IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

No. 35558

MEN AND WOMEN AGAINST DISCRIMINATION,

Respondent-Plaintiff Below,

VS.

THE FAMILY PROTECTION SERVICES BOARD,
JUDI BALL, BARBARA HAWKINS, KATHIE KING,
JUDY KING SMITH, AND DEBORAH McDANIEL,

Petitioners-Defendants Below.

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APPELLANTS' REPLY BRIEF

COUNSEL FOR APPELLANTS:

Darryl V. McGraw, Jr. # 2461
Attorney General
State of West Virginia
Room 26-E, State Capitol
Charleston, W. Va. 25305
(304) 558-2021

Robert M. Bastress, Jr. # 263
Special Assistant Attorney General
P.O. Box 1295
Morgantown, W. Va. 26507
(304) 293-5308

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STANDARD OF REVIEW

"It is well established that '[a] circuit court's entry of summary judgment is reviewed *de novo*.' Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)." *Clarence T. Coleman Estate v. R. M. Logging Inc.*, ___ W.Va. ___, ___, 2010 W. Va. Lexis 53 at *8 (2010); *accord, e.g., State ex rel. Baker v. Morgan County War Memorial Hospital*, ___ W.Va. ___, ___, 2010 W. Va. Lexis 84 at *13 (2010); *Mylan Laboratories, Inc. v. American Motorists Insurance Co.*, ___ W.Va. ___, ___, 2010 W. Va. Lexis 74 at *11-12 (2010).

JUDICIAL REVIEW OF LEGISLATIVE RULES

As explained in appellants' principle brief, the rules promulgated by the Family Protection Services Board ("the Board" or "FPSB") have all been approved by a majority of both houses of the Legislature and signed off on by the Governor. The Board's rules are therefore law as enacted pursuant to the procedures and requirements set forth in Articles VI and VII of the West Virginia Constitution, *see State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 462 S.E.2d 586 (1995); *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981), and no judicial review may set them aside unless they are unconstitutional. Moreover, even under the analysis set forth in *Chevron UAS, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which MAWAD advocates, this Court has held that, if a "legislative rule is valid, clear as to its intent and *not contrary to the legislative enactment* that triggered its promulgation, the need for further review does not arise. It becomes the court's duty to apply the rule as written." *Appalachian Power Company v. Tax Department*, 195 W.Va. 573, 586, 466 S.E.2d 424, 437 (1995) (emphasis added). Neither the appellee in its brief nor the circuit court in its opinion has identified any Board regulation that is contrary to any legislative enactment.

Appellee quotes the circuit court's unremarkable conclusion that "[t]he 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. . . . 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." The Board does not challenge that conclusion, nor has the Board issued any regulation – or acted in any manner – that is inconsistent with the Legislature's intent. The appellee and the circuit court have failed to identify any rule that is contrary to the Legislature's directive and, most significantly, have failed to identify a single instance in which any individual has been denied any service or opportunity by the Board or its grantees because of that person's sex.

CERTIFICATION OF DOMESTIC VIOLENCE ADVOCATES AND PROGRAMS

The appellee makes much of the fact that the Board relies upon a private trade association, the West Virginia Coalition Against Domestic Violence, for training and certification of domestic violence advocates. According to the appellee and the circuit court, the underlying statute, W. Va. Code §§ 48-26-101, *et seq.*, nowhere authorizes such a delegation. Of course, it nowhere *precludes* it either, but it does require that at least one member of the Board must be "a member of a major trade association that represents shelters from across the State." W. Va. Code § 48-26-301(a). Only one such organization has ever existed in West Virginia, and that is the Coalition Against Domestic Violence. Because of the Coalition's experience and expertise, the Board has decided to rely on it to ensure that domestic violence advocates are adequately trained. Deposition of Judith Ball at 41.

Appellee contends, at page 10 of its brief, that certification as a domestic violence

advocate "is not available to the general public" and that licensing of domestic violence shelters could be denied "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 the field of domestic violence." Such claims are nonsense. *Anyone* can become a domestic violence advocate – after the person has received the training and certification required by the Board. Moreover, the most prominent and well-educated individuals in the field can obtain a license to operate a shelter – once they meet the Board's requirements. (The Board also does provisional licensing.) The point is that the Board has set standards for certification and licensing – as it was instructed to do by the Legislature – and those seeking certification or a license must meet those standards.

This circumstance is no different than if the most highly educated, qualified, and experienced lawyer sought admission by motion to the West Virginia State Bar. To be admitted, he or she would first have to meet the requirements of this Court's Rules for Admission to the Practice of Law, Rules 4.0 - 4.4, including successful passage of "the Multistate Professional Responsibility Examination ("MPRE") prepared and administered by the National Conference of Bar Examiners." *Id.*, Rule 4.4. Needless to say, the National Conference of Bar Examiners is a private trade association. Moreover, no matter how well-educated a Bar applicant might be, no matter how well that person did in law school, and no matter whether the applicant clerked for this Court and / or for the United States Supreme Court, to be admitted to the West Virginia Bar with less than five years experience such an applicant would have to pass not only the MPRE but also the West Virginia Bar Examination, which consists of three parts, all of which are prepared by the same private trade association, the National Conference of Bar Examiners. *Id.*, Rule

3.2(b).

Appellee also cites to the deposition of Judy King Smith and to the exhibits attached to Sue Julian's deposition to the effect that the Code of Ethics for domestic violence advocates provides that "[d]omestic violence advocates promote the safety and well-being of women and children who are victims of abusive relationships." Appellee's Brief at 8-10. Appellee fails to point out, however, that Sue Julian (a Team Coordinator for the Coalition) testified that that provision in the Code of Ethics was revised in 2008 to reflect the practice of the domestic violence programs in the State to protect the safety and well-being of all victims of domestic violence and to recognize that "batterers" can be male or female, as can their victims. Deposition of Sue Julian at 50-54.

The appellee makes general claims that the Board and the Coalition's licensing "require licensed facilities to certify advocates, hire staff and administer shelters on the basis of gender bias." Appellee's Brief at 13. Appellee, however, cannot cite to anything in the record to support such a claim. None of the relevant regulations impose any gender requirement, and there was not one example adduced anywhere in the record of gender bias occurring in the certification of advocates, the hiring of staff, or the administration of the shelters. To conclude that the Board has engaged in discrimination, there must be evidence of discrimination. There is none.

SPECIAL NEEDS POPULATION

The Board's Rule § 191-2-4.11 requires, as a condition for a license, that

> A shelter shall 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, but not limited to, victims who are: elderly, have disabilities, or who are adult and adolescent males.

From this rule, MAWAD leaps to the following conclusion:

> This rule not merely allows, but indeed requires as a condition to licensure [sic] 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.

Appellee's Brief at 15. This conclusion is wrong on several counts.

The rule has the obvious purpose of requiring that shelters have plans in place to provide for special needs groups, and adult men quite clearly present special needs because of privacy and security concerns. The rule does not "require" separate but equal treatment; rather, it requires only that shelter have written policies for those occasions when they are unable to accommodate certain individuals because of lack of space or because of the individuals' special needs. One might assume that all shelters would provide "separate" accommodations for adult men and women in the sense that the shelters would not assign different sexes to the same bed or bedroom. Perhaps MAWAD would insist on that, but surely this Court will not. So, the question really is what degree of "separation" between adult females and males may the shelters provide. The record shows that some shelters house adult male victims and some provide them with alternative lodging that ensures their safety and meets their needs, and that the shelters' policies are based on their individual physical facilities and space. *E.g.*, Deposition of Judith Ball at 13-15; Deposition of Judy King Smith at 12-16. In any event, the placement of male victims is made pursuant to the policies adopted by the individual shelters and not pursuant to anything in § 191-2-4.11. Moreover, the "practical effect" of the rule is not to exclude victimized men; rather, it is to account for them. Finally, there is *no* evidence in this case that

any male has ever been denied services by any domestic violence shelter in West Virginia. If MAWAD members are "routinely" denied safety and security by the State's shelters, one would expect it to have produced at least one example.

PERPETRATOR INTERVENTION PROGRAMS

As explained in appellants' previously submitted brief, the Board has issued no rules and maintains no policies (and the circuit court identified none) that require a gender bias in the administration of Perpetrator Intervention Programs ("PIPs"). Furthermore, the Board plays *no* role in the assignment of individuals to PIPs. Those decisions are made almost entirely by magistrates and judges. To the extent that shelters (not the Board) exercise discretion in PIP assignments, that discretion is based upon individualized assessments of the perpetrators. *See, e.g.* Deposition of Sue Julian at 52-53; Deposition of Judith Ball at 54-56. That, of course, was the point of the deposition testimony quoted in appellee's brief at 18-20: effective counseling for female perpetrators is different from that which is effective for male perpetrators. That point is acknowledged, too, in the 2005 legislative report quoted at length by the appellee on pages 20-12 of its brief. Finally, there is – again – simply *no evidence* that even one male victim was denied the benefit of counseling services for his female perpetrator. No evidence requires the conclusion that there is no discrimination.

CONCLUSION

The appellee has failed to adduce even one instance of sex discrimination in the administration of the State's domestic violence laws. That alone is cause for reversal. Even if such discrimination exists – which it does not – it must be remedied by individualized determinations based on actual facts. There is no Board policy or rule that requires or causes

discrimination on the basis of sex. Finally, as explained in appellants' prior brief, appellee's claims of infringement on its members rights of free expression are, frankly, frivolous.

For all of the above reasons, this Court should reverse the judgment of the circuit court and remand with instructions to dismiss the case.

Darryl V. McGraw, Jr. # 2461
West Virginia Attorney General

Robert M. Bastress (ID # 263)
Special Assistant Attorney General
P.O. Box 1295
Morgantown, W.Va. 26507-1295
(304) 293-5308

Counsel for Appellants

CERTIFICATE OF SERVICE

I have mailed a copy of the foregoing Reply Brief for Appellants to appellees' counsel, Harvey D. Peyton, The Peyton Law Firm, 2801 First Avenue, Nitro, W. Va. 25143, and to *amici* counsel, William D. Turner, 206 W. Randolph St., Lewisburg, W. Va. 24901, on this the 9th day of August, 2010.