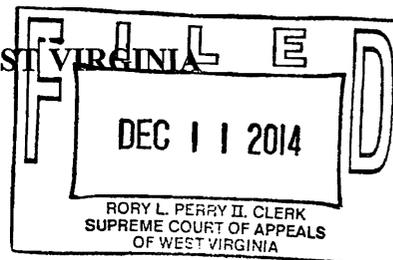


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0664



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

Petitioners,

v.

E.H., et al.,

Respondents.

BRIEF OF RESPONDENTS E.H., ET AL.

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INTRODUCTION

Petitioner Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities (“DHHR”) once again challenges the circuit court’s authority to enforce a prior consent order of the parties, characterizing the circuit court’s order on appeal as violating the separation of powers and invading the province of the executive and legislative branches, despite this Court’s prior holdings in this case rejecting the same DHHR arguments and finding that the circuit court has just such authority. Over five years ago, DHHR voluntarily agreed to remedy certain serious problems with the staffing of its two state psychiatric hospitals, Mildred Mitchell Bateman Hospital in Huntington (“Bateman”) and William R. Sharpe, Jr. Hospital in Weston (“Sharpe”). DHHR undertook this agreement in order to come into compliance with its obligation to protect and care for patients under section 27-5-9 of the West Virginia Code. It is undisputed that the exact same problems, leading to the same statutory violations, persist to date. Not only has DHHR failed to comply with the agreements it entered in 2009, as well as numerous court orders enforcing those agreements, it has failed to take any steps on its own to bring itself into compliance with the court orders or the law over the past five years. Because the order at issue in this appeal is merely the latest circuit court order attempting to compel DHHR to comply with the agreements it made five years ago, the circuit court did not exceed its authority when it directed DHHR to develop a plan utilizing existing state policies and procedures to meet its obligations.

In this appeal, DHHR raises two assignments of error, challenging two separate holdings of the circuit court, contained in subparagraphs (a) and (b) of an order entered on June 2, 2014 (“2014 Enforcement Order”). In its Notice of Appeal dated July 2, 2014, however, DHHR specifically appealed only subparagraph (b) of the 2014 Enforcement Order, arguing that this Court has jurisdiction to consider the circuit court’s ruling on subparagraph (b), because unlike the issues

addressed in subparagraph (a) of that order, subparagraph (b) constituted a final judgment. See Notice of Appeal, Attachments at 1-4, S. Ct. No. 14-0664 (July 2, 2014). Despite citing subparagraph (b) of the 2014 Enforcement Order as the sole basis for appeal, DHHR has now expanded the scope of their appeal to encompass the circuit court’s ruling found in subparagraph (a) of that order. Incredibly, DHHR has expanded the scope of its appeal *despite raising the exact same issues in a second appeal*, filed as Supreme Court No. 14-0845, and *despite this Court’s refusal to consolidate those appeals*. Because the court’s ruling contained in subparagraph (a) of the 2014 Enforcement Order was not final when this appeal was lodged, and because DHHR should not be allowed two bites at the apple—i.e. two opportunities to appeal the exact same issues from the exact same order—the Respondents herein respectfully request that the Court refrain from considering the issue raised in DHHR’s first assignment of error, and reserve that issue for Appeal No. 14-0845, in which it will be fully addressed. Nevertheless, Respondents herein will address all of the issues raised by DHHR, so as not to waive any arguments.¹

¹ Given the representations made in DHHR’s Notice of Appeal, and given that this Court denied DHHR’s motion to consolidate the two appeals, Respondents herein designated documents for the appendix in this appeal on the belief that this appeal was directed solely towards subparagraph (b) of the 2014 Enforcement Order. Upon discovering that this was not the case and that DHHR is raising the exact same issues in both appeals, Respondents contacted counsel for DHHR and obtained permission to cite to the appendix designated for Appeal No. 14-0845, which contains the documents designated by Respondents to address the issues raised in DHHR’s first assignment of error. (See Stipulation Regarding Appendix, S. Ct. No. 14-0664, December 11, 2014.) While the first 1408 pages of the appendices for the two appeals are identical, a second appendix volume, containing pages 1409-1931, was submitted with Appeal No. 14-0845. Accordingly, all cites herein to pages 1409 through 1931 of the appendix refer to the appendix filed in Appeal No. 14-0845. Should this Court have any questions or desire that Respondents address the appendix dilemma in a different manner, Respondents are happy to comply.

STATEMENT OF THE CASE

1. Background

This action was originally filed by the petitioners below as an original jurisdiction petition for mandamus, in response to egregious violations of section 27-5-9 of the West Virginia Code, regarding the unnecessary institutionalization of West Virginians with mental disabilities in abhorrent conditions in the state psychiatric facilities. See E.H. v. Matin, 168 W. Va. 248, 284 S.E.2d 232 (1981) (Matin I). In response to this Court's ruling, in October 1983, the parties agreed and the court adopted the West Virginia Behavioral Health System Plan, to be implemented by DHHR with oversight by the court, ensuring protection of patient rights and provision of appropriate treatment. See E.H. v. Matin, 189 W. Va. 102, 104, 428 S.E.2d 523, 525 (1993) (Matin II). In 1993, after ten years of implementation, DHHR appealed a ruling by the circuit court halting construction of a hospital. Id. In Matin II, this Court held that the circuit court did not have the authority to halt the construction of a hospital when the Legislature had already explicitly appropriated funds for the hospital's construction. Id. at 105, 428 S.E.2d at 526. The Court further determined, in a subsequent opinion, that continued court monitoring of DHHR's delivery of services was necessary. E.H. v. Matin, 189 W. Va. 445, 432 S.E.2d 207 (1993) (Matin III).

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

In 2008, the Ombudsman issued a report indicating that, among other problems, DHHR's treatment and care of patients at Sharpe and Bateman hospitals was suffering as a result of staffing problems and patient overcrowding. Matin IV, 223 W. Va. at 383, 674 S.E.2d at 244. In a separate report issued around the same time, the Ombudsman found that DHHR had failed to establish a system of care for West Virginians suffering from traumatic brain injuries, which DHHR had agreed to in a 2007 consent order. Id. As a result of the Ombudsman's reports, the circuit court re-opened the case and scheduled an evidentiary hearing. See id. at 384, 674 S.E.2d at 245. DHHR objected to the circuit court's re-opening of the case, and filed a writ of prohibition with this Court arguing that the circuit court had exceeded its authority and was encroaching on the authority of the legislative and executive branches. Id. at 384-85, 674 S.E.2d at 245-46.

In considering the writ of prohibition, this Court noted the serious staffing problems being faced by the two state psychiatric hospitals:

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

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

2. 2009 Evidentiary Hearings and Agreed Order

In April 2009, following this Court's decision in Matin IV, the circuit court conducted a two-day evidentiary hearing. During the hearing, Dr. Shahid Masood, the clinical director of Bateman Hospital, testified that staffing vacancies were causing "unsustainable" working hours for clinical

staff. (App. 1671.) He testified that using temporary workers was not an efficient use of resources because “by the time they are trained, it is time for them to leave.” (App. 1682.) He stated that increasing salaries would be an “extremely effective” method of recruiting additional employees. (App. 1683.) He further testified that as a result of the overcrowding and understaffing, hospital patients were suffering from increased levels of anxiety, which resulted in those patients being given increased amounts of sedative medications. (App. 1676-78.)

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

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

10. Facilities:

- (a) DHHR *shall provide for increased pay for direct care workers* at Bateman and Sharpe in order to (i) *be able to recruit staff and retain existing staff* and (ii) preclude the practices of mandatory overtime and reliance on temporary workers (except in exceptional and infrequent contexts). (See Attachment B.)
- (b) DHHR will use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent contexts.

(App. 4) (emphasis added). Attachment B, as referenced in paragraph 10(a) of the Agreed Order, sets forth a chart listing the various classifications of direct care employees,² the number of positions for each classification, the proposed salary increase, and the total funding DHHR would need to implement the increase. (App. 6.)

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

² The direct care positions designated to receive increased pay pursuant to Attachment B include three health service employee classifications (similar in nature to a nurse’s aide), seven nursing classifications, and psychiatrists.

3. 2011 Enforcement Proceedings.

In July 2011, the circuit court conducted an evidentiary hearing regarding DHHR's compliance with the 2009 Agreed Order. (App. 1684.) In an order entered following the hearing on August 18, 2011, the circuit court found that both hospitals continued to have problems with overcrowding, resulting in violations of patient rights, and that "there continue to be staffing vacancies and the hospitals continue to utilize voluntary and mandatory overtime to maintain a minimum level of staffing for the protection of staff and patients." (App. 1687.)

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

4. 2012 Enforcement Proceedings

In the summer of 2012, it became apparent that DHHR had failed to comply with its agreement in the 2009 Agreed Order regarding increasing salaries for the lowest-paid classifications of direct care workers. (App. 8-10; 33-35.) While DHHR had increased the salaries for registered nurses and psychiatrists by at least as much as was provided for in Attachment B to the 2009 Agreed Order, it had not increased salaries for health service employees. (App. 12.) Rather, DHHR had implemented a three percent raise for those health service employees who had already been in their

position for three years or longer. (Id.) Contrary to the representations made on page four of DHHR's opening brief, the three percent raises received by the few health service employees who actually qualified for them were substantially less than the \$1,000-\$2,000 dollar pay increases required for those positions in the 2009 Agreed Order.³ (App. 50.) Accordingly, Respondents herein requested that the circuit court enforce DHHR's pay raise commitments in the 2009 Agreed Order. (App. 8-10, 33-35.)

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

On December 11, 2012, the circuit court entered an order following the October 17, 2012, hearing directing DHHR to "comply with Item number 10(a) regarding increased pay for direct care workers at Bateman and Sharpe Hospitals of the Agreed Order entered by this Court on July 2, 2009." (App. 120.) The circuit court clarified that "said increases shall be for the exact amount listed in 'Attachment B' under the Proposed Increase column," and that "this pay increase shall be . . . implemented on or before January 1, 2013." (Id.) The circuit court did not require DHHR to

³ Notably, rather than cite to the evidentiary record, DHHR repeatedly cites to its own prior briefing, making unsupported and factually inaccurate assertions. (See Pet. Br. 4, 6, 8, 11, 12.) Indeed, DHHR's representation on page four of its brief is clearly erroneous given that the average salary for these employees is in the low \$20,000 range (App. 572-584.); a three percent raise for a salary of \$20,000 is roughly \$600.00, no where close to the \$2,000 required by the 2009 Agreed Order. (App. 6.) Indeed, for a health service worker to have received \$2,000 pursuant to a three percent raise, that employee would have had to have been already making roughly \$65,000, an amount that exceeds the salaries of even the most highly paid nurses at the two hospitals.

apply the higher salaries retroactively back to 2009, but rather directed that the new salaries be implemented going forward. (Id.)

DHHR moved the circuit court to alter or amend its judgment and to stay its order pending the reconsideration, and the circuit court conducted a hearing on those motions on December 14, 2012. (App. 122.) On December 18, 2012, the circuit court denied DHHR's Motion to Alter or Amend Judgment, and ordered that "employees in the LPN and Health Service Trainees, Workers, and Assistants classifications employed *on or after January 1, 2013*, are entitled to pay raises effective January 1, 2013, as provided in the Order entered December 11, 2012. . . ." (App. 143) (emphasis added). DHHR did not appeal the circuit court's orders.

5. April 2014 Enforcement Proceedings

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

DHHR did not dispute the evidence presented at the April 2014 hearings establishing that both hospitals continue to suffer from high numbers of vacancies in the direct care classifications. Indeed, DHHR's own documents showed that each of the two state hospitals averaged between forty and fifty vacancies per month, most of which were in direct care positions. (App. 1811-26.) The Chief Executive Officer of Bateman Hospital, Craig Richards, testified that Bateman Hospital is "habitually short on staff," and has been "for a number of years." (App. 279-80.) He further admitted that, as was occurring in 2009, patients at Bateman were not receiving legally required community integration outings (i.e. therapeutically necessary supervised trips into the community),⁴ because "we do not have enough staff to provide that." (App. 277.)

DHHR further did not contest that it continues to require large amounts of mandatory overtime from direct care employees at Sharpe and Bateman. (App. 259, 1847-63.) The Commissioner for the Bureau for Behavioral Health and Health Facilities ("BHHF"), Victoria Jones, testified that the use of overtime at Bateman and Sharpe is significant, routine and consistent. (App. 474.) DHHR documents established that direct care employees at Sharpe were required to work approximately six hundred hours of mandatory overtime a week, in addition to the overtime being worked voluntarily. (App. 1851, 1857.) A Health Service Assistant from Sharpe Hospital, Jamie Beaton, testified that direct care employees are sometimes required to work twelve to sixteen hour shifts, two to three days in a row. (App. 258-59.) He further testified that mandating overtime

⁴ Community integration outings are therapeutically necessary to prepare patients for discharge into a community setting and to prevent the patient from becoming institutionalized. Eligible patients are required to be offered multiple community trips each month. W. Va. Code R. § 64-59-14.4.

causes hardships to employees,⁵ which ultimately leads to low morale and high staff turnover. (App. 260-61.) A report generated by Sharpe Hospital entitled “Present and Future Staffing Needs” states that “[m]andatory and voluntary overtime is being used to meet the acuity levels on the patients units. This is stressing staff leading to turn-over and morale issues.” (App. 1878.)

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

Importantly, ample evidence was introduced during the April 2014 evidentiary hearings that at least one major cause of DHHR’s inability to recruit and retain direct care employees is its failure to offer competitive wages and retention incentives. Ginny Fitzwater, the Director of Human Resources for BHHF testified that “I believe that offering a competitive salary would assist us in recruiting employees.” (App. 329.) BHHF Commissioner Jones testified that DHHR’s failure to provide periodic raises or salary increases to the direct care employees results in those positions being non-competitive and hurts DHHR’s ability to retain employees. (App. 477.) Bateman

⁵ When DHHR needs additional employees to work a given shift in order to ensure enough staff are on the units, it first asks for volunteers; if not enough staff is willing to work over for that shift, DHHR then mandates certain employees to stay and fill the gap. (App. 258-59.) Refusal to work mandated overtime is grounds for termination. (App. 259.)

Hospital CEO Richards testified that he had problems recruiting direct care staff because Bateman competes with many other large hospitals in the Huntington area, and he agreed that having the ability to pay a competitive salary would help address staffing vacancies at his hospital. (App. 277, 296-97.) Indeed, the evidence established that market competitors in the Bateman Hospital area pay significantly higher salaries for comparable positions, offer annual cost of living increases, and offer other opportunities for pay raises, all of which make those hospitals more attractive in the market. (App. 359-63, 1713, 1737.) Similarly, the Sharpe Hospital report entitled “Present and Future Staffing Needs,” states that “[e]mployees are being lost to other state agencies that are paying higher wages.” (App. 1878.)⁶

Despite the overwhelming evidence that DHHR has continued to operate in violation of the 2009 Agreed Order for the past five years, the evidence presented at the April 2014 hearings established that DHHR has taken no steps to rectify these problems without court intervention. (App. 396-97, 404-05, 481-82.) Testimony further established that an agency such as DHHR has the ability to increase pay for state employees through higher starting salaries and through periodic retention incentives, pursuant to the established Board of Personnel policies and procedures.⁷ (See

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

⁷ As state employees, the wages and benefits for the direct care workers at the state psychiatric hospitals are set by the West Virginia Division of Personnel. (App. 563; 564-51.) Each class of employee is assigned to a salary grade by the Division of Personnel, and must be paid at least the minimum for that grade. (Id.; App. 327.) While an employee’s starting salary may be increased incrementally based on prior qualifying experience, DHHR has implemented an internal policy that a new employee’s starting salary may never be more than the average salary of other employees in

App. 277, 289-91, 327-337, 395-96, 1795-1800.) Other than when ordered by the circuit court, however, DHHR had never requested to increase starting salaries for direct care employees or request retention incentives to help retain employees. (App. 396-97, 404-05, 481-82.) Despite years of knowledge that it was violating its obligations under the 2009 Agreed Order, DHHR presented no proposal to systemically address its failures at the April 2014 hearings.

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

Upon questioning, BHHF Commissioner Victoria Jones confirmed that DHHR had never requested a special hiring rate for the health service employee classifications and that the salaries for new hires in those classifications were determined using the pre-2009 Agreed Order minimum

the same position, regardless of the number of years of experience. (App. 327, 340-41.) DHHR almost always hires employees at or very near the minimum salary. (App. 572-84.) Furthermore, direct care workers hired by DHHR do not receive raises, regardless of years of service, unless the Legislature and Governor issue an across-the-board pay raise for all employees, or unless DHHR obtains permission from the Board of Personnel to provide a "retention incentive." (App. 332, 336-37.)

salaries. (App. 439-446.) Based on DHHR's own documents, it is clear that numerous Health Service Trainee employees hired since January 1, 2013, are being paid the minimum salary of \$18,552, the same minimum salary that was in place since before the 2009 Agreed Order. (App. 441-43.) Commissioner Jones acknowledged that, although she believed that the circuit court's December 18, 2012, Order applied only to those employed as of January 1, 2013, in fact, the order as written actually applies to those employed *on or after* that date. (App. 488.)

6. June 2, 2014, Enforcement Order

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

(1) significantly reduce the number of staff vacancies at Sharpe and Bateman, (2) discontinue the practice of mandatory overtime except in exceptional and infrequent contexts, and (3) discontinue the reliance on temporary employees and contract workers to fill the vacant positions. Among other things, the plan should utilize the currently available options, as set forth in the policies of the Division of Personnel, to implement special hiring rates and incentives in order to recruit full time direct care employees. In doing so, the [DHHR] shall consider prevailing market wages in the respective market areas for the two Hospitals. The plan must further include requests to the Division of Personnel for retention incentives to encourage retention of existing hospital employees. The plan must provide a schedule for future proposals to the Division of Personnel to ensure that base salaries remain competitive and that additional retention incentives are distributed.

(App. 244-45.)

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

The base starting rates for the three classifications of health service employees are the same base starting rates that were in effect on February 1, 2009—prior to the 2009 Agreed Order. The three classes of health service employees have not been issued a special hiring rate because the Respondents never requested a special hiring rate for those classes of employees. The Respondents continue to hire individuals in those three classifications at pre-2009 Agreed Order base rates.

(App. 241-42.) The circuit court concluded that “[t]he Respondents have failed to comply with the terms of the 2009 Agreed Order and subsequent December 18, 2012, Order, which require a special starting salary for the three classes of direct care employees, as set forth in Attachment B to the 2009 Agreed Order.” (App. 244.) It therefore ordered, in subparagraph (b) of the 2014 Enforcement Order, that DHHR immediately implement a special starting salary for the three categories of health service employees for new hires going forward, and that DHHR retroactively compensate those employees who were entitled to the higher starting salaries since January 1, 2013, but to which the higher salaries were denied. (App. 245.)

This is the order on appeal.

7. June 27, 2014 Contempt Order⁸

Despite the circuit court's clear directive in the 2014 Enforcement Order that DHHR develop a remedial plan using existing Division of Personnel policies and procedures to immediately address recruitment and retention of hospital employees, DHHR presented to the circuit court three long-term

⁸ Because DHHR raises arguments relating to proceedings and orders that were entered after the 2014 Enforcement Order, the only order at issue in this appeal, Respondents herein review those subsequent proceedings as well. Respondents, however, object to DHHR's arguments relating to these subsequent proceedings, given that they occurred subsequent to the order in this appeal.

proposals, all of which would be subject to legislative approval and would take years to implement. (App. 594, 597-636.) None of these proposals had been raised during the evidentiary hearings as possible solutions, and no evidence had been presented as to their efficacy. The circuit court found that the three proposals presented by DHHR did not conform with its directive to develop a remedial plan that could be implemented immediately, to address years of delay and staffing deficiencies. (App. 708-09.) In an order issued on June 27, 2014, the circuit court reviewed DHHR's five year history of failing to comply with the 2009 Agreed Order and subsequent orders, and found that "[b]y failing to comply with the Court's Orders and by failing to remedy issues that have plagued the Hospitals for years, the [DHHR] continue[s] to neglect and disregard the safety and welfare of West Virginia's psychiatric patients." (App. 709.) Consequently, the circuit court held DHHR in contempt of those orders, and directed that DHHR could remedy the contempt by presenting a remedial plan that could be immediately implemented.

8. August 1, 2014, Order Purging Contempt

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

On July 29, 2014, DHHR submitted the plan in writing to the circuit court, and the court conducted a hearing on August 1, 2014. (App. 729.) At that hearing, the circuit court found that DHHR's proposed plan was an appropriate immediate remedy, and purged DHHR of contempt. (App. 1075-76.) In so doing, the circuit court made clear that, should DHHR desire to move forward

with asking the Legislature to approve one of its other, long term plans, the circuit court was not impeding its ability to do so. (App. 1072-75.) The court explained:

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

(App. 1270.) Consequently, the circuit court made it very clear to DHHR that it was in no way preventing DHHR from pursuing long-term legislative changes to the manner in which the hospitals are administered. Rather, the 2014 Enforcement Order, as well as the subsequent June 27, 2014, Order, simply required DHHR to develop and implement a short-term solution utilizing existing policies and procedures in order to address on-going, serious violations of the 2009 Agreed Order that continue to negatively impact patient treatment and care and cause violations of patients' rights.

SUMMARY OF ARGUMENT

The two issues raised in this appeal by DHHR both challenge the circuit court's inherent authority to enforce its own prior orders, including the 2009 Agreed Order entered into voluntarily by DHHR. First, DHHR appeals subparagraph (a) of the circuit court's 2014 Enforcement Order, which directed DHHR to develop a remedial plan to address long-standing staffing problems at Sharpe and Bateman hospitals in order to bring DHHR into compliance with the 2009 Agreed Order. As a preliminary matter, this issue should not be addressed in this appeal, because it is not a final order, was not noticed in the appeal, and will be thoroughly addressed in Appeal No. 14-0845. Even addressing the merits, however, it is clear that the circuit court was well within its discretion to order DHHR to remedy its non-compliance with its prior agreements by developing its own plan using existing state policies and procedures to immediately address the problems.

Second, DHHR appeals subparagraph (b) of the 2014 Enforcement Order, in which the circuit court directed DHHR to comply with an order dated December 18, 2012, by implementing a special starting salary for certain health care workers at the two state psychiatric hospitals. Specifically, the circuit court order from 2012 clearly states that “employees in the LPN and Health Service Trainees, Workers, and Assistants classifications *employed on or after* January 1, 2013, are entitled to pay raises effective January 1, 2013” DHHR implemented pay raises for those employees who were already employed on January 1, 2013, but refused to implement the new starting salary for those hired after that date, notwithstanding its admissions that its failure to do so violated both the 2009 Agreed Order and the December 18, 2012, Order. After receiving evidence documenting that fact, the circuit court directed DHHR in the 2014 Enforcement Order to come into compliance with the prior orders by implementing the new starting salary and retroactively compensating the employees hired since January 1, 2013, who had been improperly denied the increased salary. Because the circuit court has the inherent authority to enforce its own prior orders, and because the evidence is undisputed that DHHR is in violation of the 2009 Agreed Order and December 18, 2012, Order, this Court should affirm the circuit court’s ruling.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents do not believe oral argument is necessary in this matter, given that the only issue properly before the Court in this appeal is a simple question of whether the circuit court has the inherent authority to enforce its order of December 18, 2012, by requiring DHHR to implement a new starting salary for certain classes of direct care employees, and reimburse those employees for lost wages. Pursuant to Rule of Appellate Procedure 18(a)(4), oral argument is unnecessary when “the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.” Respondents respectfully

submit that the very narrow issue to be decided on this appeal is adequately presented in the briefs and record on appeal. Should the Court desire oral argument, however, Respondents respectfully suggest that this case is appropriate for argument under Rule of Appellate Procedure 19(a), as it presents a narrow issue of settled law concerning the circuit court's authority to enforce its prior order. If this Court decides to address both assignments of error, however, Respondents respectfully request Rule 19(a) oral argument, as the facts and procedural history of this issue are quite complicated and argument may assist the Court in developing a clear understanding of the issues. Respondents respectfully suggest that the issues on appeal may be appropriately addressed through a memorandum decision.

ARGUMENT

I. Standard of Review

It is undisputed that the 2014 Enforcement Order is not a final judgment in this case, in the sense that it has not ended the litigation. (App. 235-246.) As a general matter, this Court only has jurisdiction to hear appeals from final judgments. See, e.g., Coleman v. Sopher, 194 W. Va. 90, 94, 459 S.E.2d 367, 371 (1995) (“The usual prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case.”). DHHR contends, however, that appellate jurisdiction exists in this case under the collateral order doctrine, which provides that an interlocutory order may be subject to immediate appeal when it “(1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.” James M. B. v. Carolyn M., 193 W. Va. 289, 293 n.4, 456 S.E.2d 16, 20 n.4 (1995) (internal quotations and citations omitted). Because the issues addressed in the 2014 Enforcement Order do not conclusively determine a disputed controversy, and instead merely enforce prior agreements entered into by

DHHR, as well as prior orders of the circuit court, and because the issues resolved by the 2014 Enforcement Order are central to the case, not “separate from the merits of the action,” *id.*, Respondents dispute that the 2014 Enforcement Order meets the standard for the collateral order doctrine, and urge the Court to dismiss the appeal on that basis.

Should this Court determine that the 2014 Enforcement Order is “final” for purposes of this appeal, however, this Court reviews a circuit court’s final order under an abuse of discretion standard. Syl. Pt. 1, Burgess v. Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996). Findings of fact are only overturned if they are “clearly erroneous,” whereas questions of law are reviewed de novo. *Id.* “In this Court’s review of a lower court determination, this Court may not overturn a finding simply because it would have decided the case differently, and this Court must affirm ‘[i]f the [circuit] court’s account of the evidence is plausible in light of the record viewed in its entirety[.]’” Francis v. Bryson, 217 W. Va. 432, 436, 618 S.E.2d 441, 445 (2005) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)). This Court may not make credibility determinations based on the record; rather, the circuit court, which heard the testimony first hand, is in the best position to make these determinations. *Id.* (citing Michael D.C. v. Wanda L.C., 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997)). Further,

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

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

court is vested with inherent authority to enforce both consent orders and its own prior orders, the circuit court has not abused its discretion and the 2014 Enforcement Order should be affirmed.

II. DHHR's first assignment of error is lacks finality, ignores this Court's Order declining to consolidate DHHR's appeals, and should be stayed for resolution in appeal number 14-0845.

DHHR's first assignment of error in this appeal should be denied on the basis that (1) by DHHR's own admission, the portion of the 2014 Enforcement Order being appealed in the first assignment of error lacked finality at the time the underlying Notice of Appeal was filed and, thus, this Court lacks jurisdiction to consider the issue in this appeal; (2) the same exact issue is being appealed separately in Appeal No. 14-0845; and (3) this Court refused DHHR's request to consolidate Appeal No. 14-0845 with the instant appeal. For these three reasons, and because this Court will have the opportunity to fully consider the issue raised in the first assignment of error in the context of Appeal No. 14-0845, Respondents herein respectfully request that the Court stay this assignment of error, and address only the second assignment of error in this appeal.

In its Notice of Appeal for the instant appeal filed on July 2, 2014, DHHR limited the scope of the instant appeal to the issue of whether subparagraph (b) of the circuit court's Enforcement Order was arbitrary and capricious and an abuse of discretion. See Notice of Appeal Attachments at 6, S. Ct. No. 14-0664 (July 2, 2014). Acknowledging that the Enforcement Order is interlocutory in nature, DHHR specifically argued in the Notice of Appeal that this Court has appellate jurisdiction over that very narrow issue, because that specific ruling (contained in subparagraph (b) of the Enforcement Order) meets the requirements of the collateral order doctrine and, thus, constitutes a final order. Id. at 2-4. Indeed, DHHR specifically stated that

the June 2, 2014, Order requires immediate implementation of special starting salary [the holding of subparagraph (b)], however many other aspects of the litigation remain unresolved. Indeed the Order requires the Department to create a plan to

reduce staff vacancies, discontinue mandatory overtime, and discontinue the reliance on temporary employees [subparagraph (a)]. The Order also requires the Department to create opportunities for community integration for patients [subparagraph (c)]. *Thus, there are several important issues still pending, however the Order is final regarding the implementation of a special starting salary.*

Id. at 3 (emphasis added). Thus, DHHR itself argued that, while the court's ruling in subparagraph (b), i.e. the issue addressed in the second assignment of error, was final, the ruling contained in subparagraph (a) was one of several "important issues still pending." Id. Therefore, as admitted by its own assertions in its Notice of Appeal that the order contained in subparagraph (a) was *not final*, DHHR should be estopped from attempting to raise that issue at this time. See W. Va. Dep't of Transp., Div. of Highways v. Robertson, 217 W. Va. 497, 504, 618 S.E.2d 506, 513 (2005) ("The doctrine of judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation. . . . Under the doctrine, a party is generally prevented . . . from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." (internal citations omitted).)

A review of the record clearly demonstrates that subparagraph (a) of the 2014 Enforcement Order was not final at the time of this appeal, given that the circuit court conducted numerous hearings and issued several subsequent orders on the same topic over the several months following the entry of that order. (See App. 585-693, 704-12, 1031-1213, 1218-20, 1267-71, 1282-83, 1299-1309.) As discussed above, the 2014 Enforcement Order does not meet the standard of the collateral order doctrine, given that it does not conclusively determine a disputed issue (as demonstrated by the numerous subsequent hearings and orders on this issue), and because it is an order enforcing a prior consent agreement and prior orders of the circuit court, the substance of which are central to the merits of the case. See James M. B., 193 W. Va. at 293 n.4, 456 S.E.2d at 20 n.4. Accordingly,

as DHHR argued in its Notice of Appeal, the circuit court's ruling in subparagraph (a) of the 2014 Enforcement Order is not final and this Court lacks jurisdiction to consider it on this appeal.

Moreover, DHHR has appealed the exact same issues in a separate appeal that has been docketed as Appeal No. 14-0845. (See Notice of Appeal, S. Ct. No. 14-0845 (Aug. 25, 2014).) On August 25, 2014, DHHR moved to consolidate the two appeals. This Court denied that motion on September 12, 2014. DHHR's opening brief in that appeal was filed on December 2, 2014, at which time it became apparent that, *despite this Court's clear rejection of DHHR's motion to consolidate*, DHHR is currently appealing *the exact same issues in both appeals*. Accordingly, this Court will have the opportunity to fully consider the merits of the issue in Appeal No. 14-0845.

For these reasons, Respondents herein respectfully request that this Court reserve consideration of the first assignment of error, which raises the circuit court's holding in subparagraph (a) of the 2014 Enforcement Order for consideration in Appeal No. 14-0845, and limit the focus of this appeal to the second assignment of error, specifically the holding contained in subparagraph (b) of the 2014 Enforcement Order.

III. The circuit court's order in subparagraph (a) is an appropriate remedy for DHHR's consistent breaches of its voluntarily entered agreement.

Not only is the first assignment of error improperly raised herein, the substance of DHHR's argument also has no merit.⁹ DHHR appeals the circuit court's order requiring it to abide by its earlier agreements. To support its appeal, DHHR raises the same stale arguments that have been repeatedly rejected by this Court. The circuit court's order simply enforces DHHR's own earlier agreement to avoid the use of temporary workers and mandatory overtime in staffing its hospitals,

⁹ As previously noted, despite their objections, Respondents herein are addressing both assignments of error, so as not to waive any issue. See W. Va. R. App. P. 10(d).

so as to provide adequate and appropriate treatment to patients pursuant to its obligations under section 27-5-9 of the West Virginia Code. Because the circuit court's order simply enforces the parties' agreements after five years of continued violations by DHHR with no attempts to remedy its noncompliance, DHHR's arguments should be rejected and the 2014 Enforcement Order should be upheld.

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

DHHR does not dispute that it has consistently and completely failed to comply with its 2009 agreement to end its reliance on mandatory overtime and contract and temporary workers in the state psychiatric hospitals. Rather, its only argument is that the remedy ordered by the circuit court for DHHR's breach of its obligations is invalid and improper. Despite DHHR's attempts to distract with constitutional arguments, this is an issue of straightforward contract law. As this Court has repeatedly explained, consent orders—like settlements—must be interpreted and enforced as contracts. See *Matin IV*, 223 W. Va. at 386, 674 S.E. 2d at 247; Syl. Pt. 1, *Seal v. Gwinn*, 119 W. Va. 19, 191 S.E. 860 (1937); *Matin V*, No. 35505 (W. Va. Apr. 1, 2011). Indeed, “the policy of the law is to encourage settlements.” *Robinson*, 197 W. Va. at 485, 475 S.E.2d at 861 (internal quotations omitted). After determining that a party has breached a consent order, the court has the responsibility to fashion an appropriate remedy. A remedy might be equitable in nature, such as ordering specific performance on the contract. See *Thomas v. Bd. of Educ. of McDowell Co.*, 181 W. Va. 514, 518, 383 S.E.2d 318, 322 (1989); see also *Messer v. Huntington Anesthesia Group, Inc.*, 222 W. Va. 410, 420, 664 S.E.2d 751, 761 (2008) (awarding attorney fees as equitable relief in enforcement of settlement). On the other hand, a remedy might require the payment of damages.

Thomas, 181 W. Va. at 518, 383 S.E.2d at 322. It is up to the sound discretion of the court to devise the appropriate remedy. See, e.g., id.

Despite DHHR's assertions to the contrary, this Court has repeatedly held *in this case* that DHHR is required to comply with its own prior agreements and, in the absence of doing so, the circuit court is authorized to order an appropriate remedy. In 2009, DHHR argued that the circuit court did not have authority to revisit whether DHHR had complied with its agreement to implement programs to support individuals with traumatic brain injury ("TBI"). In response, this Court held that the circuit court not only had authority to take evidence on the issue, it also had the authority to "enter such orders and decrees as may be necessary to enforce" DHHR's prior agreements. Matin IV, 223 W. Va. at 386, 674 S.E.2d at 247 (quoting Seal, 119 W. Va. 19, 191 S.E. 860, at syl. pt. 1). When the circuit court did just that, by ordering that DHHR apply for and implement a TBI Medicaid Waiver program and a TBI trust fund, DHHR again appealed. In its appeal, DHHR asserted (mirroring its present arguments) that the court violated the separation of powers doctrine and usurped executive and legislative authority by improperly mandating a specific remedy to DHHR's breach of its agreements; like here, DHHR argued that the court's remedy was improper because it was not "purely ministerial." (Pet. Br. 19; compare with Matin V, No. 35505, Pet Br. 10, asserting that "the order removed the decision making process from [DHHR]".) This Court conclusively rejected those arguments and upheld the circuit court's creation of an appropriate remedy. The Court held: "The Court finds the DHHR's assignments of error to be devoid of merit. It is the Court's opinion that the separation of powers doctrine . . . [is] not implicated in this case. Rather, this case concerns the enforcement of two consent orders entered into and agreed to by the DHHR." Matin V, No. 35505 at 2-3 (W. Va. Apr. 1, 2011) (quoting Bragg v. Robertson, 83 F. Supp. 2d 713, 717

(S.D.W. Va. 2000); syl. pt. 1, Sanders v. Roselawn Mem. Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)).

The instant matter is identical. Here, the circuit court determined that DHHR manifestly failed to fulfill its obligations under the 2009 Agreed Order, including that it failed to offer competitive wages and salaries to recruit and retain full time employees; that it failed to comply with its specific agreement to provide increased starting salaries for direct care workers; that staffing shortages have led to violations of patient rights as established by legislative rule; and that it relied heavily on mandatory overtime and temporary workers to staff its hospitals. (See App. 243-44.) In response to *five years* of DHHR's repeated breaches of the 2009 Agreed Order and refusal to take any action or develop any solution to the ongoing breaches, the circuit court issued an order requiring that DHHR take the actions necessary to perform on its agreements. Specifically, closely tracking the language of the 2009 Agreed Order, the court ordered that DHHR develop a plan to reduce staff vacancies, discontinue the use of mandatory overtime except in exceptional circumstances, and discontinue reliance on temporary and contract workers. (App. 4, 244-45.) In order to ensure that DHHR complied with its agreements in a timely fashion, the court specified that DHHR use currently available options, although it did not preclude the use of other methods in the future. (App. 244-45, 1072-75, 1270.) These remedies do no more than enforce the commitments voluntarily undertaken by DHHR to appropriately staff its hospitals with full time employees and ultimately provide adequate care to its patients. (See App. 4.)

In short, because the 2014 Enforcement Order solely requires that DHHR comply with its prior agreements, it was proper.

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

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

First, DHHR asserts that “[t]he lower court was wrong to determine for itself the best policy and steps required for compliance with section 10(b) of the agreed order.” (Pet. Br. 16.) However, enforcement of the settlement agreements *supports* the agency and executive's decisions to enter into the contractually binding Agreed Order. The court has undisputable legal authority to enforce such a consent agreement. See Matin IV, 223 W. Va. at 386; 674 S.E.2d at 247; Seal, 119 W. Va. at 19, 191 S.E. at 862. Moreover, this enforcement raises no separation of powers issue. The circuit court has not concocted its method of addressing deficient care at the hospitals. Instead, the court allowed the parties to reach a mutually agreeable solution through mediation in 2009, in which DHHR agreed to discontinue the use of mandatory overtime and temporary workers and agreed that the best way to address these concerns was through providing competitive salaries through wage increases. (See App. 4.) DHHR, *not the court*, constructed this plan, and then agreed that this plan be adopted through a consent order. (See id.; see also app. 235.) DHHR then repeatedly failed to comply with this agreement, both through its failure to increase salaries as agreed upon and through its failure to address the problem independently through any other mechanism, despite that the issue was raised repeatedly over the course of the past *five years*.

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

Even after receiving this considerable evidence, the circuit court did not mandate any specific remedy. Rather, as DHHR admits, the circuit court left the remedy to DHHR's discretion, solely ordering it to "develop a plan" to ensure compliance with its prior agreements. (App. 244-45; Pet. Br. 9 ("To be sure, the court directed the Department to create the [remedial] plan.")) The only constraint on this plan was that DHHR use "the currently available options," so as to effectuate a timely remedy after years of delay, and to ensure that salaries and retention incentives were made competitive. (Pet. Br. 10-11.) Given that increased salaries were the only solution proposed at the hearing by either party, and that it reflected the solution that DHHR had previously agreed to in

2009, the court's provision of this guidance was clearly appropriate. In short, the court's order clearly does not encroach on the Executive's or the Legislature's authority.

While DHHR's citations to prior orders in this case are accurate, they have no relation to the instant controversy, other than to undermine DHHR's position. For instance, Matin I addressed statutory compliance, not DHHR's repeated failure to comply with consent orders. Moreover, given that the circuit court's order here requires DHHR (not the court) to create a remedial staffing plan, it fully complies with the dictates of Matin I. As DHHR notes, Matin II relates to a court order that contravened a legislative appropriation. (Pet. Br. 18.) This ruling also supports the circuit court's order here, where court simply directed DHHR to comply with its earlier agreements utilizing the methods and procedures previously established by the Legislature and the Executive to address personnel problems. See W. Va. Code § 29-6-1, et seq. (establishing a civil service system and designating the Division of Personnel to create a system of classification and compensation for all civil service employees); W. Va. Code R. § 143-1-1, et seq. (rules promulgated by the Division of Personnel implementing W. Va. Code § 29-6-1, et seq.). Finally, as described above, this Court's 2009 and 2011 orders in this case explicitly support the circuit court's authority to order compliance with DHHR's prior agreements. There, like here, the circuit court entered a remedial order that necessarily involved "interpretation [and] policy decisions" in order to effectuate the parties' prior agreements. (Pet. Br. 19.)¹⁰

¹⁰ Interestingly, DHHR has a distinctly different interpretation of the TBI remedial order now than it did when it lodged its appeal of that order in 2009. At that time, DHHR argued that the circuit court exceeded its authority by creating a remedy that required more concrete and immediate action (immediate application for a TBI waiver) than was required by the consent orders (which required DHHR to seek an appropriation and develop a system of care). Matin V, No. 35505 at 2. DHHR's current claims that the circuit court's TBI remedial order was "purely ministerial and required no interpretation or policy decisions," is exactly the opposite of what they argued to this Court in their appeal of that order. (Pet. Br. 19.)

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

None of the cases cited by DHHR, however, stand for the proposition that they advance—that a circuit court does not have authority to enforce a voluntarily entered agreement between two parties. While DHHR cites a long list of cases in which this Court has afforded the Legislature an opportunity to “devise any necessary remedial plans” (Pet. Br. 20), a closer review of those cases shows that they are inapposite to this case, as they pertain to situations in which this Court has invalidated a statute and/or regulation, but stayed its decision to give the Legislature the opportunity to remedy the issue. See, e.g., Jewell v. Maynard, 181 W. Va. 571, 383 S.E.2d 536 (1989) (invalidating the manner in which courts were appointing and paying court-appointed criminal attorneys, but staying the remedy to afford the Legislature an opportunity to resolve the problem); State ex rel. Bd. of Educ. for Grant County v. Manchin, 179 W. Va. 235, 366 S.E.2d 743 (1988) (holding statute unconstitutional and giving the Legislature an opportunity to address the problem); State ex rel. Longanacre v. Crabtree, 177 W. Va. 132, 350 S.E.2d 760 (1986) (holding statute

unconstitutional and staying order to give Legislature an opportunity to revise). Obviously these cases dealing with the validity of statutes has no bearing on the instant matter, which involves the enforcement of an agreement between the parties.

Moreover, even though it had broad authority to create a remedy to DHHR's violation of its agreements, the circuit court permitted DHHR to create its own plan in the instant matter. Interestingly, as DHHR admits, in Crain III this Court found that it was appropriate for the court to intervene, given that the executive branch did not remedy the problem for "*eight years*" (Pet. Br. 22, citing Crain III, 180 W. Va. 246, 376 S.E.2d 140); undoubtedly the *five years* in which DHHR has failed to comply with the 2009 Agreed Order by eliminating mandatory overtime and reliance on temporary workers is sufficient to permit the circuit court to order DHHR to draft its own plan to address this problem and immediately come into compliance with its agreement.¹¹

In sum, DHHR falls well short of carrying its burden of showing that the circuit court's order illegally conflicts with the West Virginia Constitution or this Court's prior decisions. As this Court has already held, it is well within the circuit court's authority to "enter such orders and decrees as may be necessary to enforce the decrees entered before dismissal," which is precisely what occurred here. Matin IV, 223 W. Va. at 386, 674 S.E. 2d at 247 (quoting Seal, 119 W. Va. 19, 191 S.E. 860, at syl. pt. 1).

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

As a final matter, Respondents wish to directly address DHHR's repeated, misleading assertions that the circuit court has prevented and/or forbidden it from working with the Legislature

¹¹ DHHR's citations to federal law are no more relevant, and also do not relate to the instant dispute about compliance with a voluntarily entered agreement between the parties.

to implement a plan of its own choosing. This is simply not the case, as the circuit court has repeatedly made clear.

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

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

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

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

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

(App. 1269.)

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

IV. In its second assignment of error, DHHR attempts to re-litigate settled issues of law and ignores the plain language of the circuit court's order directing DHHR to implement a new special starting salary for certain classes of health care employees.

In its second assignment of error, the sole issue actually raised in DHHR's Notice of Appeal,¹² DHHR contends that the circuit court erred in subparagraph (b) of the 2014 Enforcement Order by directing DHHR to implement a special starting salary for certain classes of health care workers and to retroactively compensate those employees who had been improperly denied increased pay. In making this argument, DHHR attempts to re-litigate settled issues in this case and ignores the plain language of the 2012 Order. Because the question of whether DHHR is required to implement new starting salaries for certain classes of health care workers was settled in 2012 in orders that DHHR did not appeal; because the circuit court's December 18, 2012, Order is

¹² While Respondents herein do not believe that any portion of the 2014 Enforcement Order constitutes a "final judgment," given that the entirety of the order is directed at enforcing prior consent orders and other orders of the circuit court, Respondents are choosing to direct their argument towards the merits of the appeal on this issue, which clearly support the circuit court's order.

unambiguous; and because the circuit court has inherent authority to enforce its own orders, this Court should affirm subparagraph (b) of the 2014 Enforcement Order.

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

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

“[A] court order whose language is plain need not be construed, but should be applied according to the plain meaning of the words used in the order.” Syl. Pt. 7, in part, State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 228 W. Va. 252, 719 S.E.2d 722 (2011). In other words,

“unambiguous orders must be applied as they are written without reference to extraneous matters.” Id. at 267, 719 S.E.2d at 737. Here, the language of the December 18, 2012, Order is unambiguous. It clearly requires DHHR to provide the specified increased pay to the specified classifications of health care workers “*employed on or after January 1, 2013.*” (App. 143.) DHHR admits that it has not complied with this directive. Consequently, because the order is unambiguous and because DHHR admits that it is not complying with the order as written, this Court should affirm the circuit court on this issue.

Moreover, circuit courts are vested with the inherent authority to enforce their own orders. See, e.g., E. Associated Coal Corp. v. Doe, 159 W. Va. 200, 208, 220 S.E.2d 672, 678 (1975) (acknowledging the “inherent power and duty of courts to enforce their orders”); Clark v. Druckman, 218 W. Va. 427, 435, 624 S.E.2d 864, 872 (2005) (quoting Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., v. U. S. Fire Ins. Co., 639 So.2d 606, 608-09 (Fla.1994)) (“[c]learly, a trial judge has the inherent power to do those things necessary to enforce its orders, . . .”). Here, the December 18, 2012, Order merely enforced DHHR’s commitments made in the 2009 Agreed Order. Similarly, the 2014 Enforcement Order merely enforces the December 18, 2012, Order. Because the circuit court is vested with the inherent authority to enforce its own prior orders, it has not abused its discretion in the order currently on appeal.

Finally, DHHR’s argument on appeal, which boils down to its purported “belief” that it was never required to implement new starting salaries for its lowest-paid health care workers, is simply implausible. (See Pet. Br. 28.) The 2009 Agreed Order states “DHHR *shall* provide for increased pay for direct care workers at Bateman and Sharpe in order to (i) *be able to recruit staff* and retain existing staff. . . .” Agreed Order at ¶ 10(a) (emphasis added) (App. 4). While providing pay raises to existing employees addresses the goal of helping to *retain* staff, DHHR provides no explanation

for how such raises to existing staff would in any manner help *recruit* new employees. Moreover, DHHR clearly understood its responsibilities under the 2009 Agreed Order with regard to nurses and psychiatrists. For each of those classifications of direct care workers, DHHR not only raised the salaries of existing employees, it also implemented special hiring rates to aid in recruiting new employees. (App. 564-71; 348-50.) DHHR does not address why it has persisted in treating these different classifications of employees differently, despite that they are all governed by the same language in the 2009 Agreed Order.

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

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Court affirm the circuit court's June 2, 2014, Order in its entirety, or, in the alternative, reserve DHHR's first assignment of error for consideration in Appeal No. 14-0845, and affirm the circuit court's holding challenged in the second assignment of error.

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

NO. 14-0664

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

Petitioners,

v.

E.H., et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Lydia C. Milnes, counsel for the Respondents in the above-styled matter, do hereby certify that I have served a true and exact copy of the foregoing *Response Brief* upon counsel for the Respondents via hand delivery on this 11th day of December, 2014, as follows:

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