.E.2d 240; Pt. Br. 15-27. DHHR's argument consists of a convoluted series of citations to undisputed principles of constitutional law; it fails to coherently explain, however, how the circuit court's order violates any of these principles.

First, DHHR asserts that "[t]he lower court was wrong to determine for itself the best policy and steps required for compliance with section 10(b) of the agreed order." (Pet. Br. 16.) However, enforcement of the 2009 Agreed Order *supports* the agency and executive's decision to enter into contractually binding agreements. The court has undisputable legal authority to enforce such a consent agreement. See Matin IV, 223 W. Va. at 386, 674 S.E.2d at 247; Seal, 119 W. Va. at 19, 191 S.E. at 862. Moreover, this enforcement raises no separation of powers issue. The circuit court has not concocted on its own a method of addressing deficient care at the hospitals. Instead, the

court allowed the parties to reach a mutually agreeable solution through mediation in 2009, in which DHHR agreed to discontinue the use of mandatory overtime and temporary workers and agreed that the best way to address these concerns was through providing competitive salaries through wage increases. (App. 4.) DHHR, *not the court*, constructed this plan, and then agreed that this plan be adopted through a consent order. (See id.; see also App. 235.) DHHR then repeatedly failed to comply with this agreement, both through its failure to increase salaries as agreed upon and through its failure to address the problem independently through any other mechanism, despite that the issue was raised repeatedly over the course of the past *five years*.

Consistent with evidence at numerous prior hearings, in April 2014, the circuit court heard testimony from DHHR that it was routinely using mandatory overtime and temporary workers in violation of the 2009 Agreed Order, to the detriment of patient care, and that this could be remedied by the development of a plan to create competitive wages. (App. 4, 259, 277, 279-80, 285-86, 296-97, 329, 359-63, 459-60; 474, 477, 1713, 1737, 1811-26, 1847-63, 1878.) Indeed, the *only* remedy presented for DHHR's violation of its agreement was to increase staff salaries; DHHR put on *no* evidence that any alternative solution was feasible, reasonable, or available. (See App. 247-520.) The court further heard testimony that available methods exist to correcting these problems through use of existing Division of Personnel policies and procedures, and heard evidence that other agencies use of these procedures to remedy similar staffing shortages. (App. 277, 289-91, 327-337, 395-96, 402-05, 1795-1800.) Finally, the court learned that DHHR had made no effort to devise any method to address the consistent and ongoing use of mandatory overtime and temporary workers in violation of the 2009 Agreed Order, although it has authority and capability to do so with or without action on the part of the Legislature. (App. 396-97, 404-05, 481-82.)

Even after receiving this considerable evidence, the circuit court did not mandate any specific remedy. Rather, as DHHR admits, the circuit court left the remedy to DHHR's discretion, solely ordering it to "develop a plan" to ensure compliance with its prior agreements. (App. 244-45; Pet. Br. 8 ("To be sure, the court directed the Department to create the [remedial] plan.")) The only constraint on this plan was that DHHR use "the currently available options," so as to effectuate a timely remedy after years of delay, and to ensure that salaries and retention incentives were made competitive. (App. 244-45; Pet. Br. 10.) Given that increased salaries were the only solution proposed at the hearing by either party, and that it reflected the solution that DHHR had previously agreed to in 2009, the circuit court's provision of this guidance was clearly appropriate. In short, the circuit court's order clearly does not encroach on the Executive's or the Legislature's authority.

While DHHR's citations to prior orders in this case are accurate, they have no relation to the instant controversy, other than to undermine DHHR's position. For instance, Matin I addressed statutory compliance, not DHHR's repeated failure to comply with consent orders. Moreover, given that the circuit court's orders here require DHHR (not the court) to create a remedial staffing plan, it fully complies with the dictates of Matin I. As DHHR notes, Matin II relates to a court order that contravened a legislative appropriation. (Pet. Br. 17.) This ruling also supports the circuit court's orders here, where the court simply directed DHHR to comply with its earlier agreements utilizing the methods and procedures previously established by the Legislature and the Executive to address personnel problems. See W. Va. Code § 29-6-1, et seq. (establishing a civil service system and designating the Division of Personnel to create a system of classification and compensation for all civil service employees); W. Va. Code R. § 143-1-1, et seq. (rules promulgated by the Division of Personnel implementing W. Va. Code § 29-6-1, et seq.). Finally, as described above, this Court's 2009 and 2011 orders in this case explicitly support the circuit court's authority to order compliance

with DHHR's prior agreements. There, like here, the circuit court entered a remedial order that necessarily involved "interpretation [and] policy decisions" in order to effectuate the parties' prior agreements. (Pet. Br. 18.)⁸

This Court's opinions in other matters similarly support the circuit court's orders. There is no dispute over the general principal that reform should be spearheaded by the executive branch, but that the courts must become involved if the executive fails to fulfill its responsibilities. See, e.g., State ex rel. Smith v. Skaff, 187 W. Va. 651, 655, 420 S.E.2d 922, 926 (1992) (directing the Division of Corrections to develop a plan to create a temporary housing arrangements for inmates, to bring the agency into compliance with prior Supreme Court decision as well as governing statutes); Crain v. Bordenkircher, 180 W. Va. 246, 376 S.E.2d 140 (1988) (Crain III) (ordering the Division of Corrections to build a new prison by July 1, 1992); Crain v. Bordenkircher, 176 W. Va. 338, 363, 342 S.E.2d 422, 448 (1986) (Crain I) (reviewing a Division of Corrections' plan developed pursuant to a consent decree, finding the plan insufficient, and ordering the agency to revise the plan "to include the development of new facilities.").

None of the cases cited by DHHR, however, stand for the proposition that it advances—that a circuit court does not have authority to enforce a voluntarily entered agreement between two parties. While DHHR cites a long list of cases in which this Court has afforded the Legislature an opportunity to "devise any necessary remedial plans" (Pet. Br. 19), those cases are wholly inapposite

⁸ Interestingly, DHHR has a distinctly different interpretation of the TBI remedial order now than it did when it lodged its appeal of that order in 2009. At that time, DHHR argued that the circuit court exceeded its authority by creating a remedy that required more concrete and immediate action (immediate application for a TBI waiver) than was required by the consent orders (which required DHHR to seek an appropriation and develop a system of care). Matin V, No. 35505 at 2. DHHR's current claims that the circuit court's TBI remedial order was "purely ministerial and required no interpretation or policy decisions," is exactly the opposite of what they argued to this Court in their appeal of that order. (Pet. Br. 18.)

to the instant matter. Indeed, those cases pertain to situations in which this Court has invalidated a statute and/or legislative rule, but stayed its decision to give the Legislature the opportunity to remedy the issue. See, e.g., Jewell v. Maynard, 181 W. Va. 571, 383 S.E.2d 536 (1989) (invalidating the manner in which courts were appointing and paying court-appointed criminal attorneys, but staying the remedy to afford the Legislature an opportunity to resolve the problem); State ex rel. Bd. of Educ. for Grant County v. Manchin, 179 W. Va. 235, 366 S.E.2d 743 (1988) (holding statute unconstitutional and giving the Legislature an opportunity to address the problem); State ex rel. Longanacre v. Crabtree, 177 W. Va. 132, 350 S.E.2d 760 (1986) (holding statute unconstitutional and staying order to give Legislature an opportunity to revise). Obviously these cases dealing with the validity of statutes has no bearing on the instant matter, which involves the enforcement of an agreement between the parties to enable DHHR to come into compliance with the law.

Moreover, even though it had broad authority to create a remedy to DHHR's violation of its agreements, the circuit court permitted DHHR to create its own plan in the instant matter. Interestingly, as DHHR admits, in Crain III this Court found that it was appropriate for the court to intervene, given that the executive branch did not remedy the problem for "*eight years*" (Pet. Br. 21, citing Crain III, 180 W. Va. 246, 376 S.E.2d 140); undoubtedly the *five years* in which DHHR has failed to comply with the 2009 Agreed Order by eliminating mandatory overtime and reliance on temporary workers is sufficient to permit the circuit court to order DHHR to draft its own plan to address this problem and immediately come into compliance with its agreement.⁹

In sum, DHHR falls well short of carrying its burden of showing that the circuit court's orders illegally conflict with the West Virginia Constitution or this Court's prior decisions. As this

⁹ DHHR's citations to federal law are no more relevant, and also do not relate to the instant dispute about compliance with a voluntarily entered agreement between the parties.

Court has already held, it is well within the circuit court's authority to "enter such orders and decrees as may be necessary to enforce the decrees entered before dismissal," which is precisely what occurred here. Matin IV, 223 W. Va. at 386, 674 S.E. 2d at 247 (quoting Seal, 119 W. Va. 19, 191 S.E. 860, at syl. pt. 1).

C. The circuit court permitted DHHR to work with the Legislature to implement a long-range plan of its choosing, in addition to developing a plan which could be implemented immediately.

As a final matter, Respondents wish to directly address DHHR's repeated, misleading assertions that the circuit court has prevented and/or forbidden it from working with the Legislature to implement a plan of its own choosing. This is simply not the case, as the circuit court has repeatedly made clear.

First, DHHR has known of its obligation to "use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent circumstances," since entering into the July 2009 Agreed Order. (App. 4.) It has similarly known that it was failing to comply with those agreements since that time. Nothing has prevented DHHR from working with the Legislature over the last five years to change the manner in which it operates its psychiatric hospitals. Indeed, despite knowing it was not in compliance with the 2009 Agreed Order, DHHR has done nothing to remedy the situation until directed to develop a plan by the circuit court.

Second, the circuit court made clear on several occasions that nothing in its rulings prohibits or infringes upon the ability of DHHR to work with the Legislature to legislatively change the manner in which DHHR operates the hospitals. In its Order dated August 13, 2014, the Court held that the plan proposed by DHHR presented an appropriate method by which DHHR could immediately remedy its staffing vacancies and thereby reduce reliance on temporary workers and mandatory overtime, and then stated:

The [DHHR] 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 [DHHR] from seeking such legislative action.*

(App. 1270) (emphasis added). Rather, the circuit court clearly explained that it was requiring DHHR to develop a plan utilizing the existing policies and procedure set by the Division of Personnel to address just such staffing shortages, because of the urgency of the need to address the problems with patient care and treatment. As the circuit court explained in paragraph 10 of the August 13, 2014 Order,

[o]ngoing vacancies and the [DHHR]'s 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.

(App. 1269.)

DHHR's assertions that the circuit court has "precluded the Department from working with the legislature" are simply untrue. (Pet. Br. 2.) Nothing in the circuit court's orders prevents DHHR from seeking a legislative change to the manner in which the hospitals are operated, and nothing in the circuit court's orders exceed the scope of its authority in this regard.

III. DHHR's second assignment of error is an attempt to re-litigate settled issues and ignores the plain language of the circuit court's December 18, 2012, order directing DHHR to implement a new special starting salary for certain classes of health care employees.

In its second assignment of error, DHHR challenges the circuit court's June 2, 2014 Enforcement Order directing DHHR to come into compliance with several prior orders, including the 2009 Agreed Order, which required the implementation of a new starting salary for certain classes of direct care employees. While Respondents do not believe that this issue is properly raised in the instant appeal, given that the June 2, 2014 Enforcement Order was not noticed as being one

of the “judgments” being appealed, and because this issue has already been fully briefed in Supreme Court Appeal No. 14-0664, Respondents herein are addressing this assignment of error so as not to waive any issue. See W. Va. R. App. P. 10(d).

In this assignment of error, DHHR contends that the circuit court erred in subparagraph (b) of the 2014 Enforcement Order by directing DHHR to implement a special starting salary for certain classes of health care workers and to retroactively compensate those employees who had been improperly denied increased pay. In making this argument, DHHR attempts to re-litigate settled issues in this case and ignores the plain language of the 2012 Order. This Court should affirm subparagraph (b) of the 2014 Enforcement Order because this issue was settled by the unambiguous December 18, 2012, Order that DHHR did not appeal, and the circuit court has inherent authority to enforce its own orders.

First, in two separate hearings during the fall of 2012, the circuit court considered whether DHHR was in violation of the 2009 Agreed Order by failing to provide pay raises to certain classes of health care workers at the two state hospitals. (App. 44-101, 120, 141.) At that time, the Acting Commissioner for BHHF testified that the agency had not complied with the 2009 Agreed Order in this regard. (App. 92.) Given this admission, as well as the evidence in the record, the circuit court directed DHHR to comply with the 2009 Agreed Order by implementing new starting salaries for the specified positions and by providing raises to the current employees in those positions. Specifically, on December 18, 2012, the circuit court ordered that “employees in the LPN and Health Service Trainees, Workers and Assistants classifications *employed on or after* January 1, 2013, are entitled to pay raises effective January 1, 2013” (App. 143) (emphasis added). In tacit acknowledgment that this order was appropriate, DHHR did not appeal the 2012 orders and those orders are valid and enforceable.

It is undisputed that DHHR has not complied with the plain language of the December 18, 2012, Order, compelling it to comply with the 2009 Agreed Order. In the 2014 evidentiary hearings, evidence established that, although DHHR gave the required raises to those employed *on* January 1, 2013, it did not increase the starting salary for those hired *after* that date. (App. 440, 443.) Thus, as BHHF Commissioner Victoria Jones admitted during the April 2014 hearings, DHHR has not complied with the plain language of the December 18, 2012, Order. (App. 488.)

“[A] court order whose language is plain need not be construed, but should be applied according to the plain meaning of the words used in the order.” Syl. Pt. 7, in part, State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 228 W. Va. 252, 719 S.E.2d 722 (2011). In other words, “unambiguous orders must be applied as they are written without reference to extraneous matters.” Id. at 267, 719 S.E.2d at 737. Here, the language of the December 18, 2012, Order is unambiguous. It clearly requires DHHR to provide the specified increased pay to the specified classifications of health care workers “*employed on or after* January 1, 2013.” (App. 143.) DHHR admits that it has not complied with this directive. Consequently, because the order is unambiguous and because DHHR admits that it is not complying with the order as written, this Court should affirm the circuit court on this issue.

Moreover, circuit courts are vested with the inherent authority to enforce their own orders. See, e.g., E. Associated Coal Corp. v. Doe, 159 W. Va. 200, 208, 220 S.E.2d 672, 678 (1975) (acknowledging the “inherent power and duty of courts to enforce their orders”); Clark v. Druckman, 218 W. Va. 427, 435, 624 S.E.2d 864, 872 (2005) (quoting Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., v. U. S. Fire Ins. Co., 639 So.2d 606, 608-09 (Fla.1994)) (“[c]learly, a trial judge has the inherent power to do those things necessary to enforce its orders, . . .”). Here, the December 18, 2012, Order merely enforced DHHR’s commitments made in the 2009 Agreed Order.

Similarly, the 2014 Enforcement Order merely enforces the December 18, 2012, Order. Because the circuit court is vested with the inherent authority to enforce its own prior orders, it has not abused its discretion in the order currently on appeal.

Finally, DHHR's argument on appeal, which boils down to its purported "belief" that it was never required to implement new starting salaries for its lowest-paid health care workers, is simply implausible. (See Pet. Br. 26.) The 2009 Agreed Order states "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. . . ." Agreed Order at ¶ 10(a) (emphasis added) (App. 4). While providing pay raises to existing employees addresses the goal of helping to *retain* staff, DHHR provides no explanation for how such raises to existing staff would in any manner help *recruit* new employees. Moreover, DHHR clearly understood its responsibilities under the 2009 Agreed Order with regard to nurses and psychiatrists. For each of those classifications of direct care workers, DHHR not only raised the salaries of existing employees, it also implemented special hiring rates to aid in recruiting new employees. (App. 348-50, 564-71.) DHHR does not address why it has persisted in treating these different classifications of employees differently, despite them all being governed by the same language in the 2009 Agreed Order.

Because the undisputed evidence plainly establishes that DHHR failed to comply with the plain language of the circuit court's December 18, 2012, Order, the circuit court did not abuse its discretion in enforcing that order. Accordingly, Respondents herein respectfully request that this Court affirm the circuit court's ruling in subsection (b) of the 2014 Enforcement Order.

IV. The circuit court correctly refused to certify the orders being appealed as final judgments and this Court should dismiss the appeal for lack of jurisdiction.

In its final assignment of error, DHHR contends that the circuit court erred in refusing to certify “its order” as an appealable final judgment under Rule 54(b). (Pet. Br. at 1.) Review of DHHR’s brief indicates that the order DHHR alleges to be a final judgment is the circuit court’s June 2, 2014 Order; confusingly, that order was not among the “judgments” listed as being appealed in DHHR’s Notice of Appeal. (See Not. of Appeal at 2, Aug. 25, 2014 (listing the “Date of Entry of Judgment” as “08/1/2014; 08/13/2014”).) Accordingly, DHHR is impermissibly expanding the scope of its appeal by arguing that the June 2, 2014, Enforcement Order is a final judgment and should be overturned, despite failing to designate that order in its notice of appeal.

Nevertheless, Respondents herein will address the merits of DHHR’s argument that the June 2, 2014, Enforcement Order is a “final judgment,” so as to avoid waiving that argument. See W. Va. R. App. P. 10(d). DHHR contends that the June 2, 2014, Enforcement Order “approximates a final order in its nature and effect,” or, alternatively, meets the standards of the collateral order doctrine. Respondents respectfully disagree and urge this Court to find that it does not have jurisdiction to consider these orders on appeal.

While Respondents do not disagree that orders in this case can approximate final orders in their nature and effect, and have in the past, the orders at issue here do not because they are merely enforcement orders by the circuit court attempting to compel compliance with a prior consent order. Specifically, the orders being challenged by the DHHR are but some of many that the circuit court has issued in attempting to compel the DHHR to comply with the 2009 Agreed Order. Under DHHR’s reasoning, any of those prior orders could have been considered final; however, additional

orders continue to be required in the ongoing effort to compel compliance, demonstrating the lack of finality around this issue.

This Court has previously addressed a similar situation in Adkins v. Capehart, 202 W. Va. 460, 504 S.E.2d 923 (1998). In that case, the Court dismissed an appeal by several environmental and union groups who sought to overturn a lower court's refusal to invalidate the method by which the West Virginia Tax Department values coal reserves, on the basis that the underlying order lacked finality and, thus, the Court was without jurisdiction to consider the appeal. Id. at 461, 464, 504 S.E.2d at 924, 927. In explaining its decision, this Court noted that "the circuit court's order clearly contemplates additional review, if only in the nature of monitoring the progress of proposed methodology changes, and further provides for continuing jurisdiction over the matter for 'any purpose related to the issues involved, including' requests for modification or dismissal." Id. at 463, 504 S.E.2d at 926. The instant case is similar, given that the circuit court clearly has continued jurisdiction and is undertaking additional review, a variety of issues continue to be litigated, and ongoing monitoring is being performed by the court.

On the other hand, the cases cited by DHHR for the proposition that an appeal may be taken regardless of the circuit court's designation of an order as a final judgment concern matters in which a party or claim has been dismissed for failure to state a claim or in summary judgment. See Durm v. Heck's, Inc., 184 W. Va. 562, 401 S.E.2d 908 (1991); McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995). A dismissal of a claim or party clearly creates finality as to that claim or parties' liability; indeed, a dismissal with prejudice is considered an adjudication on the merits. See Sisson v. Seneca Mental Health/Mental Retardation Council, Inc., 185 W. Va. 33, 36, 404 S.E.2d 425, 428 (1991); W. Va. R. Civ. P. 41(b). Here, no party or claim has been dismissed; rather, the orders being appealed are orders enforcing a prior agreement of the parties (as

well as subsequent orders attempting to compel compliance with that agreement). Unlike the dismissal of a party at the summary judgment stage, the orders being challenged in this appeal do not demonstrate the finality typical of a final judgment.

DHHR further contends that the orders, although interlocutory in nature, can be appealed under the collateral order doctrine. Under that doctrine, “[a]n interlocutory order would be subject to appeal . . . 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.” James M.B. v. Carolyn M., 193 W. Va. 289, 293 n.4, 456 S.E.2d 16, 20 n.4 (1995) (internal quotations and citations omitted). This Court has previously applied the collateral order doctrine to interlocutory orders denying qualified immunity, see Robinson v. Pack, 223 W. Va. 838, 679 S.E.2d 660 (2009), and denying motions to compel arbitration, see Credit Acceptance Corp. v. Front, 231 W. Va. 518, 745 S.E.2d 556 (2013).

The orders on appeal here, however, are of a very different nature from the issues to which this Court has previously applied the collateral order doctrine. Specifically, the issues addressed in the orders challenged herein do not conclusively determine a disputed controversy, and instead merely enforce prior agreements entered into by DHHR as well as prior orders of the circuit court. Furthermore, the issues resolved by these orders are central to the case, not “separate from the merits of the action.” Id. As a result, the orders challenged in this appeal do not meet the standard for the collateral order doctrine.

Accordingly, Respondents herein urge this Court to determine that the orders on appeal, specifically those entered on August 1, 2014 and August 13, 2014, lack finality and, as a result, that this Court lacks jurisdiction to consider the appeal.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Court either refuse the appeal for lack of jurisdiction, or affirm the circuit court's orders and find that the circuit court has not exceeded its authority in directing DHHR to develop a remedial plan to immediately achieve compliance with its prior agreements, prior court orders, and state law.

**Respectfully submitted,
E.H. et al., Respondents
herein and Petitioners below,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0845

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

Petitioners,

v.

E.H., et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Lydia C. Milnes, counsel for the Respondents in the above-styled matter, do hereby certify that I have served a true and exact copy of the foregoing *Response Brief* upon counsel for the Respondents via hand delivery on this 16th day of January, 2015, as follows:

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