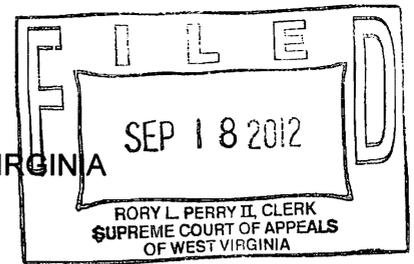


IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA



PATRICIA HUDSON,

Petitioner Below, Petitioner,

vs.

Docket No. 12-0775

MICHAEL J. LEWIS, Secretary, West Virginia  
Department of Health & Human Resources, and  
STEPHEN M. BAISDEN, State Hearing Officer,  
West Virginia Department of Health & Human  
Resources,

Respondents Below, Respondents.

BRIEF ON BEHALF OF PETITIONER PATRICIA HUDSON

Bruce Perrone (WVSB 2865)  
Counsel for Petitioner Patricia Hudson  
Legal Aid of West Virginia  
922 Quarrier Street, 4th Floor  
Charleston, WV 25301  
304-343-4481 ext 2127  
[bperrone@lawv.net](mailto:bperrone@lawv.net)

September 18, 2012

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## INTRODUCTION

In this Food Stamp overpayment case, DHHR alleged that spouses Harold & Patricia Hudson were living together between May 2010 and September 2011, when Patricia Hudson received food stamps as a separated spouse in a one-person household. The DHHR Notice of Overpayment was utterly meaningless in explaining the reason for the overpayment (“because of other eligibility factors”), but the court below did not rule upon petitioner’s claim on this issue.<sup>1</sup> DHHR staff obstructed access to DHHR file materials by Ms. Hudson and her representative prior to hearing, but again the court below did not rule upon petitioner’s claim on this issue.<sup>2</sup>

On the underlying substantive issue Patricia Hudson asserts that after she threw her husband out of the house for his alcoholic behavior in 2009, the spouses continued to use the “same address” for driver licenses and DHHR benefits, but did not “live together.” The 8th Circuit has held that use of a common mailing address is not alone sufficient to conclude that the spouses meet the federal statutory term of “living together.” After being thrown out of the house Harold Husband lived a peripatetic existence, shifting every week or two among his son’s home in Buffalo, NY; a daughter’s home in Akron, OH; his sister’s home in Logan County; and at locations in Boone County. For the first four months of the alleged overpayment period, when intermittently in Boone County Mr. Hudson slept in his brother’s camping trailer parked in his wife’s yard. For the remaining thirteen months of the alleged overpayment period, when in Boone County Mr. Hudson slept in his adult daughter’s home.

The Department presented no evidence that during the 17 month period of alleged overpayment, Patricia Hudson bought food for Harold; prepared food for Harold; did laundry for Harold or let him use her laundry room; let Harold bathe or shower or toilet in her home; let

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<sup>1</sup> See discussion at Argument Section II below, at pages 11-14.

<sup>2</sup> See discussion at Argument Section III below, at pages 14-18.

Harold sleep in her home; or even allowed Harold to enter her home for any purpose. To the contrary, the undisputed evidence from multiple witnesses was that Patricia Hudson did not do any of these things.

The court below essentially held that because the husband for four months (May to August 2010) intermittently slept in his brother's camping trailer in the yard of the wife's home, "it is logical to conclude that Petitioner and her spouse *lived in the same household*" during the entire seventeen month period of alleged overpayment (from May 2010 through November 2011) [emphasis added]. Petitioner Patricia Hudson asserts the court below erred as a matter of law in applying an improper definition of the term "living together," both as to the initial 4 month period when the camper trailer was in Patricia Hudson's yard, and for the subsequent 13 month period when there was no camper trailer and Harold Hudson never stayed on Patricia Hudson's property.

#### ASSIGNMENTS OF ERROR

1. The court below erred by failing to rule upon petitioner's claim that DHHR's notice of overpayment violated constitutional Due Process of Law requirements set forth in *Miller v. Ginsberg*, Civil No. 74-390 CH (S.D.W.Va. 1978; amended 1987).
2. The court below erred by failing to rule upon petitioner's claim that DHHR obstructed her constitutional Due Process of Law right of access to her "entire file at any time" prior to hearing, as guaranteed by *Miller v. Ginsberg*, Civil No. 74-390 CH (S.D.W.Va. 1978 amended 1987).
3. The court below erred in applying an incorrect legal definition of the term "living together" to conclude petitioner and her husband "lived in the same household" during the repayment period of May 2010 to September 2011.

## STATEMENT OF THE CASE

### A) Facts Regarding Household Composition

Patricia Hudson is 64 years old.<sup>3</sup> In 2011 her income was \$697 per month (\$8,364 per year), from Social Security Disability and Supplemental Security Income benefits.<sup>4</sup> In 2010 and 2011 she also received \$146 per month in food stamps (SNAP) benefits. App. Rec. 26. She applied for food stamp benefits listing herself as the sole resident in her home, with no income other than her own. App. Rec. 70-71.

By notice dated September 8, 2011 DHHR determined that Ms. Hudson was overpaid a total of \$1,985.<sup>5</sup> App. Rec. 15. The Notice did not explain the reason for the alleged overpayment, see App. Rec. 15. At administrative hearing the DHHR representative alleged that Ms. Hudson's estranged husband Harold Hudson was also living in her home, so that the husband's income should have been included in the wife's food stamp eligibility calculations. App. Rec. 209-210.

At hearing, DHHR presented numerous exhibits demonstrating that Patricia Hudson and Harold Hudson used the same address.<sup>6</sup> Patricia Hudson and Harold Hudson have always acknowledged that they use the same address, but assert that this alone does not demonstrate that they have "lived together."

Patricia Hudson and Harold Hudson married in November 1980. App. Rec. 244. In later

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<sup>3</sup> App. Rec. 55, stating date of birth 04/29/1948.

<sup>4</sup> App. Rec. 71; 79;127. All of which show \$268 from Social Security Disability, and \$429 from SSI.

<sup>5</sup> The overpayment amount would be 23.7% of Ms. Hudson's total annual income.

<sup>6</sup> Applications for Non-Emergency Medical Transportation (NEMT) Reimbursement, App. Rec. 17-25; Driver License queries to DMV, App. Rec. 55-57; water bill, App. Rec. 77; electric bill, App. Rec. 78; and various DHHR computer file notes of interactions with one or the other of the spouses.

years of their marriage Harold Hudson's drinking problem became severe. App. Rec. at 245 & 261, testimony of Harold Hudson; App. Rec. 266, testimony of John Ross (son of Patricia and Harold Hudson); App. Rec. 276, testimony of Mary Holstein (daughter of Patricia and Harold Hudson).

Sometime before 2009,<sup>7</sup> the Hudsons' son John Ross financed the purchase of a home for his mother at 7856 Ridgeview Nellis Road, Ridgeview, WV. John Ross then set up an installment agreement with Patricia Hudson under which she pays \$250 per month to buy the home. App. Rec. 229-31 (testimony of Patricia Hudson); App. Rec. 269-271 (testimony of John Ross). Although Harold Hudson was living in the home with his wife Patricia Hudson at the time, his name was not placed on the deed due to his alcoholism and erratic behavior. App. Rec. 229,<sup>8</sup> (Patricia Hudson); App. Rec. 279<sup>9</sup> (Mary Holstein).

In early 2009 Patricia Hudson threw her husband out of the house due to his drinking, while telling him he was welcome back whenever he quit. App. Rec. 231 and 239<sup>10</sup> (Patricia

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<sup>7</sup> Testimony in the hearing referred to the purchase of the home numerous times, but at no point was the exact date of purchase identified. See App. Rec. 229-31; 269-71; 279.

<sup>8</sup> "Q. Why was Harold's name not listed on the deed?"

"A. Well, Harold has a drinking problem, and at the time that the house was purchased, we just thought it was best that we would cover that way, so it was [sic] always be our home for us girls if something would ever happen to him because of his drinking." App. Rec. 229

<sup>9</sup> "Q. And do you know why your dad's name wasn't listed on the deed?"

"A. Because he's an alcoholic, and in case something would ever happen to him, she'd have a home, and I'd have a home, and if something would ever happen to her, I was taken care of. My brother made sure that that would happen." App. Rec. 279.

<sup>10</sup> "A. ... Any time he straightens himself up, that's his home.

"Q. What do you mean, "straightens himself up"?"

"A. If he can stop his drinking, then he's welcome home. That's his home, if he could just straighten that part of his life up." App. Rec. 239.

Hudson); App. Rec. 245<sup>11</sup> and 271<sup>12</sup> (husband Harold Hudson); App. Rec. 267<sup>13</sup> (son John Ross); and App. Rec. 276<sup>14</sup> (daughter Mary Holstein). From that point forward, Harold Hudson took up a roving life, rotating stays of a few days to a week in Boone County,<sup>15</sup> or with his son in Buffalo, NY,<sup>16</sup> or with his stepdaughter in Akron,<sup>17</sup> or at his mother's house while she was in a nursing home,<sup>18</sup> or with a sister in Logan County,<sup>19</sup> or with his daughter Mary Holstein.<sup>20</sup> Harold

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<sup>11</sup> "Q. And why did you two separate?

"A. Because I wouldn't quit drinking, and I'm a diabetic, and she said if I was going to die, I was going to do it someplace else." App. Rec. 245.

<sup>12</sup> "A. Well, I have no choice because I can't drink here. She gets aggravated with me drinking and so - - I don't know. ... You know, maybe if I would sell some food stamps, I could go up to the damn Moose and drink, but I have to go where I can." App. Rec. 271.

<sup>13</sup> "A. ... He's got a drinking problem, and he cannot stay at my mother's when he has a drinking problem.

He is diabetic, and he has no choice. My mom does not want anything to do with him as long as he's drinking because he's going to end up killing himself." App. Rec. 267.

<sup>14</sup> "Q. How often does your dad stay with you now?

"A. Now he's permanently staying with me until he can sober up and go back home to my mom." App. Rec. 276.

<sup>15</sup> App. Rec. 232-238 (Patricia Hudson); 274-275 (Mary Holstein).

<sup>16</sup> "Once the sports are done, and he usually generally goes back to Akron on his way back to West Virginia. He'll stop off at my brother's in Akron or my sister's, and 90 percent of the time at my sister's, but the other 5 or 10 percent of the time that he's at the house, he's usually came there in pretty rough shape, and I'm not going to throw him out as long as he's willing not to drink at the house. He can stay at my house for a week if he needs to. He hasn't never stayed that long, but generally once he sobers up, he generally goes back home," App. Rec. 268-269, testimony of John Ross (son).

<sup>17</sup> App. Rec. 245 (Harold Hudson); App. Rec. 269 (John Ross); 275 (Mary Holstein).

<sup>18</sup> App. Rec. 246. Mr. Hudson estimated this to be from August 2010 until his mother died in November 2010. App. Rec. 246.

<sup>19</sup> For example, Mr. Hudson testified he sometimes visits his sister in Hewitt, Logan County, WV. "I'm allowed up there as long as I'm not drinking." App. Rec. 254.

<sup>20</sup> App. Rec. 276, "Now he's permanently staying with me until he can sober up and go back home to my mom." Mary Holstein's home is 7906 Ridgeview Nellis Road, next door to

Hudson's living pattern was described by his daughter as follows:

- Q. During the period of May 2010 and through September 2011, how many times do you think your dad stayed with you?
- A. I have no idea. I mean, different times. It was never - - he stayed one day. Then he'd be gone for three or four days. Then he'd come back for one night and then he'd go.

App. Rec. 277.

At the May 2010 start of the period for which DHHR alleges improper food stamp benefits, when Harold Hudson stayed in Boone County he used a camping trailer in the yard of Patricia Hudson. App. Rec. 274-275.<sup>21</sup> Harold Hudson testified that the camper was owned or controlled by his brother, who owned a bar in Madison WV. App. Rec. 247. Harold Hudson brought the camper to the property and began using it in April 2009 when he was thrown out of the house. App. Rec. 247.

Mr. Hudson used the camper for only four months, until August 2010. At that point his mother was placed in a nursing home and he began staying at his mother's house. App. Rec. 246. Harold Hudson's mother died in November 2010. App. Rec. 246; 276. After their mother's funeral, the brother removed the camper. App. Rec. 247. From that point (November 2010), Harold Hudson changed his Boone County locus to the home of his daughter Mary Holstein, who lives next door to Patricia Hudson. App. Rec. 276-277.<sup>22</sup> Ms. Holstein testified that he never lingered long at her house, though: "... he stayed one day. Then he'd be gone for three or four days. The he'd come back for one night and then he'd go." App. Rec. 277.

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her mother, Patricia Hudson. App. Rec. 274.

<sup>21</sup> "Q. Where did your dad go when your mom kicked him out of the house?"  
"A. First he sat there and he went to live inside the camper, and then he just started traveling, seeing each of the kids." App. Rec. 274-275 (Holstein).

<sup>22</sup> "Q. Now, when did all this come about where he started staying with you?"  
"A. Because my son didn't want him to leave pretty much, and I don't want - - I want to know where he is, to be honest." App. Rec. 277.

During the period he was sleeping in the camper in his wife's yard (until August 2010), Harold Hudson did not have a water hookup, App. Rec. 236. To take showers he went to his daughter Mary's house next door, not to his wife's house. App. Rec. 236. His daughter Mary did most of his laundry, App. Rec. 236-237 (Patricia Hudson); App. Rec. 276 (Mary Holstein). Daughter Mary also did his grocery shopping, App. Rec. 276. Harold Hudson did not keep clothing, shoes, or even a toothbrush or personal toiletries in Patricia Hudson's home. App. Rec. 239. Mr. Hudson had electricity in the camper by running an extension cord from Patricia Hudson's house, App. Rec. 237 (Patricia Hudson); 248-249 (Harold Hudson), and "sometimes" paid her for the electricity. App. Rec. 249. If he got phone calls at Patricia's phone, she would "take messages for him and give them to him or my daughter, Mary." App. Rec. 232.

Driver's License. In April 2008, before he had been kicked out of the house, Mr. Hudson was issued a driver's license at the address of 7856 Ridgeview Nellis Road, Ridgeview, WV. App. Rec. 255. After he was kicked out of the house, Mr. Hudson renewed his license in 2011. He tried to list his separate mailing address of P.O. Box 196, Ridgeview, because at that point he did not "live with" his wife in the house at 7856 Ridgeview Nellis Road. App. Rec. 256. He was told by the postal worker he had to have a physical address and he had to have a proof of identification and address.<sup>23</sup> For lack of any alternative he used his old voter's registration card, and again gave the 7856 Ridgeview Nellis Road address. App. Rec. 256.

When asked why she would allow him to use her address, Patricia Hudson responded "because that's Harold's address, too. That's Harold's home. Any time he straightens himself up, that's his home." App. Rec. 238.

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<sup>23</sup> Hearing Exhibit 29 consists of a print-out from the DMV web site of "Driver's License Information." Those 15 pages are replete with references to an applicant's "current physical address," App. Rec. 147; App. Rec. 148; and the admonition that "documents must show your current physical address. **Post Office Box addresses are not accepted as proof of WV residency.**" App. Rec. 158 (bold emphasis in original).

Joint Household Bills and Checking Account. When Patricia Hudson threw Harold Hudson out of the house in 2009, she did not remove his name from the existing household utility accounts for electricity and water, for reasons of both convenience and optimistic hope that he would quit drinking. App. Rec. 239-240.<sup>24</sup> She also did not remove his name from their joint bank account, for similar reasons. App. Rec. 240.<sup>25</sup>

B) Facts Regarding Access to Information In File Prior to Hearing

After being notified of the alleged overpayment Ms. Hudson requested a hearing to contest the claim. App. Rec. 169. On October 19, 2011 Ms. Hudson's representative faxed a request to DHHR for release of "All my medical records; also education records and any and all other information and records about me." App. Rec. 374. A few days later DHHR responded by saying "the release you provided did not grant us permission to release the information you requested...." App. Rec. 377. The representative responded on October 26, 2011 with a fax re-submitting the Release of Information signed by Ms. Hudson, with a copy of DHHR regulations specifying that a recipient has access to "his or her entire case file," and requesting release of "my client's entire case file going back two years." App. Rec. 379-383. The same date Ms. Hudson's representative also notified the Hearing Officer of the problem and requested the Hearing Officer's "assistance in obtaining the information." App. Rec. 385. A week later, November 2, 2011, the representative noted that the file material had not been provided until Friday, October 28, when Ms. Hudson herself went to the DHHR office, was told

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<sup>24</sup> "Why would I change them? It didn't make sense to me. For one thing, I didn't have extra money to put up deposits for them. For another thing, I have hopes that we're going to get back together. Why would I change them? I don't know. I'm sorry, but I just can't see any reason for that. He didn't ask me to." App. Rec. 239-240.

<sup>25</sup> "Because Harold and I have bad credit, and I really didn't think that we'd ever be able to establish another bank account, and it wasn't a problem with him, and it's not a problem with me that I give him the money, that his check gets automatically deposited into this checking account every month." App. Rec. 240.

she could not get the material, but waited for 2 ½ hours, and finally was given file access. App. Rec. 387.

### SUMMARY OF ARGUMENT

1. Inadequate Notice. Governing case law and DHHR regulations require that notices of adverse action must state “the reasons for the action provided in terms readily understandable by the applicant or recipient and specifying all applicable manual sections.” DHHR Common Chapters Manual § 710.14.A.2. The Notice in the present case stated only: “We have determined that you were issued more SNAP benefits than you were eligible to receive during the period 05/01/2010 to 09/30/2011 *because of other eligibility factors.*” [Emphasis added.]

Petitioner argued below that this notice was not adequate. The lower court made no finding or ruling upon the issue.

2. Obstruction of Access to File. Governing case law and DHHR regulations require that a claimant have access, prior to hearing, to his or her “entire case record, including, but not limited to, all documents that pertain to the change in the applicant’s or recipient’s case that is the subject of the fair hearing.” DHHR Common Chapters Manual § 710.15.D.

Petitioner presented evidence below and argued that her access to the “entire case record” had been improperly obstructed prior to the hearing. The lower court made no finding or ruling upon the issue.

3. “Living Together.” The fact that the spouses used the same address does not alone establish that they were “living together” for purposes of food stamp eligibility. The fact that the husband for four months intermittently stayed in a camping trailer in the yard of the wife did not establish that the spouses were “living together” for purposes of Food Stamp eligibility. During the following thirteen months when the camper was gone and the husband never spent a night

on the property of the wife, there was no evidence below that the spouses were "living together" for purposes of Food Stamp eligibility.

### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner/appellant believes that oral argument would significantly aid decision of the remedy issues presented in the Defective Notice claim and the Obstruction of Access to File claim, and in decision of the application of a "Living Together" claim. Petitioner further believes that Rule 19 argument is appropriate, and that memorandum decision may be appropriate.

### ARGUMENT

#### I. STANDARD OF REVIEW

"Contested cases involving ... the receipt of public assistance" are statutorily exempted from the WV Administrative Procedures Act. WV Code § 29A-1-3(c). Judicial review of administrative agency decisions involving public assistance "is properly obtained through the writ of certiorari." Syl. Pt. 2, *State ex rel. Ginsburg v. Watt*, 168 W.Va. 503, 285 S.E.2d 367 (1981); *Wysong v. Walker*, 224 W. Va. 437, 686 S.E.2d 219 (2009).

The Court has previously held an abuse of discretion standard of review governs the review of a circuit court's certiorari judgment. *Wysong, id.*, 224 W. Va. at 441, 686 S.E.2d at 223 (citing *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*, 223 W. Va. 146, 150, 672 S.E.2d 282, 286 (2008) ). If, however, the appeal from the circuit court involves a question of law, the Court's review is de novo. Syl. Pt. 1, *Lower Donnally Ass'n v. Charleston Mun. Planning Comm'n*, 212 W. Va. 623, 575 S.E.2d 233 (2002) (in a case involving the appeal of a dismissal of a writ of certiorari, the Court held that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of statute, we apply a de novo standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va.

138, 459 S.E.2d 415 (1995).

II. THE COURT BELOW ERRED BY FAILING TO RULE UPON PETITIONER'S CLAIM THAT THE NOTICE VIOLATED DUE PROCESS REQUIREMENTS.

a. Violation

Food stamp entitlement benefits (now called SNAP benefits<sup>26</sup>) are "property" entitled to the full panoply of due process protections. See *Atkins v. Parker*, 472 U.S. 115, 128, 105 S. Ct. 2520, 2528, 86 L. Ed. 2d 81, 92 (1985). The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. at 267, 90 S. Ct. at 267, 25 L. Ed. 2d at 299. When a deprivation is contemplated, "these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 267–68, 90 S. Ct. at 267, 25 L. Ed. 2d at 299.

Various federal court cases have defined the contours of Goldberg's adequate notice requirement. See, e.g., *Kapps v. Wing*, 404 F.3d 105 (2d Cir. 2005); *Ortiz v. Eichler*, 794 F.2d 889 (3rd Cir. 1986), *aff'g* *Ortiz v. Eichler*, 616 F. Supp. 1046 (D. Del. 1985); *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008, 95 S. Ct. 1454, 43 L. Ed. 2d 767 (1975); *Schroeder v. Hegstrom*, 590 F. Supp. 121 (D. Or. 1984); *Baker v. State, Dept. of Health and Soc. Servs.*, 191 P.3d 1005 (Alaska 2008).

Federal food stamp regulations provide that "The notice of adverse action shall be considered adequate if it explains in easily understandable language: The proposed action; the reason for the proposed action; and [other elements omitted]." 7 C.F.R. 273.13(a)(2).

Over thirty years ago the WV DHHR (or its predecessor) entered a federal court

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<sup>26</sup> Formerly known as the "food stamp" program, SNAP is an acronym standing for "Supplemental Nutrition Assistance Program," pursuant to 7 U.S.C. § 2011 *et seq.* Hereafter the benefits may be referred to either as "SNAP" or as "Food Stamps."

Consent Decree specifying the procedural Due Process requirements that apply to public assistance cases. *Miller v. Ginsberg*, Civil No. 74-390 CH (S.D.W.Va. 1987), submitted at the administrative hearing, App. Rec. 114, and attached to Petitioner's Brief in the Circuit Court.

App. Rec. 321.<sup>27</sup> Paragraph 2.(b) of that Decree requires:

adequate notice, simplified in form and comprehensible to the average person, which notice shall clearly state: (1) the proposed action; (2) the reasons for the action being taken; ....

App. Rec. 121 and 327.

DHHR regulations therefore specify that:

adequate notice .. must include the following information: ... 2. The reason(s) for the action provided in terms readily understandable by the applicant or recipient and specifying all applicable manual sections.

Section 710.14.A.2, DHHR Common Chapters Manual, attached to Petitioner's Brief in the Circuit Court, App. Rec. 336.<sup>28</sup>

In this case, the relevant part of the Notice issued by DHHR stated:

We have determined that you were issued more SNAP Benefits than YOU WERE ELIGIBLE TO RECEIVE DURING THE PERIOD 05/01/10 TO 09/30/11 BECAUSE OF OTHER ELIGIBILITY FACTORS.

App. Rec. 83, "Notice of SNAP Overissuance, dated 09/08/2011 [Capitalization as in original].

There can be no serious dispute as to whether the phrase "because of other eligibility

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<sup>27</sup> The 1987 *Miller v. Ginsberg* consent order is an amended version of an earlier order, first issued December 21, 1978. The earlier version stated the notice requirement as: "(2) the right to adequate notice in a comprehensible form detailing the proposed action, the reasons for such action, citation to all applicable policy manual sections, ... [remainder of paragraph omitted]." *Miller v. Ginsberg*, Civil No. 74-390 CH (S.D.W.Va. Dec. 21, 1978). The 1987 text was strengthened to specify "comprehensible to the average person."

<sup>28</sup> The Common Chapters Manual provision is also available on-line at: [http://www.wvdhhr.org/oig/a%20-%20oig%20-%20common%20chapters/07-08%20Common%200Chapters%20-%20Section%20700%20-%20\(Hearings%20Held%20by%20BOR\)%207-7-08.pdf](http://www.wvdhhr.org/oig/a%20-%20oig%20-%20common%20chapters/07-08%20Common%200Chapters%20-%20Section%20700%20-%20(Hearings%20Held%20by%20BOR)%207-7-08.pdf) at page 9.

factors" meets the requirement to state "the reasons for the action provided in terms readily understandable." The Department did not contest below that the Notice was defective.<sup>29</sup> The more serious question is about remedy: what to do about the defective notice.

B. Remedy

The only workable method of sanctioning inadequate notices is to dismiss the Department's claim where it fails to meet Due Process requirements along the way, unless the error is shown by DHHR to be an isolated instance of unintended error with no prejudice to the out come of the proceedings. DHHR has not met that burden.

Petitioner does not believe or contend that this inadequate notice was intentionally written in bad faith for the purpose of obscuring the Department's position. In terms of promoting the effective functioning of the "fair hearing" dispute resolution system, applying a remedy for violation only where there is proof of intentional bad act would not achieve anyone's goals. It would be virtually impossible for any ordinary recipient to obtain proof of the worker's state of mind, to prove that the worker consciously intended to write a meaningless notice. Inviting such a dispute into the administrative "fair hearing" process would only clog the system, for little foreseeable benefit.

The far more likely premise is that an overworked and probably underpaid employee took a shortcut with what felt like a mere technicality. But the vacuousness of the phrase used ("because of other eligibility factors') suggests a far more damning culture, where the Due Process notice requirement is honored mostly in the breach. If the ordinary supervision and discipline processes within the agency were working, then meaningless bureaucratic gibberish wouldn't be put forth as an official pronouncement on behalf of the State of West Virginia.

It might be argued that because Ms. Hudson's representative surmounted the shoddy

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<sup>29</sup> In fact, the Department filed no brief at all in the lower court, stating only that "the Hearing Examiner's order says what can be said of his decision." App. Rec. 389.

notice and figured out what was really going on, then there was a “no harm no foul” situation and no sanction should be imposed. But this would set up a perfect Catch 22: where recipients with good representation catch defective notices and overcome them, no sanction is imposed; and where recipients without good representation don’t catch defective notices and don’t overcome them, no sanction is imposed. That approach would provide no reason or incentive for the Department to effectively assure adherence to the requirements of Due Process of Law. The only effective way to police bad notices is to insist upon full adherence. The Department’s claim of overpayment should be dismissed for its failure to provide adequate notice.

Ordinarily, a failure by the lower court to address a substantial issue in the case would earn a remand for further consideration. In the present case, however, there is no dispute as to the facts. The words of the defective Notice are in the record. The question presented is purely a matter of application of law, whether the requirement to explain the reasons in understandable terms is satisfied by the explanation “because of other eligibility factors.” Petitioner asks that this Court declare the Notice defective, and dismiss the Department’s claim due to the defective Notice.

III. THE COURT BELOW ERRED BY FAILING TO RULE UPON PETITIONER’S CLAIM THAT DHHR OBSTRUCTED HER DUE PROCESS RIGHT OF ACCESS TO THE “ENTIRE FILE” PRIOR TO HEARING.

A. Requirement for Access to Contents of File

The 1987 *Miller v. Ginsberg* Amended Consent Decree also addressed the recipient’s right of access to information in the DHHR file:

(d) the right to access of the claimant or claimant’s nominated representative, law or professional, to the contents of the entire case file at any time, and an opportunity to examine and copy, free of charge, all material which may be used at a hearing at any time;

App. Rec. 120. This right is also set forth in the Department’s “Common Chapters Manual”

regulations governing the conduct of hearings:

D. - Release of Information to the Applicant or Recipient. For the purpose of the fair hearing process, the applicant or recipient shall have access to his or her entire case record, including, but not limited to, all documents that pertain to the change in the applicant's or recipient's case that is the subject of the fair hearing. With written authorization from the applicant or recipient, the applicant's or recipient's attorney or representative may review the record. ... Additionally, applicant or recipient, or his or her attorney/representative, may request and receive, free of charge, a copy of the entire case record.

DHHR Common Chapters Manual, § 710.15.D; App. Rec. 107.

B. Violation<sup>30</sup>

Ms. Hudson's representative entered her appearance on October 14, 2011, less than a week before the scheduled Oct. 20 hearing. App. Rec. 174. She requested a continuance of the case, which was granted, and the matter was rescheduled for November 10. App. Rec. 175-179. The same date she also spoke with the food stamp investigator handling the case and requested the case file. App. Rec. 385.<sup>31</sup>

On October 19 (a Wednesday), having received only "a few pieces of paper" from the food stamp investigator, the representative spoke again with investigator and requested the entire file dating back two years. App. Rec. 385. Ms. Hudson's representative faxed an Authorization and Release to DHHR seeking release of "All my medical records; also education records and any and all other information and records about me." App. Rec. 374.

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<sup>30</sup> The facts recited in this portion are documented by attachments to petitioner's brief submitted to the Circuit Court. This Court has made clear that on certiorari review of a DHHR decision, the lower court may take additional evidence. *Wysong v. Walker*, 224 W. Va. 437, 686 S.E.2d 219 (2009). DHHR did not object to the submission of the attachments to petitioner's Circuit Court brief, and did not dispute any of the facts set forth therein.

<sup>31</sup> App. Rec. 385 is a one page letter from Ms. Hudson's representative to the Hearing Officer, summarizing the representative's unsuccessful efforts to obtain access to the file. In that letter the representative stated "I originally requested Mrs. Hudson's case file on October 14, 2011."

The following Monday, October 24, DHHR sent out a letter declining to release any information. App. Rec. 377. DHHR asserted the Release did not cover food stamp records, and also should instead have been directed to another DHHR employee instead of the food stamp repayment investigator. App. Rec. 377.

On October 26 (a Wednesday) Ms. Hudson's representative received the letter denying access to the file information. App. Rec. 385. That date the representative faxed a renewed request, this time to a Boone County DHHR employee. App. Rec 380, and communicated with the Hearing Officer seeking her "assistance in obtaining the information I requested...." App. Rec. 385.

On October 27, 2011 the representative emailed another request for the client file, to yet another Boone County DHHR employee. This request also was refused. For reasons not set forth, this DHHR employee still deemed the Release "not proper" so that records would not be released. App. Rec. 387.

On October 28 (a Friday) the representative sent Ms. Hudson personally to the Boone DHHR office to try to get her records. App. Rec. 387. Ms. Hudson initially was told she was not allowed to have information from her file. App. Rec. 387. Ms. Hudson refused to accept "no," and sat in the waiting room for another 2 ½ hours. Finally, late on Friday afternoon, Ms. Hudson was given the information from her file. App. Rec. 387.

C. Remedy

Proceedings for recipients to contest DHHR decisions can move quickly, and this is appropriate. However, that speed places a similar obligation upon DHHR to respond expeditiously to recipient requests for information.

In the two weeks between October 14 and October 28, Patricia Hudson or her representative were denied access to the file information *four different times*. Only after sitting in a waiting room for 2 ½ hours and refusing to leave, even after being verbally informed that

she could not have her file, did Ms. Hudson receive the right of access to file information that the law guarantees.

At best, the DHHR's bureaucratic word parsing to declare that the submitted release somehow wasn't "proper" illustrates a culture of resistance to the right of clients to see the information in their files. At worst, it may have been willful and deliberate obstruction. One can only imagine how many other recipients, less determined and willful, simply resigned themselves to the denial of their rights, convinced that there's "no beating the system."

It is true that in the end, with a skilled representative firing repeated requests to at least 4 different DHHR officials,<sup>32</sup> and with a willingness to "occupy" a DHHR waiting room in the face of being told "no" until her rights were honored, Ms. Hudson finally accomplished access to her file information. That should not be taken as "compliance" with the legal duty to provide access "to the contents of the entire case file at any time," as *Miller v. Ginsberg* requires.

As with the defective notice, the fact that 'denial of right' was overcome by 'determined advocacy' should not be a basis for the courts to ignore the denial of right in the first place. Otherwise, the same Catch 22 obtains: where the denial of right is caught and overcome, no sanction is imposed; and where the denial of right is not caught and not overcome, no sanction is imposed. Petitioner believes the only effective sanction available to the courts is to dismiss the Department's claim where the Department has failed to honor Due Process requirements along the way.

In the present case, DHHR did not dispute the facts presented to the circuit court of DHHR unwillingness to grant Ms. Hudson access to the contents of her own file. The question presented is purely a matter of application of law, whether the requirement to permit access to

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<sup>32</sup> Brian Shreve, food stamp investigator, App. Rec. 373; Linda Meade, Boone County DHHR, App. Rec. 379-382; Steve Hill, Boone County DHHR, App. Rec. 387; and Stephen Baisden, DHHR State Hearing Officer, App. Rec. 385.

the entire file at any time was satisfied by the Department's conduct in this case. Petitioner asserts that DHHR's conduct was not sufficient, and asks that this Court dismiss the Department's claim as an appropriate sanction for its inexcusable refusal to follow the clear requirements of the law.

IV. THE COURT BELOW ERRED IN APPLYING AN INCORRECT LEGAL DEFINITION OF THE TERM "LIVING TOGETHER" TO CONCLUDE PETITIONER AND HER HUSBAND "LIVED IN THE SAME HOUSEHOLD" DURING THE REPAYMENT PERIOD OF MAY 2010 TO SEPTEMBER 2011.

A. Burden of Proof upon DHHR at Administrative Hearing

The Department's regulations specify that DHHR has the burden of proof at the administrative hearing: "The burden of proof is first on the Department to prove, by a preponderance of evidence, that its adverse action was correct, then shifts to the applicant or recipient to prove, again by a preponderance of evidence, that the Department's action was incorrect." DHHR Common Chapters Manual § 710.20.F, App. Rec. 109-112. Thus the burden was upon DHHR to establish not merely that Patricia Hudson and Harold Hudson used the same address, but that they were "living together" at that address.

B. Spouses Who Do Not "Live Together" May Be Considered As Separate Households For Purposes of Food Stamp Eligibility.

Under federal law food stamp benefits are provided to a "household," generally defined as an individual or group of individuals "who live together *and* customarily purchase food and prepare meals together for home consumption." 7 U.S.C. § 2012(n)(1); 7 C.F.R. § 273.1(a) [emphasis added]. It is a two-part test, so as a general rule it is possible for individuals who are sharing quarters nevertheless to establish separate households if they do not "customarily purchase food and prepare meals together for home consumption." In simpler terms, the general rule is that if people purchase and prepare meals separately, they may be separate "households" even though they live together.

However, the Separate Household rule is different for married spouses. “Spouses who live together” **must** be considered as one household even if they do not customarily purchase and prepare meals together. 7 U.S.C. § 2012(n)(2);<sup>33</sup> 7 C.F.R. 273.1(b)(1); WV Income Maintenance Manual § 9.1.A.1.b.(2).<sup>34</sup> Only if spouses do not “live together” can they establish separate food stamp households.

The Department of Agriculture has not defined the term “living with,” commenting that a “regulatory definition would be no more effective than the application of a reasonable judgment based on the circumstances of a particular living arrangement.” 47 Fed. Reg. 52328, 52329 (1982). Similarly, West Virginia regulations do not define the terms “live with” or “live together.”<sup>35</sup>

Federal case law has held, however, that a state agency may *not* apply an irrebuttable “same address” test, under which individuals merely living at the same address are conclusively presumed to be “living together.” *Robinson v. Block*, 869 F.2d 202, 211 (3rd Cir. 1989). The fact that individuals use the “same address” is not by itself sufficient to establish that they live together. Instead, the agency must consider “all the circumstances” that determine whether people “live together,” such as “separate entrances and locks, separate finances, utility bills and telephone, and essentially separate living quarters.” *Robinson v. Block*, 869 F.2d 202, 209 (3rd Cir. 1989). For other cases following the *Robinson* principle that an irrebuttable Same Address

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<sup>33</sup> This statute currently lists 3 types of individuals who must be considered a single household if they live together, regardless of whether they purchase and prepare meals together: (1) spouses; (2) parents and minor children; and (3) children under 18 living with a non-parent who functions as a parent.” 7 U.S.C. 2012(n)(2).

<sup>34</sup> Hereafter cited as “IMM § 9.1.A.1.b.(2).” The complete text of IMM § 9.1 is included at App. Rec. 84-106.

<sup>35</sup> DHHR regulations on ‘verification of residence’ suggest that a variety of information, including statements from neighbors, may be appropriate. Section 4.2.H.1, DHHR Income Maintenance Manual. DHHR introduced no such neighbor evidence in this case.

test may not be applied, see *Zayas v. Dep't of Health and Rehabilitative Services*, 598 So.2d 257 (1st Dist. Ct. of App., FL, 1992); *Baca v. Arizona Dep't of Econ. Sec.*, 191 Ariz. 43, 951 P.2d 1235 (Ct. of Apps, Div. One, Arizona 1997); *Bonilla v. State of Texas*, 2010 Tex. App. LEXIS 4176 (14th Dist. Ct. of Apps., June 3, 2010) (unpublished opinion).

C. The DHHR Representative's Belief That Harold Hudson Was Living in "The Same Residence, the Same Dwelling, but Separate Parts of the Building." Even If True Amounted Only to the Prohibited "Same Address" Test.

At the conclusion of the administrative hearing the DHHR representative Brian Shreve stated the Department's belief that the spouses "lived together in the same residence, the same dwelling, but separate parts of the building...." App. Rec. 291.<sup>36</sup>

As discussed in the following sections, the DHHR's representative's assertion is factually wrong. There is in fact no evidence whatsoever in the record supporting the mistaken belief that the spouses were "living in the same residence, the same dwelling, but separate parts of the building." But the point to be made here is that even if the assertion were true, it is not sufficient.

The DHHR representative's statement *even if true* was nothing more than the prohibited "same address" test. Even if it were true that the spouses were living in "the same dwelling but separate parts of the building" as Mr. Shreve said, that would not be sufficient under the *Robinson v. Block* decision. If for example the facts also showed they had separate entrances and locks, or otherwise essentially separate living quarters within the same building, then *Robinson v. Block* would lead to a different conclusion. The DHHR representative's

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<sup>36</sup> In support of this contention, DHHR representative also introduced a photo (App. Rec. 81), saying it was "a picture of the residence. They are not separate residences. They're connected." App. Rec. 209. He testified that he took the photo, App. Rec. 209, so it would have had to be after he received the referral for investigation in June 2011. App. Rec. 194-195. That date was long after the camping trailer was removed from the property in November 2010. The photo of Patricia Hudson's home in June 2011 adds no useful information to the question of whether Harold Hudson was "living with" Patricia Hudson during the time the camping trailer was on the property..

summation, even if it were supported by the facts or record, did not suffice to prove that the spouses were "living together."

D. The Evidence That for a Four Month Period Harold Hudson Stayed in a Camping Trailer in Patricia Hudson's Yard Does Not Establish That the Spouses Were "Living Together During That Time."

Patricia Hudson threw her husband out of the house in March 2009. App. Rec. 231. Her daughter Mary Holstein testified that when her mother threw her father out of the house for his drinking, "he went to live inside the camper." App. Rec. 275. Harold Hudson continued using the camping trailer (during the times that he was in Boone County) until August 2010, when his mother was placed in a nursing home. App. Rec. 246.<sup>37</sup> Therefore, for the first four months of the overpayment period alleged by DHHR (May 2010 through August 2010), the evidence is that Mr. Hudson was periodically sleeping in the camping trailer in Patricia Hudson's yard (between time in Buffalo, NY; Akron, OH; his sister's home in Logan County; and his daughter's home in Boone County).

During those four months he did not have a water hookup to his wife's house; he used the bathroom at his daughter's home next door. App. Rec. 236. His daughter did most of his laundry. App. Rec. 236-237. His daughter did much of his grocery shopping. App. Rec. 276. If Harold Hudson got calls on his wife's phone, she took messages but did not allow him to come in and use the phone. App. Rec. 232. Harold Hudson did not keep clothing, shoes or personal toiletries in Patricia Hudson's home. App. Rec. 276. He did have an electric cord to his wife's house, but he paid her occasionally for the power used. App. Rec. 248-249.

None of these facts were disputed by the DHHR representative. No evidence was presented in the hearing that contradicted these facts. For example, DHHR did not submit any

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<sup>37</sup> From August to November Mr. Hudson stayed at his mother's house while she was in a nursing home. App. Rec. 246; 276. Following her death in November 2010, the camping trailer was entirely removed from Patricia Hudson's property. App. Rec. 247.

evidence or testimony of neighbors that would counter the testimony that is in the record.<sup>38</sup> All of these small facts are exactly the kind of indicia of separate living that the *Robinson v. Block* case requires to determine whether spouses using the same address are also “living together.” The answer is that on these facts, no definition of “living together” can be applied to these spouses during the four month time that Harold Hudson was periodically sleeping in the camping trailer in Patricia Hudson’s yard.

E. For the Thirteen Month Period after Harold Hudson Was Sleeping In the Camping Trailer, There Is No Evidence That the Spouses Were Living Together.

For the thirteen months of the alleged overpayment period which came after August 2010, there is even less basis for applying the “living together” definition. During those 13 months Harold Hudson was not even intermittently staying in the yard of Patricia Hudson’s house. The only evidence of record for those 13 months is that when Mr. Hudson was intermittently in Boone County he was either staying in his mother’s house (August through November 2010), App. Rec. 246, or at his daughter’s house (November 2010 through September 2011 end of alleged overpayment period). App. Rec. 276-277. He continued using the same address for his driver’s license and DHHR benefits, but he was not physically staying on the same parcel of land as Patricia Hudson. There is no definition of “living together” which can be applied to these undisputed facts.

F. The Decisions Below Have No Adequate Finding That the Petitioner’s Evidence Was Not Credible

If the decisions below were thought to be based upon a conclusion that the petitioner and her witnesses were not credible, they are wholly inadequate. There is no discussion in them whatsoever of credibility, or of reasons to disregard the otherwise uncontradicted testimony rendered by petitioner and her witnesses.

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<sup>38</sup> DHHR regulation at Income Maintenance Manual § 4.2.H.1 lists statements from neighbors as an example of evidence helpful in verifying residence.

In *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996), this Court held that “where there is a direct conflict in the critical evidence upon which an agency proposes to act,” then the agency may not elect one version over another unless the conflict is resolved by “reasonabed and articulate decision ... rendering its decision capable of revie by an appellate court.” *Id.* at Syllabus Point 6. That holding has been repeatedly acknowledged, as recently as in *Sims v. Miller*, 227 W. Va. 395, 709 S.E.2d 750 (2011), and is thoroughly consistent with this Court’s seminal discussion of review of administrative agency decisions in *Citizens Bank of Weirton v. West Virginia Board of Banking & Financial Institutions*, 160 W. Va. 220, 233 SE2d 719 (1977).

The agency decision of the State Hearing Officer contains a section labeled “Findings of Fact.” App. Rec. 10-11. This consists, however, mostly of a recitation of who said what, without any identification of conflicts of evidence or of resolution of conflicts of evidence. Finding of Fact #4 summarized that petitioner acknowledged that her spouse lived “on her property;” that “he did not live in her home, but in a camper which sat on her lot;” that she would not allow her husband “to live in her home while he was abusing alcohol;” and that “the camper has been removed from her property and her spouse now stays with her daughter.” App. Rec. 10.

Finding of Fact #5 summarized a DHHR worker’s testimony that in early 2010 the husband had told the worker that “he lived behind her and he took care of her and she took care of him.” App. Rec. This testimony was fully consistent with Patricia Hudson’s testimony; establishes no more than a “same address” situation; and seems to support the fact argument that the spouses were not “living together.”

The full entirety of the State Hearing Officer’s explanation for ruling against petitioner was a single sentence in the Conclusions of Law: “Neither Respondent nor her spouse submitted sufficient evidence to support their claim that they had separate residences.” App.

Rec. 11. As argued above, all of the Department's evidence proved only that the spouses used the "same address."<sup>39</sup> If this conclusion of insufficiency was meant to rest upon a finding of lack of credibility, it does not meet the requirements of *Muscatell*, *Sims*, and *Citizens Bank of Weirton* for "reasoned and articulate decision."

The review decision by the circuit court below is no more adequate, particularly given that the reviewing court was not the original trier of fact, did not observe the witnesses, and was merely reviewing the transcript record. Again the crux of the decision is a single sentence:

Sufficient evidence indicates that Petitioner and her spouse shared utilities and property where Petitioner receives her public assistance benefits; therefore, it is logical to conclude that Petitioner and her spouse lived in the same household during the repayment period....

App. Rec. 392-393. The task of the reviewing court was to determine whether the agency had rendered a reasoned and articulate decision addressing credibility issues, rendering the decision capable of review by an appellate court. See *Syl. Pt. 6, Muscatell v. Cline, supra*, 196 W. Va. 588, 474 W. Va. 518 (1996). The agency decision failed to do that. It is not adequate for the reviewing court to say in essence: "if the agency had made reasoned findings on credibility then there might have been enough evidence to uphold, so that's enough to uphold." In performing the function of appellate review of administrative agency decisions, courts must require agencies to adhere to the "reasoned and articulate decision" requirement. When court do not do that, they act in error.

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<sup>39</sup> The photograph introduced by DHHR to show "not separate residences," as explained in footnote 36 *supra*, is meaningless. It was taken long after the camper trailer was removed from the property, and the sole evidence in the record is that the husband was sleeping in the house of his daughter next door after the camper was removed. Every other item of evidence profered by DHHR establishes only that the spouses used the same address.

## CONCLUSION

First, the notice of overpayment, stating that Ms. Hudson was not eligible because of "other eligibility factors," violated the requirement that a notice must state the reasons for action "in terms readily understandable by the applicant." Petitioner therefore asks this Court to hold the notice constitutionally deficient, and to prohibit the Department from proceeding with the overpayment recoupment attempt.

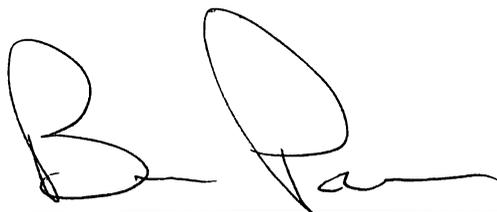
Second, the Department's persistent and repeated failure to permit Patricia Hudson to have access to the information in her file violated the requirement that DHHR provide access to "the entire case file at any time." Petitioner therefore asks this Court to hold the Department's conduct constitutionally deficient, and to prohibit the Department from proceeding with the overpayment recoupment attempt.

Third, the evidence showing that the spouses used the same address is not sufficient to establish that they were "living together." The fact that Harold Hudson intermittently stayed in a camping trailer in Patricia Hudson's yard during the months from May 2010 to August 2010 is not sufficient to establish that the spouses were "living together," where the husband did not draw water from the wife's home, did not use the bathroom facilities in her home, did not use laundry facilities in her home, did not eat in her home, did not purchase food with her, and did not keep clothing, shoes or personal toiletries in her home. Petitioner asks this court to reverse the holding of the lower court that applied a definition of "living together" to uphold the overpayment determination for those four months.

Finally, the evidence showing that the spouses used the same address is not sufficient to establish that they were "living together" especially for the 13 months from November 2010 through September 2011 when Harold Hudson was not even intermittently staying in a camping trailer in Patricia Hudson's yard, but was staying with other people on other real property when in Boone County. Petitioner asks this court to reverse the holding of the lower court that

applied a definition of "living together" to uphold the overpayment determination for those thirteen months.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bruce Perrone', written over a horizontal line.

Bruce Perrone (WVSB 2865)  
Legal Aid of West Virginia  
Counsel for Petitioner Patricia Hudson  
922 Quarrier Street, 4th Floor  
Charleston, WV 25301  
343-4481 ext 2127

PATRICIA HUDSON,  
Petitioner Below, Petitioner Herein  
By Counsel

IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA

PATRICIA HUDSON,

Petitioner Below, Petitioner,

vs.

Docket No. 12-0775

MICHAEL J. LEWIS, Secretary, West Virginia  
Department of Health & Human Resources, and  
STEPHEN M. BAISDEN, State Hearing Officer,  
West Virginia Department of Health & Human  
Resources,

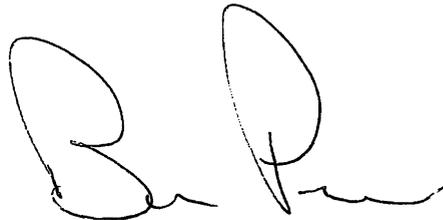
Respondents Below, Respondents.

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Brief on Behalf of Petitioner Patricia Hudson, and Appendix Record, was served upon the parties, by depositing the same in the United States mail, first class postage prepaid, to the following address:

Michael Jackson  
Assistant Attorney General  
DHHR Region II Office  
4190 Washington Street, W  
Charleston, WV 25313

All of which was done on September 18, 2012.



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Bruce Perrone (WVSB #2865)