

35558

IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

MEN & WOMEN AGAINST DISCRIMINATION

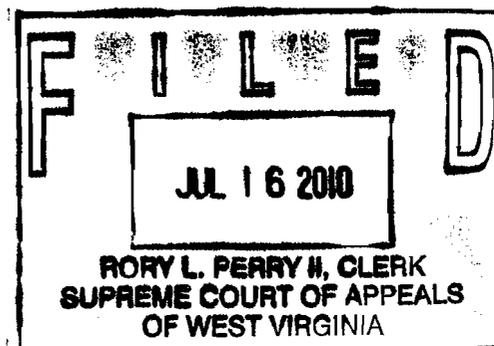
Appellee and Plaintiff Below,

vs.

THE FAMILY PROTECTION SERVICES BOARD
JUDI BALL, BARBARA HAWKINS, KATHIE KING,
JUDY KING SMITH, AND LORA MAYNARD

Appellants and Defendants Below.

REPLY BRIEF FOR THE APPELLEE



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REPLY BRIEF FOR THE APPELLEE

This is a simple case. The West Virginia Legislature created the Family Protection Services Board (hereinafter referred to as "the Board") and gave it authority to implement parts of the West Virginia Domestic Violence Act. *W. Va. Code* §48-26- 101, et seq. The Legislature gave the Board authority to promulgate rules as necessary to meet its responsibilities. *W. Va. Code* §48-26-401(4). Men & Women Against Discrimination (MAWAD) is a nonprofit, charitable organization formed to promote fairness and gender equality in the implementation of the West Virginia Domestic Violence Act. MAWAD makes no secret of its intent to concentrate its advocacy efforts on that sizable population of domestic violence victims who are adult or adolescent males. As the Board admits in its brief, this population represents at least 14% of "dating partner abuse victims" and 16% of "spouse abuse victims."

MAWAD filed this lawsuit because of its belief that the Board has exercised its rulemaking authority to promote an overtly gender biased view of the West Virginia

Domestic Violence Act, infringing on the appellee's ability to advocate for the interests of adult and adolescent male victims of domestic violence. It asked the Circuit Court of Kanawha County, West Virginia to declare certain of the Board's rules void.

Appellee challenged the propriety of rules promulgated by the Board in carrying out three of its specific functions. Those functions are (1) licensure of domestic violence shelters and programs, (2) grants of funding to those shelters and programs, and (3) implementation and licensure of perpetrator intervention programs. The appellee acknowledged that the Board's rules constituted valid legislative rules, adopted by the agency in accordance with *W. Va. Code* §29A-3-9, et seq. However, MAWAD asserts that the Board has issued regulations that are inconsistent with or that alter or limit its express statutory authority. The circuit court agreed and granted most of the relief prayed for. The Board now appeals.

POINTS AND AUTHORITIES RELIED UPON

W. Va. Code §29A-3-9, et seq.

W. Va. Code §48-2-604.

W. Va. Code §48-26-101, et seq.

W. Va. Code §48-26-401 (4), (13).

W. Va. Code §48-26-404.

W. Va. Code §48-26-601.

W. Va. Code §48-27-101 (A.) (1).

W. Va. Code §48-27-204.

Legislative Rules 191-2-3 and 191-2-4.

State v. Davidson, 689 S.E.2d 808 (W.Va. 2010).

Newman v. Michel, 688 S.E.2d 610 (W.Va. 2009).

Public Citizen, Inc., v. First Nat. Bank, 198 W. Va. 329, (1996).

In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

Appalachian Power Co. v. State Tax Department of West Virginia, 195 W. Va. 573, 466 S. E.2d 424 (1995).

Stephen L.H. v. Sherry L.H., 195 W. Va, 384, 465 S.E.2d 841 (1995).

Ranger Fuel Corp. v. West Virginia Human Rights Commission, 180 W. Va. 260, 376 S.E.2d 154 (1988).

Chevron USA, Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984)

Rowe v. West Virginia Department of Corrections, 170 W. Va. 230, 292 S.E.2d 650 (1982).

State ex rel Callaghan v. West Virginia Civil Service Commission, 166 W. Va. 117, 273 S.E.2d 72 (1980).

STANDARD OF REVIEW

The first thing this Court needs to establish is the appropriate standard of review. This issue was not addressed by Appellant.

At the trial court level, both parties submitted pretrial motions for summary judgment. Before deciding these motions, the circuit court continued the trial date, and at that time the parties waived their right to a jury trial and asked the court to conduct a bench trial. When the court decided this case and issued its specific findings of fact and conclusions of law based on those findings, it had before it all of the deposition testimony, exhibits and other matters that would have been submitted to the court at trial.

Accordingly, it is MAWAD's position that this matter should be reviewed under the same standard that applies to the findings and conclusions of a circuit court made after a bench trial.

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review. State v. Davidson, 689 S.E.2d 808 (W.Va. 2010); Newman v. Michel, 688 S.E.2d 610 (W.Va. 2009); Public Citizen, Inc., v. First Nat. Bank, 198 W. Va. 329, (1996).

Under the clearly erroneous standard, if the findings of fact and the inferences drawn are supported by substantial evidence, such findings and inferences may not be overturned on review even if this Court may be inclined to make different findings or draw contrary inferences. Stephen L.H. v. Sherry L.H., 195 W.Va, 384, 465 S.E.2d 841 (1995). A reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. Syllabus Point 1, In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

The Appellant sets out five separate assignments of error, each based upon the Board's disagreement with specific conclusions arrived upon by the circuit court. The Appellant does not challenge any of the circuit court's specific findings of fact upon which those conclusions are based. The Appellant concedes that the circuit court's findings were supported by substantial evidence and not clearly erroneous. Since the Appellant has not challenged the circuit court's specific findings, it would be inappropriate for this Court to overturn any of those findings and inferences even if this Court were inclined to make different findings or draw contrary inferences. The circuit court's account of the

evidence is not challenged by the Appellant and is plausible in light of the record in this case viewed in its entirety. There is nothing in the entirety of the evidence submitted in this case that could lead any rational observer to a definite and firm conviction that a mistake has somehow been committed here.

Insofar as the Appellant in portions of its brief argues about policy or the manner in which government speech may relate to family planning, tobacco smoking, alcohol consumption, displays of the Ten Commandments, public school instruction regarding equality and racial and sexual diversity, the rights of the Ku Klux Klan or Communism and Fascism, such arguments are misplaced. They are based only on a desire by the Appellant for this Court to decide the case differently from the circuit court simply because a different result might be more appealing, politically correct or in accord with the Board's world view. These arguments by the Board for a different result are inappropriate and amount to asking this Court to abandon its long accepted standard of review of a competent circuit judge's findings of fact and conclusions of law.

Because the circuit court's findings of fact have not been challenged, the issue to be decided on this appeal is whether the circuit court's conclusions of law and decision amount to an abuse of the trial court's discretion. They do not. To demonstrate this the Appellee will address the alleged errors separately.

REVIEW OF RULES BY CIRCUIT COURT

Determination of the validity of rules promulgated by an administrative agency is a two-step process. Because the rules challenged in this case are legislative rules, the court must first determine their validity. A legislative rule is valid if it has been submitted to the legislative rulemaking review committee for approval as required by. All of the legislative rules that are the subject of this action reflect that they were submitted to and approved by the legislative rulemaking review committee. Each of the rules has been

properly published in the West Virginia State Code of Rules maintained by the office of the Secretary of State. The issue of validity of these rules from the standpoint of legislative rulemaking is an undisputed fact.

Because the challenged rules are valid, judicial review involves two separate but interrelated questions. The court must apply the standards set out by the United States Supreme Court in Chevron USA, Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984) and first ask whether the Legislature has spoken directly to the precise question at issue. If the intent of the Legislature is clear, that is the end of the matter, and the agency's position can only be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation. Appalachian Power Co. v. State Tax Department of West Virginia, 195 W. Va. 573, 466 S. E.2d 424 (1995). The rules of an agency must faithfully reflect the intent of the Legislature. When there is clear and unambiguous language of a statute, that language must be given the same clear and unambiguous force and effect in the rule that it has in the statute. Ranger Fuel Corp. v. West Virginia Human Rights Commission, 180 W. Va. 260, 376 S.E.2d 154 (1988). Simply stated, rules promulgated by an administrative agency can only be upheld if they are reasonable and do not enlarge, amend or repeal substantive rights created by statute. State ex rel Callaghan v. West Virginia Civil Service Commission, 166 W. Va. 117, 273 S.E.2d 72 (1980).

On the other hand, if the legislative intent is not clear and the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. Appalachian Power Co. v. State Tax Department of West Virginia, 195 W. Va. 573, 466 S.E.2d 424.

Appellee does not question that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with or that alters or limits its statutory authority. Rowe v. West Virginia Department of Corrections, 170 W. Va. 230, 292 S.E.2d 650 (1982).

The circuit court concluded that “[t]he intent of the West Virginia Legislature relative to domestic violence is crystal clear. The Legislature has found that every person has a right to be safe and secure in his or her home and family and to be free from domestic violence. *W. Va. Code* §48-27-101 (A.) (1). To secure this right to all West Virginians, the Legislature has defined domestic violence and those who can be perpetrators or victims of domestic violence in the strictest of gender-neutral terms. *W. Va. Code* §48-27-204. Every person, regardless of gender, enjoys a statutory right to participation in and receipt of domestic violence services offered by facilities licensed and funded in whole or in part by the state of West Virginia.”

CERTIFICATION OF DOMESTIC VIOLENCE ADVOCATES
AND PROGRAM LICENSING

The court then reviewed the validity of the challenged rules in light of this legislative intent. The Board is the administrative agency charged by the Legislature with the responsibility of promulgating standards for annual licensure of all domestic violence shelters and programs in the state. *W. Va. Code* §48-26-401 (4), (13). To meet this responsibility the Board has adopted Legislative Rules 191-2-3 and 191-2-4. Included within Rule 191-2-3 is subdivision 3.2 .k .12. This provision mandates that all family protection programs, as a condition to licensure, assure the Board that at least one third of

its direct service providers are certified by the West Virginia Coalition Against Domestic Violence (hereinafter "the Coalition") as Domestic Violence Advocates.

The circuit court made specific findings of fact with regard to the certification of domestic violence advocates and the relationship between that certification and licensing of domestic violence programs. Those findings are numbered as 10, 11, 12, 13, 14, 15, 16, 17 and 18 in the circuit court's October 2, 2009 order. These findings are not disputed by the Appellant because they are clearly supported by substantial evidence. Based upon these findings, the court concluded that the Board rules relative to the certification of domestic violence advocates exceed the Legislative authority granted to the Board. Testimony from Board members and representatives of the West Virginia Coalition Against Domestic Violence support the court's findings and conclusions. It is abundantly demonstrated that the Board established no objective, verifiable standards for certification, and that the restriction of certification to only those persons who are actually employed by members of the West Virginia Coalition is arbitrary and capricious.

Nowhere in the enabling statute is the Board authorized to delegate the setting of standards for licensed facilities to a private trade organization such as the Coalition. In practice this rule excludes any person who does not adhere to the gender biased fundamental beliefs of the Coalition from applying for and receiving the status of certified Domestic Violence Advocate. During her deposition, Board member Judy King Smith was asked about the domestic violence advocates certification program. At page 54 of her deposition, commencing at line 8, the following exchange took place:

Q: Well, would you agree that the domestic violence advocate certification program, if it's a part of your board's responsibility under the state code and your rules, has to be gender-neutral? You cannot discriminate in your certification process based upon sex, can you?

A: I don't believe that we do.

Q: Well, do you understand that you can't?

A: Yes.

Q: And is it your understanding that to obtain certification, an advocate must, in addition to completing minimum training and experience requirements, demonstrate competency? That certainly is appropriate I would think, wouldn't you?

A: Yes.

Q: And adhere to the code of ethics for domestic violence advocates. You understand that?

A: Yes.

Q: Do you know what the code of ethics for domestic violence advocates is?

A: I can't quote it, but I'm aware that it's included.

* * *

Q: And that the very first statement in the code of ethics that an applicant has to adhere to to be certified is No. 1: Domestic violence advocates promote the safety and well-being of women and children who are victims of abusive relationships period.

Do you understand that's what a person is required to adhere to in order to be certified by the Coalition Against Domestic Violence?

A: Yes.

Q: And you agree with me that that does not encompass the gender neutrality of the statute. It doesn't speak about the victims. It speaks about women and children.

A: Yes

During the deposition of Coalition team coordinator Sue Julian, two exhibits were produced demonstrating the requirements for certification as a domestic violence

advocate. Both of those exhibits require a person seeking certification to adhere to certain "Basic Truths" that include a statement "that the philosophical base of our work is empowerment of battered women and their children." One seeking certification must also accept as a basic truth that "the battered women's movement is national and global and touches all other forms of violence and oppression." (Julian deposition, exhibits 1 and 2).

Certification as a Domestic Violence Advocate is not available to the general public but only to employees of programs that are members of the private trade group known as the West Virginia Coalition Against Domestic Violence. (Julian deposition, page 46, line 4). Contrary to the intention of the Legislature to combat domestic violence in a comprehensive fashion, this rule denies licensure to any entity that will not adhere to whatever requirements the Coalition from time to time adopts. This could include a group staffed by the most prominent and well-educated individuals working in the field of domestic violence in the United States.

This fact was verified during the depositions of two of the Board members. Here is what Board member Judy King Smith had to say:

Q: Well, unless the program is willing to employ at least 33.3 percent of its staff who are certified by the coalition, then they cannot be licensed.

A: Yes.

Q: So, licensure of a third of your staff by the board of directors-- approval of one-third of a program staff by the board of directors of the coalition is a prerequisite to licensing.

A: Yes

Q: And would that be the same for licensing standards for family outreach – family protection outreach services?

A: Yes.

Q: And is there a requirement in your rules that outreach staff attend at least two coalition advocate certification trainings per year?

A: I believe so.

Q: What if the staff just doesn't agree with the coalition's Duluth Model, for instance, and they have a Master's degree in counseling and have worked in the field of domestic violence, violence prevention in New York or California or Virginia or Ohio, and they just say, you know, I've got a Ph.D. in this and I don't agree with this, they can't be licensed, correct?

A: Correct.

Q: Can't be certified.

A: Right.

Q: Can you tell me what objective standards the board has established that would disqualify a person with a Ph.D. in guidance and counseling and domestic violence prevention that would deny them licensure just because they didn't agree with the coalition's code of ethics? What objective standard is there?

A: I don't know.
(Smith deposition, p. 51, line 9 - p. 52, line 17).

Board member Judy Ball said the following:

Q: Well, if the requirement is that one-third of the staff be certified by the Coalition Against Domestic Violence, you couldn't license a facility that was staffed by only Ph.D.s, who were published in peer review literature and world renowned in the field of domestic violence, its cause, prevention and its theory, you couldn't do that?

A: Well, I guess not.
(Ball deposition, p. 79, line 20 - p. 80, line 3).

Because of its arbitrary and capricious nature, this rule requiring a significant portion of direct contact service providers to be certified by the Coalition is void.

The Appellant asks this Court to justify the Board's action by comparing the rules regarding certification of domestic violence advocates to this Court's standards for the admission to the practice of law. Appellant says that this Court's rules for the admission to practice law demonstrate the propriety of drawing on private entities for their expertise. However, the Appellant fails to note that Rule 3.0 of the Rules for Admission to the Practice of Law provide that a person may take the bar examination in West Virginia upon the completion of a full course of study in a law school accredited by the American Bar Association, *or its equivalent*. The bar applicant must also have been "granted and hold a degree of LLB or JD, *or their equivalents*, and a degree of AB or BS, or higher degree, from an accredited college or university, *or its equivalent*." (emphasis supplied) There is no ability under the rules voided in this case for a person seeking the status of certification to apply to the Board for approval of some equivalent qualifications. This just slams the door on the free interchange of ideas and theories relative to domestic violence advocacy for adult and adolescent men. The Appellant does not explain why it rejects any "equivalent" qualifications for certification. The Board provides no opportunity for one seeking certification to present "equivalent" qualifications for consideration. The Appellant has simply devolved all of its authority for certification to the Coalition. The fact that one of the Protective Service Board members who is also the head of a program that is a member of the Coalition chooses to self describe herself and her colleagues as "experts" is clearly insufficient to justify the Appellant's position.

West Virginia Code §48-2-604 establishes the West Virginia Family Protection Fund as a special revenue account to be distributed by the Board. In Rule 191-1-2, the Board acknowledges that one of its purposes is to provide ongoing administration and allocation of the West Virginia Family Protection Fund. The Board has promulgated rules

relative to the funding of family protection programs and shelters. Rule 191-2-6 sets out the funding requirements. This rule does not, however, incorporate the specific directive of the Legislature in the authorizing statute, *W. Va. Code* §48-26-601. This code section provides in pertinent part:

“A family protection shelter or program may not be funded initially if it is shown that it discriminates in its services on the basis of... sex... If such discrimination occurs after initial funding, the shelter or program may not be refunded until the discrimination ceases.”

Since the licensure requirements discussed above require licensed facilities to certify advocates, hire staff and administer shelters on the basis of gender bias, the funding application requirements adopted by the Board in its Rule 191-2-6 exceed the Board's legitimate authority.

Funding by the Board is even more problematic than simple gender bias. The Board is directed by the Legislature to come up with a formula for the distribution of the West Virginia Family Protection Fund. Rule 191-2-6.6 sets out the parameters for such a formula. The trouble is, the Board has never done what its enabling legislation and rules require it to do. No one who currently serves on neither the Board, nor any of the current or former staff members of the Board have any knowledge of the allocation formula. For at least the six-year period from 2002 through 2008, the minutes of the Board reflect that no action has been taken on any funding formula. (Morrison deposition, p. 15, line 17 - p. 16, line 10, [the formula was around when she came to the Board]; p. 22, lines 18- 24 [“the formula is long lost to me”]; Barker deposition, p.25, lines 13-15 [no Board discussions of funding allocations]; p. 29, line 22 - p. 30, line 1 [the Board has never reviewed or changed its allocation]; p. 33, lines 3-10 [the Board takes no official action on an annual basis on allocation of funding].)

The formula was put in place more than a decade ago and has not been revisited by the Board since. During that same period of time the Board has imposed the staffing requirement that gives the Coalition control over not less than one third of all direct service providers at licensed facilities. This is based upon a certification program that was written by the Coalition and never specifically approved by the Board. The net effect is that licensure depends upon the hiring of certified Domestic Violence Advocates. Certified Domestic Violence Advocates can only come from employees of Coalition member programs. The funds distributed by the Board can only be distributed to licensed programs, all of which happened to be member programs of the Coalition. Thus, de facto control of public funds administered through the West Virginia Family Protection Fund has been passed by the Board to the Coalition. There exists no legislative authority for this delegation of power.

The circuit court concluded that the Appellant's rules regarding advocate certification deprive the Appellee of even the opportunity to apply for public funding to promote its desired advocacy for the fourteen to sixteen percent of domestic violence victims that the Appellant admits are men. Certification is available only to employees of Coalition members; all of the members of the Family Protection Services Board are members of the Coalition and many are employees of programs that also have membership in the Coalition. Since membership in the Coalition is an absolute precondition to certification, it stands to reason that no one, whether individual or entity, who is not a part of the Coalition insiders, will ever be able to achieve certification and, therefore, qualify to apply for funding. This arrangement can certainly be looked at as an effort on the part of well-intentioned folks to preserve a funding source and limit access to that funding source upon the belief that well-intended means justify a particular end. Of course, one could also see this arrangement as a type of cheap, conflict-ridden West Virginia political funding scheme. It seems the circuit court leaned more towards the latter than the former.

SPECIAL NEEDS POPULATIONS

Rule 191-2-4.11 places additional licensing standards on programs that also serve as domestic violence shelters. In doing so it exceeds the authority granted to the Board and flies in the face of the intent of the West Virginia Domestic Violence Act. Because the standards in this section are in addition to the program standards set forth in 191-2-3, the same problem relative to staffing by Coalition certified Domestic Violence Advocates applies.

This rule is even worse, however, because it mandates that any licensed shelter must have a written process for obtaining alternative lodging to house victims of domestic violence and their children when the residential facility is filled to capacity or is unable to accommodate special needs populations, including adult and adolescent males. This rule not merely allows, but indeed requires as a condition to licensure any domestic violence shelter must adopt and adhere to the principles of “separate but equal treatment” based on gender. The practical effect of this rule is to exclude adult and adolescent males from their statutory right to safety and security free from domestic violence for no reason other than their gender. Male victims of domestic violence are routinely rejected from licensed domestic violence shelters in West Virginia even when those shelters are otherwise unoccupied.

Four year Board member Lora Maynard freely acknowledges that there is a gender distinction in providing shelter services:

Q: But you understand that the services are provided in a different way to men than they are women, shelter services, aren't they?

A: Shelter services?

Q: Correct.

A: Yes.

(Maynard deposition, p. 33, lines 16-21)

The difference in the services offered men and women was explained by Board member Smith:

Q: Let's say the determination has been made. You've got two individuals, one male, one female. Okay? And the initial intake determination has been made that both these people are appropriate for services..., shelter services. All right?

A: Uh-huh

Q: If there is space available in the shelter when these two people present, the woman goes into the shelter, correct?

A: Yes.

Q: The man goes to a homeless shelter, a mission or an area motel.

A: Yes.

(Smith deposition, p. 10, lines 15 - 22)

The circuit court concluded that the Board's rule mandating the treatment of adult and adolescent males as part of a "special needs population" violates the gender neutral intent of the Legislature. The sky did not fall as a result of this reasoning. The circuit court did not order the housing of men and women in the same shelter at the same time. The court did not order that equal amounts of money be spent at each shelter to maintain an equal number of rooms for men and women, many of which would probably remain empty a good deal of the time. All the court said was that a rule which mandates the treatment of adult and adolescent males as "special needs" individuals is not gender neutral.

Since the Appellee is primarily interested in reaching out to the underserved fourteen to sixteen percent of domestic violence victims who are males, it is impossible for the Appellee to deliver its message and provide its services in compliance with Rule

191-2-4.11. On the other hand, it would seem to be a tiny burden on the Appellant to re-write this rule to allow for alternative housing for victims of either gender depending on the reasonable circumstances related to the program providing the shelter and its primary constituent base.

The circuit court's findings of fact relative to this issue are found in numbered findings 27, 28 and 29 of the Court's October findings of fact and conclusions of law.

PERPETRATOR INTERVENTION PROGRAMS

West Virginia Code 48-26-404 directs the Board to propose rules for programs of intervention for perpetrators of domestic violence. The enabling statute specifically directs that the rules shall include criteria and required qualifications concerning education, training and experience for providers of intervention programs. The Legislature has directed that the standards adopted by the Board must be based upon and incorporate three principles: (1) the focus of a program is to end the acts of violence and ensure the safety of the victim and any children or other family or household members, (2) domestic violence constitutes behavior for which the perpetrator is accountable, and (3) although alcohol and substance abuse often exacerbate domestic violence, it is a separate problem which requires specialized intervention or treatment.

In response to this legislative mandate the Board adopted Rule 191-3-3. A part of this rule requires that all educators/facilitators working in licensed perpetrator intervention programs shall have a minimum of 30 hours of training approved by the Board including, but not limited to, (1) the dynamics of domestic violence within the context of power and control, (2) the effects of domestic violence on victims and their children and the critical nature of victim contacts and safety planning and (3) the understanding that domestic violence is deeply rooted in historical attitudes towards

women and is intergenerational. This rule obviously exceeds the Board's authority. It permits funding and licensure only of perpetrator intervention programs that employ staff trained in the gender biased paradigm of power and control and historical attitudes towards women. As a result of the Board's unauthorized interjection of gender bias into the program of perpetrator intervention, no programs of perpetrator intervention have been initiated. Instead, the Board uses this rule as a basis for licensing and approving batterer's intervention programs which are based upon the conclusion that only men can be batterers and that women can be neither batterers nor perpetrators. Three board members verified this action.

Q: Well, what happens when a 38 year old depressed manic mother takes a ball bat and whacks her 22 year old pregnant daughter and the daughter picks up a pop bottle and hits her back and you get them both, what do you do with them in an intervention program when a woman is violent against a family member?

A: Well, it might or might not be a case that would make sense for a domestic violence program to deal with. However, if we believe that both people were victims, we might counsel with them. If we believe both were perpetrators, we might work with them, but I don't understand the reason for your question.

Q: But neither one of them is going to an intervention program, correct?

A: They're going to the intervention that is now – that's currently provided, which is specified in that document.

Q: Which is what, you send them to a domestic violence program for one on one counseling?

A: Yes

Q: They don't go to the batterer's intervention program that a man is sent to?

A: Right, because it's specifically set up to deal with men. (Smith deposition, p. 59. line 8 - p. 60, line 7).

Board member Maynard was equally as straightforward:

Q: Well, let me restate the question. Do you acknowledge here as a member of the Family Protection Services Board that the term “batterer” that you use interchangeably with “perpetrator” that the legislator used can refer to either a male or a female?

A: It could.

Q: And do you acknowledge that distinction in licensing programs for perpetrators or as you refer to them, batterers?

A: The model that we use currently – I mean, the way the rules are written currently is for men, programs for men.

Q: Okay. You acknowledge that a batterer or perpetrator can be a man or a woman, correct?

A: Could be, yes.

Q: But your rules are written so that the only program for batterers or perpetrators are for men, correct?

A: Correct.

(Maynard deposition p. 20, line 14 – p. 21, line 8)

The deposition testimony of Board member Judith Ball more clearly demonstrates the Board’s disregard for the Legislature’s intention to create gender neutral perpetrator intervention programs:

Q: Well, did I understand you to say that men batter?

A: Uh-huh,

Q: Women do not batter?

A: Women do not batter.

Q: So accepting your definition of the term “batter” –

A: It’s not my definition.

Q: Oh, your board’s -- when your board uses the word “batterers intervention,” then that is a gender specific phrase directed towards men, correct?

A: As it is currently used, yes.

Q: And you understand that that’s not the terminology that the legislature used because they used the word “perpetrator”?

A: Perpetrator.

Q: And what authority, acting pursuant to that statute which talked about a perpetrators intervention program, did the board adopt the gender specific term “batterer” to apply only to men?

A: I don’t really know the answer to that question.
(Ball deposition, p. 56, line 4 - p. 57, line 1).

The circuit court used this testimony and other evidence in the case as a basis for its findings of fact numbered 19, 20, 21, 22 and 23. The court also had before it a June, 2005 report from the West Virginia Legislature, Performance Evaluation and Research Division questioning the Board’s misapplication of the legislative authority to implement perpetrator intervention programs. Here is what that report says:

Perpetrator Intervention Programs Do Not Serve Female Perpetrators

During a 2004 Board meeting, recommendations from statewide batterer education programs were discussed. One recommendation said, “*Licensed Batterer Education Programs will not accept women into the classes. Many women who use violence against their male partners are battered women and use violence in self-defense. It is important to differentiate among battering, power and control, and self-defense.*” In response to that recommendation the meeting notes from that meeting state, “*The FPSB agreed to endorse and adopt this*

recommendation, adding that courts should be encouraged to refer women who are named as perpetrators to licensed domestic violence programs for individual and/or group counseling.”

...

The Legislative Auditor acknowledges that a significant portion of female batterers are, in fact, domestic violence victims. However, it is important that appropriate remedies under law exist for victims of female batterers, even if the occurrence of such abuse is not statistically predominant.

Although it is not appropriate to put a female batterer into a class for male batterers, intervention and treatment should be available to female batterers. The Board has implemented the practice of recommending female batterers to a licensed Family Protection program for counseling and treatment. The Board should study and decide upon appropriate treatment for female batterers. Such treatment should acknowledge that women can be batterers, and that some women batter in self-defense. Uniform and clear treatments for female batterers need to exist in order to provide just access to remedies under law to victims of female batterers.

According to the *West Virginia Bench Book for Domestic Violence Proceedings, 2004 Ed.*, “. . . men can be domestic violence victims, and the courts should be alert to that possibility.” Therefore, **the Legislative Auditor recommends that the Board research methods of treating female batterers, and that the Board implement treatment of female batterers into licensing standards for either Perpetrator Intervention programs or Family Protection programs.”** (*Preliminary Performance Review on the Family Protection Services Board, W. Va. Legislature, Performance Evaluation and Research Division, June 12, 2005, page 23-25*)

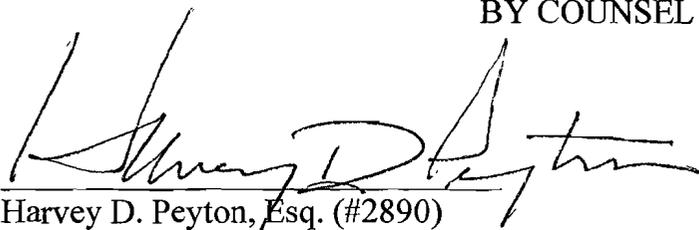
To date, the Board has failed to abide by either Judge Stucky’s order or the recommendations of the Legislative Auditor’s office. The Legislature has expressed a clear intention to provide for licensure and funding of perpetrators intervention programs that are gender-neutral. The Board, acting on its own, has morphed this intent into a gender specific program that includes only men and excludes all women. As a result, women are deprived of the benefits of participation in perpetrator's intervention programs. The male victims of domestic violence perpetrated upon them by women are deprived of the benefits they may receive from their spouse, sibling or significant other’s participation in an approved program. his is the population for whom MAWAD seeks to advocate. This is just plain wrong and the rule that permits this is void.

CONCLUSION

The Appellee concludes by saying once again this is a simple case. A portion of the rules promulgated by the Family Protection Services Board exceed that Board's granted authority and are contrary to the intent of the enacting legislation. The ruling of the Circuit Court of Kanawha County set forth in its October 2, 2009, order should be affirmed.

Respectfully submitted,
MEN & WOMEN AGAINST
DISCRIMINATION, a West Virginia corporation

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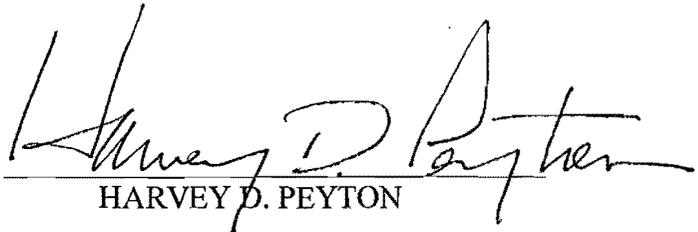
Counsel for Appellee

CERTIFICATE OF SERVICE

I, Harvey D. Peyton, counsel for the Appellee, do hereby certify that I have this 14th day of July, 2010, served a copy of the foregoing "Reply Brief for the Appellee" upon all parties of record by mailing a true copy thereof, by First Class United States Mail, postage prepaid, as follows:

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