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FREE LABOR IN THE NAME OF WORKFARE: NEW YORK'S REACTION TO THE *BRUKHMAN V. GIULIANI* DECISION

INTRODUCTION

Are welfare recipients a "threat to American civilization"?¹ Are welfare recipients causing working people, low and middle income Americans, to see a decline in their real wages?² If one followed the political debate over the decimation of various welfare programs, Aid to Families With Dependent Children ("AFDC"), and Food Stamps to single families, one would think that public assistance recipients are the reason for these ills.

In 1996, however, the cost of federal social programs combined was only \$50 billion annually, compared with \$170 billion on federal tax-funded programs for American corporations.³ For another startling comparison, federal and state spending for AFDC was approximately \$22 billion per year, while the government spent \$150 billion bailing out banks following the Savings and Loan ("S&L") scandal.⁴ Thus, the money spent on the S&L scandal could have funded the distribution of AFDC in all 50 states for almost seven years.⁵

Despite these inconsistencies, Congress and others have continued to portray welfare reform as one of the most pressing problems in the United States today.⁶ Opponents maintain that the im-

¹ Jason DeParle, *Success, and Frustration, as Welfare Rules Change*, N.Y. TIMES, Dec. 30, 1997, at A17 (citing House Speaker Newt Gingrich commenting about welfare recipients on C-Span).

² For example, the average inflation-adjusted earnings of production and non-supervisory private sector workers dropped 16% between 1973 and 1993. See HOLLY SKLAR, CHAOS OR COMMUNITY?: SEEKING SOLUTIONS, NOT SCAPEGOATS FOR BAD ECONOMICS 17-18 (1995).

³ See MICHAEL MOORE, *DOWNSIZE THIS!* 43-44 (1996).

⁴ See Nicola L. Marshall, *The Welfare Reform Act of 1996: Political Compromise or Panacea for Welfare Dependency?*, 4 GEO. J. ON FIGHTING POVERTY 333, 334 (1997) (citing Charles Sennott, *Liberals Finding the Aid System is Broken*, BOSTON GLOBE, May 17, 1994, at 1).

⁵ See Sennott, *supra* note 4, at 1.

⁶ Perhaps they have been able to do so because the image of welfare recipients as

sition of welfare reform, along with the institution of widespread mandatory workfare, will improve the lot of public assistance recipients.⁷

Nothing could be further from the truth. Workfare, as it is currently configured, not only fails to provide public assistance recipients with the means to obtain permanent, living wage jobs but also detrimentally impacts the current workforce. In fact, in today's new workfare model, the dual goals of moving welfare recipients into the workplace and maintaining living wage jobs for existing workers are contradictory.

The program harms the current workforce, or at least the preservation of living wage jobs. Specifically, welfare recipients are required to work off the value of their benefit, meaning the hours they work are credited toward the value of their benefit and food stamps.⁸ Since recipients are paid (credited) less than regular employees,⁹ local governments may be tempted to reduce the workforce through attrition and fill those positions with no wage welfare recipients.¹⁰ Short of eliminating positions, the availability of cheaper Work Experience Program ("WEP") workers¹¹ depresses the wages of permanent jobs.¹² What financially strapped, under staffed local government could resist such a bargain?

On the other side of the coin, the workfare system does a disservice to its participants in their search for meaningful employ-

able-bodied people taking a government check "fuels the debate in [a way] that is disproportionate to the actual money spent on funding welfare programs." Sennott, *supra* note 4, at 1.

⁷ See Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.

⁸ See *Bruckman v. Giuliani*, 174 Misc.2d 26, 662 N.Y.S.2d 914 (N.Y. Sup. Ct. 1997), *rev'd* 678 N.Y.S.2d 45 (1st Dep't 1998). The final outcome of this case has yet to be decided. See *infra* note 49 and Part IV.

⁹ In New York, for example, WEP participants are paid Federal minimum wage, see *Bruckman*, 174 Misc.2d at 33, 662 N.Y.S.2d at 918, while the lowest paid clerical workers earn \$8.69 per hour and blue collar workers earn a minimum of \$9.10 per hour. See Plaintiffs' Memorandum of Law, Dec. 23, 1996, at 2-3.

¹⁰ Since welfare workers are "working off" the value of their benefits (the benefits the city was paying them before they were required to participate in workfare), the municipality is actually paying nothing additional for their time worked. Local government is actually saving many of the costs involved with a regular workforce, such as health insurance and pension benefits.

¹¹ See *infra* Part II.

¹² See CHRIS TILLY, *WORKFARE'S IMPACT ON THE NEW YORK CITY LABOR MARKET: LOWER WAGES AND WORKER DISPLACEMENT 2* (Russell Sage Foundation Working Paper No. 92 1996).

ment. Local governments, in their attempt to justify paying workfare participants minimum wage while they work side by side with municipal employees who are paid far higher wages, define the workfare job descriptions differently enough to make such pay differentiation justifiable.¹³ These job descriptions profess to limit the activities of workfare participants, thereby allowing the local government to maintain that workfare participants are truly in a job category by themselves.¹⁴ This practice enables the local government to pay (or credit) workfare participants at a much lower salary rate than that of regular city employees, while avoiding violating the anti-displacement provisions, which are supposed to protect paid employees from being replaced by workfare participants.¹⁵ However, by narrowly defining workfare participants' job descriptions and professing to confine the range of their responsibilities, advancement possibilities for workfare participants become limited. This makes it less likely that they will find permanent jobs within the system.

This Comment will examine the following aspects of welfare reform: the massive influx of welfare recipients forced to enter workfare programs, the effect of workfare on the permanent employment possibilities of its participants, and the side effect on existing workers.

This Comment begins in Part I with background on the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). Part II analyzes the recent New York State Supreme court decision, *Brukhman v. Giuliani*,¹⁶ in which workfare participants challenged the New York City workfare program because it credited their work at minimum wage rather than prevailing wage. The New York State Supreme Court decided in favor of workfare participants. Although the Appellate Division, First Department, has subsequently reversed, the Fourth Department has held the opposite, requiring the Department of Social Services to credit WEP workers performing skilled work at prevailing wages.¹⁷ Ultimately, the issue will have to be resolved by the New York State Court of Appeals. Part III will address the New York State legislature's immediate attempt to limit the effects of the supreme court's holding in

¹³ See *Brukhman*, 174 Misc.2d at 37, 662 N.Y.S.2d at 920.

¹⁴ See *id.*

¹⁵ See 42 U.S.C. § 607(f)(2) (Supp. II 1996); 1997 N.Y. Laws Chap. 436, § 148.

¹⁶ See *Brukhman*, 174 Misc.2d at 26, 662 N.Y.S.2d at 914.

¹⁷ See *Enzian v. Wing*, 670 N.Y.S.2d 283 (4th Dep't 1998).

Bruckman by altering the language of the New York State social services law, upon which the court decision was based. Part IV argues that New York workfare participants are indeed entitled to prevailing wages despite the change in the state law. In other words, the Fourth Department's view is correct. As such, a reversal of the First Department by the New York Court of Appeals is the only equitable solution. Finally, in Part V, this Comment will discuss other ramifications of the PRWORA and its implementation in New York.

I. PASSAGE OF WELFARE REFORM

Passage of the federal Personal Responsibility and Work Opportunity and Reconciliation Act of 1996¹⁸ brought sweeping changes in the eligibility requirements for individuals and families seeking public assistance. The PRWORA converts Aid to Families With Dependent Children ("AFDC") and other programs into a block grant entitled Temporary Assistance to Needy Families ("TANF").¹⁹ The amount of the block grant is based on previous years' welfare spending.²⁰ The block grant allocation, once established, is frozen over the next six years.²¹ While the 1997 federal public assistance allocation to the states increased funding because of a lack of full implementation of the PRWORA,²² by 2002, funding levels will decrease by \$1 billion when compared with funding for public assistance before the PRWORA.²³

The block grant method of allocating funds is fundamentally different than that used by past welfare programs. Formerly, states provided 20 to 50 percent of the public assistance funding (which varied depending on the wealth of the state) and received partial

¹⁸ See 42 U.S.C. § 601 et seq. (Supp. II 1996).

¹⁹ See 42 U.S.C. § 603 (Supp. II 1996).

²⁰ See *id.* For an analysis of these statutes, see Mark Greenberg and Steve Savner, *The Temporary Assistance for Needy Families Block Grant*, Center for Law and Social Policy (Aug. 13, 1996) [hereinafter *Temporary Assistance*] <<http://epn.org/clasp/clsummary.html>>. The amount of the block grant is based on the greater of 1992-1994, 1994 or 1995's spending for combined AFDC, Job Opportunities and Basic Skills Training Program (JOBS), and Emergency Assistance Grants. *Id.*; 42 U.S.C. § 603(a)(1)(D) (Supp. II 1996).

²¹ See 42 U.S.C. § 603(a)(1)(A) (Supp. II 1996).

²² See David A. Super et al., *The New Welfare Law*, Part II (Center on Budget and Policy Priorities Aug. 13, 1996) <<http://www.cbpp.org/WECONF813.HTM>>.

²³ See *id.*

matching grants of the balance from the federal government, thereby giving states an incentive to increase funding.²⁴ Under the PRWORA, to receive a full block grant, a state need only maintain non-federal welfare funding at 80 percent of its fiscal year 1994 level, reduced to 75 percent if a state meets the required work participation rates.²⁵ Therefore, the incentive for individual states to provide additional funding has been removed—states will now aim to provide only the minimum state funding necessary to remain eligible for a block grant.

The PRWORA also ends guaranteed entitlement to public assistance. Therefore, even if a participant meets all the federal requirements (i.e. participating in workfare and not having received a grant for five years or more), a state can deny aid to any poor family or category of families.²⁶ In fact the legislation clearly states that it "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."²⁷ Further, the law prevents use of the federal block grants to provide assistance to any adult for more than five years; this limit applies even if the years are not consecutive.²⁸

Another major change in welfare under the PRWORA is the imposition of work requirements for public assistance recipients, the primary focus of this note. The PRWORA mandates that states require that no later than two years following a recipient's receipt of benefits, that person must be "engaged in work"²⁹ to continue to receive benefits.³⁰ Although "work" includes activities that would help an individual to obtain a permanent, living wage job, such as training, job searching, and education, participation in these programs is either limited to a short period or permitted only in addi-

²⁴ See *id.*

²⁵ See 42 U.S.C. § 609(a)(7)(B)(ii) (Supp. II 1996); Greenberg & Savner, *Temporary Assistance*, *supra* note 20.

²⁶ See Super et al., *supra* note 22, at Part I.

²⁷ 42 U.S.C. § 601(b) (Supp. II 1996).

²⁸ See 42 U.S.C. § 608(a)(7) (Supp. II 1996); Mark Greenberg & Steve Savner, *A Brief Summary of Key Provisions of the Temporary Assistance for Needy Families Block Grant of H.R. 3734 (The Work Opportunity Reconciliation Act of 1996)*, Part IV.A.2. (Aug. 13, 1996) <<http://epn.org/clasp/clsummary.html>>.

²⁹ "Engaged in work" can entail employment, work experience, on-the-job training, job search and job readiness assistance, community service programs, vocational educational training, job skills training, education directly related to employment, secondary education, and provision of child care services. 42 U.S.C. § 607(d) (Supp. II 1996).

³⁰ See 42 U.S.C. § 602(a)(1)(A)(ii) (Supp. II 1996).

tion to a minimum number of hours of traditional work.³¹ A state must meet the following minimum goals for recipients' participation in work activities: 75 percent in 1997 and 1998 for two-parent families, increasing to 90 percent for 1999-2002, requiring 35 hours per week; for other families, 25 percent in 1997 and increasing 5 percent per year until 2002 at 20 hours per week in 1997-1998, 25 hours in 1999 and 30 hours thereafter.³² Penalties on the states for failure to meet these goals include a 5 percent reduction in the block grant for the following year and 2 percent reductions each additional year, up to a maximum reduction of 21 percent.³³

Further, the PRWORA does not require that public assistance recipients who participate in the mandatory workfare programs be paid (or credited) at any specific wage level, not even minimum wage.³⁴ In fact, under the federal workfare predecessor, the Job Opportunities and Basic Skills Training Program ("JOBS"),³⁵ at least one state requested a waiver from meeting minimum wage standards, asserting instead the right to pay or credit subminimum wages to welfare recipients in work placements. The request, after protests from local unions, was denied.³⁶

In addition, the PRWORA includes an anti-displacement provision to prevent workfare recipients from eliminating existing full-time workers' jobs. Such provision specifically states:

No adult in a work activity, . . . which is funded in whole or in part, by funds provided by the Federal Government shall be employed or assigned—(A) when any other individual is on layoff from the same or any substantially equivalent job; or (B) if the employer has terminated the employment of any regular employee or otherwise caused an involuntary reduction of its workforce in order to fill the vacancy so created with an adult whose work activity is [funded in whole or in part with funds provided by the Federal Government].³⁷

³¹ See 42 U.S.C. §§ 607(c)(2)(A)(i) & (d)(8) (Supp. II 1996).

³² See 42 U.S.C. §§ 607(a) & (c) (Supp. II 1996); Mark Greenberg & Steve Savner, *A Brief Summary of Key Provisions of the Temporary Assistance for Needy Families Block Grant of H.R. 3734 (The Personal Responsibility and Work Opportunity Reconciliation Act of 1996)* Part VI.D. (Aug. 13, 1996) [hereinafter *Brief Summary of PRWORA*] <<http://epn.org/clasp/clsummary.html>>.

³³ See 42 U.S.C. § 609(a)(3) (Supp. II 1996); Greenberg & Savner, *Brief Summary of PRWORA*, *supra* note 32, at Part V.A.3.

³⁴ See NATIONAL EMPLOYMENT LAW PROJECT, *EMPLOYMENT RIGHTS OF WORKFARE PARTICIPANTS AND DISPLACED WORKERS* 7 (1996) [hereinafter *EMPLOYMENT RIGHTS*].

³⁵ See 42 U.S.C. § 681 *et seq.*

³⁶ See *EMPLOYMENT RIGHTS*, *supra* note 34, at 7.

³⁷ 42 U.S.C. § 607(f)(2) (Supp. II 1996).

In sum, the PRWORA brings monumental changes to the welfare system. It completely alters the rights of the poor to receive public assistance and changes how welfare grants are distributed. In addition, workfare has a major effect on the workplace—for both the participants and the regularly paid employees with whom participants work side by side in their assigned workplaces. Although workfare has existed for many years, the sheer number of workfare participants that will be assigned in the next several years makes workfare under the PRWORA virtually a new system.

II. THE CHALLENGE IN NEW YORK

Workfare is nothing new in New York; it has existed in some form for the last twenty-five years.³⁸ Before passage of the PRWORA, New York's workfare program required some public assistance recipients to work for their benefits through the Work Experience Program.³⁹ This program originally served Home Relief recipients (mainly single individuals) and was later expanded to include Aid to Families with Dependent Children recipients (mainly families with children).⁴⁰

A. *Statutory Protection*

New York State's Constitution, augmented by the pre-1997 social services laws, required that the workfare program pay prevailing wages, thereby protecting both the WEP workers and the regular and potential city employees.⁴¹

This general protection came from article I, section 17, of the New York State Constitution which provides:

No laborer, workman or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, . . . shall . . . be paid less than the rate of wages prevailing in the same trade or occu-

³⁸ See *Brukhman v. Giuliani*, 174 Misc.2d 26, 30, 662 N.Y.S.2d 914, 916 (N.Y. Sup. Ct. 1997), *rev'd* 678 N.Y.S.2d 45 (1st Dep't 1998).

³⁹ See *id.*

⁴⁰ Under the Welfare Reform Act of 1997, these categories are now roughly equivalent to the Safety Net Assistance and Family Assistance, respectively. See 1997 N.Y. Laws Chap. 436, § 141. Family Assistance is the main category addressed in the PRWORA under the name Temporary Assistance to Needy Families.

⁴¹ See N.Y. CONST. art. I, § 17; N.Y. SOC. SERV. LAW § 164 (McKinney 1996) (repealed 1997); N.Y. SOC. SERV. LAW §336-c(2)(b) (McKinney 1996) (amended 1997).

pation in the locality within the state where such public work is to be situated, erected or used.⁴²

Along with the general protection provided by the New York State Constitution, the social services law governed the mechanism for WEP participants under both Home Relief and AFDC. Home Relief was specifically controlled by section 164, the New York social services law, which provides that:

The social services official . . . shall provide for the establishment of *public works* projects for the assignment of employable persons in receipt of home relief The number of days of work to be given each person shall be determined by the amount of the budget deficit of the recipient and his family No person shall be required to work for more than the number of days necessary to earn such amount⁴³

The reference to "public works" in the social services law pertaining to WEP workers under Home Relief required the state to credit WEP workers toward their public assistance benefit at a rate of pay equal to the prevailing wage as enforced by the aforementioned provision of the New York State Constitution.⁴⁴ Although article I, section 17, of the New York State Constitution refers primarily to employees of contractors and subcontractors, in *Young v. Toia*, the court interpreted article 1, section 17, to apply to Home Relief recipients assigned to work in municipalities or nonprofit agencies.⁴⁵ *Young* expressly rejects the notion that Home Relief recipients involved in workfare programs should be treated as civil service employees and, therefore, found to be outside the scope of article I, section 17, as in *Corrigan v. Joseph*.⁴⁶

⁴² N.Y. CONST. art. I, § 17.

⁴³ N.Y. SOC. SERV. LAW §§ 164(2)(a), (3)(b) (McKinney 1996) (repealed 1997) (emphasis added).

⁴⁴ See *Bruckman*, 174 Misc.2d at 38, 662 N.Y.S.2d at 920.

⁴⁵ 93 Misc.2d 1005, 403 N.Y.S.2d 390 (Sup. Ct. Orleans County 1977). *Young* involved home relief recipients required to participate in a work program an average of three full days a week, regardless of the amount of assistance received. This resulted in recipients being paid at rates far below the minimum wage, as low as 45 cents an hour in some cases. See *id.* at 1007-09, 403 N.Y.S.2d at 392-93. However, the effect was similar to that in *Bruckman* because participants had little choice: either refuse to work and lose all benefits or "comply with the new law and work in a kind of involuntary servitude at an hourly rate which no one would seriously expect an employee to work for." *Id.* at 1009, 403 N.Y.S.2d at 393. Similarly, in both *Young* and *Bruckman* no one would expect city workers to do the tasks performed by the Home Relief and WEP workers at merely minimum wage.

⁴⁶ 304 N.Y. 172, 106 N.E.2d 593 (1952).

For AFDC recipients, under the old regime, participation in the WEP program was guided by Social Services Law section 336-c. This statute specifically mentioned prevailing wage in outlining the number of hours a participant is required to work as follows:

A recipient may be assigned to participate in such [a] work experience program only if: . . . (b) the number of hours that any such person may be required to work in any month does not exceed a number which equals the amount of assistance payable with respect to the family of which such person is a member, . . . divided by the higher of (1) the federal minimum wage, or (2) the state minimum wage, or (3) the rate of pay for persons employed in the same or similar occupations by the same employer at the same or equivalent site;⁴⁷

A reading of the statute shows that for AFDC recipients, the requirement to pay prevailing wages was even more explicit than for Home Relief. Specifically, Social Services Law section 336-c mandates that New York City pay WEP workers "the rate of pay for persons employed in the same or similar occupations by the same employer at the same or equivalent site."⁴⁸

The failure of New York City to meet its constitutional requirement that it pay workfare participants prevailing wages was the main focus of the class action lawsuit in *Brukhman v. Giuliani*.⁴⁹ Plaintiffs in *Brukhman*, public assistance workers, through the help of several nonprofit legal assistance organizations (the Legal Aid Society, Center on Social Welfare Policy, and the New York Employment Law Project), challenged this inconsistency of the New York City WEP program.

B. WEP Participants' Work is Comparable to that of City Workers

In *Brukhman*, the plaintiffs challenged New York City's practice of crediting WEP workers utilizing the federal minimum wage rather than the prevailing or comparable wage.⁵⁰ In many instances, WEP workers work side by side with city employees, performing the

⁴⁷ N.Y. SOC. SERV. LAW §336-c(2)(b) (McKinney 1996) (amended 1997).

⁴⁸ *Id.*

⁴⁹ See *Brukhman*, 174 Misc.2d at 35, 662 N.Y.S.2d at 919. Although the Supreme Court, Appellate Division, 1st Department reversed the lower court's holding, the 4th Department held the opposite in a similar matter. *Enzion v. Wing*, 670 N.Y.S.2d 283 (4th Dep't 1998). Ultimately, this issue should be resolved by the New York State Court of Appeals, especially since it involves interpretation of the New York State Constitution.

⁵⁰ See Plaintiffs' Memorandum of Law at 1.

basic tasks required in various city agencies. WEP workers work with sanitation employees sweeping garbage, picking up debris, and cleaning sanitation trucks.⁵¹ Moreover, WEP workers serve as office workers, filing documents, handling telephone inquiries, and assisting the public; as hospital employees, cleaning buildings, emptying bedpans, and serving meals; and as park employees, constructing fences and barricades, making repairs, and painting and maintaining park grounds.⁵² In each of these cases, city employees were paid a higher salary (the lowest paid clerical workers earned \$8.69 per hour and the minimum blue collar worker earned \$9.10 per hour),⁵³ while the WEP workers were credited towards their public assistance benefits at either the federal minimum wage, at that time \$4.75 per hour,⁵⁴ or in some cases at less than the minimum wage.⁵⁵ Further, some WEP workers performed more advanced work, which normally would have been compensated at even higher wages by the City. For instance, one WEP worker repaired electrical equipment and machinery, normally compensated at \$15.75 per hour. Another worker performed high-level clerical work, with a minimum salary of \$21,105 per year. Another performed more complex duties, even training a new office worker, and another served as an interpreter, a position normally compensated by the City at an annual salary of \$29,920.⁵⁶ All of these WEP workers were paid (or credited at) no more than \$4.75 per hour.

In *Bruckhman*, the City claimed that WEP workers were not eligible for a comparable wage since WEP workers performed different activities from regular city employees.⁵⁷ The City argued that fine distinctions existed between the WEP workers' job descriptions and those of the regular city employees.⁵⁸ For instance, for clerical workers, the City claimed that WEP workers handled only routine telephone inquiries, while city workers handled complex phone calls and that WEP workers performed simple filing, while city

⁵¹ See *Bruckhman*, 174 Misc.2d at 34, 662 N.Y.S.2d at 918.

⁵² See Plaintiffs' Memorandum of Law at 2-3.

⁵³ See *id.* at 5.

⁵⁴ The federal minimum wage was raised to \$5.15 per hour beginning in September of 1997, after this case was decided. 29 U.S.C. § 206 (1996).

⁵⁵ See Plaintiffs' Memorandum of Law at 4.

⁵⁶ See *id.* at 5-6.

⁵⁷ See City Defendants' Memorandum of Law at 12.

⁵⁸ See *Bruckhman v. Giuliani*, 174 Misc.2d 26, 34, 662 N.Y.S.2d 914, 918 (N.Y. Sup. Ct. 1997), *rev'd* 678 N.Y.S.2d 45 (1st Dep't 1998).

workers handled complex filing.⁵⁹ The City further argued that WEP sanitation workers and city employees performed different jobs because WEP workers swept city streets, removed the debris and placed it in a garbage can, while city workers also transferred the garbage to a truck; WEP park workers raked leaves, picked up trash, assisted gardeners, swept and mopped floors, while some city park workers also removed hazardous materials, and city gardeners trained the WEP workers who assisted them.⁶⁰ Moreover, the City argued that a WEP worker assigned to the Income Support Office as a translator for non-English speaking clients and clerical worker is not comparable to a civil service employee because she is not permitted to access the computer system and she performs translations only in emergency situations.⁶¹

That a WEP worker, who works only 20 hours per week,⁶² does not perform the full range of tasks of a full-time employee is understandable given the difference in time spent on the job. The difference in skill level is also logical; a newly placed WEP worker will most likely be less experienced than an existing city employee. It is also normal practice that the experienced city gardener would train the WEP worker. However, this hardly differs from any entry level city employee who requires on-the-job training from more experienced workers, even though the two are paid at the same level or hold the same job title.⁶³ Yet, in such a case, the entry-level employee does not begin at minimum wage due to his or her inexperience. Taking the City's logic a step further, the WEP employee who trains a new office worker should be paid more than the new regular city employee. The Brukman court did not accept the City's hairsplitting distinctions or the City's attempts to minimize the tasks of the WEP workers. Instead, it held that WEP workers' responsibilities were virtually the same, if not exactly the same, as those of city employees.⁶⁴

There are several indications that these artificial distinctions between the city workers' jobs and the WEP workers' job descriptions were nothing more than an attempt to avoid compliance with

⁵⁹ See City Defendants' Memorandum of Law at 12.

⁶⁰ See *id.* at 18.

⁶¹ See *id.* at 17.

⁶² See 42 U.S.C. § 607 (Supp. II 1996).

⁶³ See *Brukman*, 174 Misc.2d at 34, 662 N.Y.S.2d at 918.

⁶⁴ See *id.*

the prevailing wage standard.⁶⁵ First, the City claimed there were no WEP workers comparable to city employees and that all the job titles held by WEP workers "do not otherwise exist in the City work force."⁶⁶ However, WEP workers type, file and photocopy as do office workers; mop, dust, maintain grounds or clean streets as do housekeeping or maintenance workers; and assist the elderly or prepare food as do health aides. Given the range of activities performed by the approximately 38,000 WEP workers⁶⁷ and the similarities of these tasks to those of regular city employees, it is not illogical to assert that none of these individuals are comparable workers.⁶⁸

Second, the City claimed that every WEP worker, regardless of his or her work responsibilities, was credited for their work at the same wage level—the federal minimum wage.⁶⁹ The City saw no distinctions warranting different wages among the WEP workers. Yet, the job descriptions of the sample WEP workers varied considerably.⁷⁰ Further, the rates of pay of the workers equivalent to the few sample WEP workers in *Bruckhman* ranged from \$16,573 to \$29,920 annually.⁷¹

Finally, the City took great pains to ensure that no WEP worker would ever be comparable to a city worker. Deputy Commissioner Diamond of the New York City Human Resources Administration ("HRA") instructed his staff that "an individual WEP worker should not be assigned to perform the same range of activities as city employees working at the same or an equivalent site."⁷² This memorandum clearly exhibits the City's intention to erect and maintain an artificial barrier between the job titles and work activities of WEP workers and regular employees. The effect of this practice was to avoid the prevailing wage requirements of calculating the correct pay or credit of WEP workers.⁷³

⁶⁵ See *Bruckhman*, 174 Misc.2d at 37, 662 N.Y.S.2d at 920.

⁶⁶ *Id.* at 33, 662 N.Y.S.2d at 918 (quoting Aff. of Seth Diamond, Deputy Comm'r, Human Resources Administration ("HRA") at ¶¶ 19, 24).

⁶⁷ See THE CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT, FISCAL 1997 SUMMARY VOL. 67.

⁶⁸ See *Bruckhman*, 174 Misc.2d at 37, 662 N.Y.S.2d at 920.

⁶⁹ *Id.* at 33, 662 N.Y.S.2d at 918.

⁷⁰ See *supra* Part II.B.

⁷¹ See Plaintiff's Memorandum at 5.

⁷² *Bruckhman*, 174 Misc.2d at 33, 662 N.Y.S.2d at 918 (citing Diamond Memorandum dated April 23, 1997).

⁷³ See *id.* at 37, 662 N.Y.S.2d at 920.

The City's premise that the WEP workers' job responsibilities were fundamentally different from those of their city employee co-workers in every case contradicts the professed intent of both the PRWORA⁷⁴ and New York City's Work Experience Program. WEP was designed to move Home Relief recipients, and later AFDC recipients, from public assistance to full-time employment.⁷⁵ In fact, the HRA Deputy Commissioner noted that WEP's goal is "to enable an increasingly large population of participants to achieve economic independence through permanent full-time employment."⁷⁶ Further, the WEP Policy and Procedures Manual grants participants the right to "be assigned sufficient work to [make] them productive throughout their assignment" and "they are expected to become a team player; learn as much as possible; . . . ask for more work if they are feeling unchallenged."⁷⁷

How are these lofty goals of providing WEP workers challenging work, and eventually finding them full-time employment, to be achieved if WEP workers' job responsibilities are mandated by the HRA Deputy Commissioner always to be distinct from those of city workers? If WEP workers were to ask for additional responsibilities to ensure that they are adequately challenged, this would likely mean taking on tasks similar to those of city workers and, therefore, violating the Deputy Commissioner's aforementioned policy.⁷⁸ If WEP workers are really to become team players, then the artificial barriers preventing them from performing all tasks, especially work comparable to that of other city employees, must be eliminated. The City's position is clearly contrary to the stated goals of their social programs and to the internal procedures and policies that provide avenues for increased experience and responsibility for WEP participants.⁷⁹

Moreover, the City's position belies fairness and common sense. If workfare participants are truly prevented from performing the same range of activities as regular city employees or their work

⁷⁴ In signing the PRWORA, Clinton noted that he wanted to change the system that "exil[ed] recipients] from the entire community of work" and vowed to initiate companion job creation programs for the poor. Clines, *supra* note 7, at A1.

⁷⁵ See *Brukhman*, 174 Misc.2d at 30, 662 N.Y.S.2d at 916.

⁷⁶ *Brukhman*, 174 Misc.2d at 33, 662 N.Y.S.2d at 918 (citing Aff. of Seth Diamond, Deputy Comm'r, HRA at ¶ 15).

⁷⁷ *Id.* (quoting WEP Policy and Procedures Manual).

⁷⁸ See text accompanying *supra* note 72.

⁷⁹ See *Brukhman*, 174 Misc.2d at 34, 662 N.Y.S.2d at 918.

is characterized as less valuable than regular employees in order to avoid paying participants prevailing wages, then the goals of the PRWORA and WEP, to move public assistance recipients into full-time employment, can never be achieved.

Fortunately, the *Bruckhman* court concluded that the WEP workers were doing exactly or virtually the same jobs as city employees.⁸⁰ Therefore, New York State laws in existence until 1997 mandated that they be paid prevailing wages or wages comparable to their regular city employee counterparts.⁸¹

III. THE REACTION TO *BRUKHMAN*

As part of the process of implementing the PRWORA and becoming eligible to receive the PRWORA block grant, New York was required to submit a plan to the U.S. Department of Health and Human Services by July 1, 1997.⁸² However, New York's plan, the Welfare Reform Act of 1997,⁸³ was not signed by the Governor until August 20, 1997 after being passed by the New York State legislature as part of the flurry of end of session bills. As part of that measure, the legislature attempted to limit the effect of the *Bruckhman* decision through changes in the social services law. The thrust of the changes was to prevent WEP workers from being protected by article I, section 17, of the New York State Constitution, which requires that workers performing "public works" be paid prevailing wages.⁸⁴

To achieve its goal, the legislature modified the language of Social Services Law section 336-c (2)(b), altering the requirement that the number of hours that a person works may not exceed the assistance received "divided by the higher of (1) the federal minimum wage, or (2) the state minimum wage, or (3) the rate of pay for persons employed in the same or similar occupations by the same employer at the same or equivalent site."⁸⁵ Specifically, the legislature eliminated the comparable wage option in (3) above.⁸⁶ This

⁸⁰ See *id.* at 37, 662 N.Y.S.2d at 920.

⁸¹ See *supra* Part II.A.

⁸² Greenberg & Savner, *Temporary Assistance*, *supra* note 20.

⁸³ 1997 N.Y. Laws Chap. 436.

⁸⁴ N.Y. CONST. art. I, § 17; see also *supra* Part II.A.

⁸⁵ N.Y. SOC. SERV. LAW § 336-c(2)(b) (McKinney 1996) (amended 1997).

⁸⁶ Compare N.Y. SOC. SERV. LAW § 336-c(2)(b) (McKinney 1996), with 1997 N.Y. Laws Chap 436, Sec. 148.

provision applied to AFDC recipients, now more or less subsumed in the new category of Family Assistance (New York's version of TANF).⁸⁷

Moreover, the New York State legislature wholly eliminated section 164 of the New York Social Services Law, which referred to the work assignments of benefit recipients as "public works."⁸⁸ This section applied to Home Relief recipients, who are now mainly subsumed in the new category Safety Net Assistance.⁸⁹ Everyone participating in the WEP program, including former Home Relief recipients, is now covered by section 336.⁹⁰

Finally, the new legislation abolished the Job Opportunity Program recognized under Social Services Law section 336-e. This section permitted the establishment of a job opportunity program for public assistance recipients.⁹¹ It mandated that:

[a] person participating in a program operated pursuant to this section shall be hired by a participating employer for a job of at least twenty hours per week. The salary shall be the wage paid for *comparable work done by the employer's regular employees* but in no event shall be less than the state minimum wage.⁹²

Thus, the New York State legislature, by eliminating the above references to comparable wages and public works, attempted to limit the decision in *Brukhman* mandating prevailing wages for WEP workers.

IV. WEP WORKERS STILL DESERVE COMPARABLE WAGES

The Appellate Division, First Department, held that the state legislature was successful. The court held that once the explicit statutory language mandating prevailing wages be paid to WEP workers was removed, the constitution alone was insufficient protection since it only applied to contractors and subcontractors.⁹³ The Fourth Department, however, came to a different conclusion in

⁸⁷ See Don Friedman, *The Welfare Reform Act of 1997* (Community Food Resource Center, Inc. Aug. 20, 1997).

⁸⁸ 1997 N.Y. Laws Chap 436, § 148.

⁸⁹ See Friedman, *supra* note 87, at 2.

⁹⁰ See N.Y. SOC. SERV. LAW §§ 336 et seq. (McKinney Supp. 1998)

⁹¹ N.Y. SOC. SERV. LAW § 336-e (McKinney 1996) (amended 1997).

⁹² N.Y. SOC. SERV. LAW § 336-e(2) (McKinney 1996) (amended 1997) (emphasis added).

⁹³ See *Brukhman v. Giuliani*, 678 N.Y.S.2d 45, 47 (1st Dep't 1998).

Enzian v. Wing on March 13, 1998, almost seven months after the state legislature eliminated the prevailing wage language from the social services statute.⁹⁴ Although not explicitly addressing New York's constitutional provision, the appellate court held that a WEP worker who was designing data base systems and performing computer programming because of his advanced skills was entitled to prevailing wages.⁹⁵

One can also argue for payment of prevailing wages, even without the explicit language of the social services statute, by comparing the language of New York's constitution and current statute with the work performed by welfare recipients. At least some jobs performed by WEP workers are indeed public works, whether or not the statute explicitly uses that language.⁹⁶

Prior to discussing the current development of the law, a look at former versions is mandated. The language of the former section 164, which determined the workfare assignments for Home Relief recipients, indicated which activities are to be considered public works. Specifically, public works included employment with various divisions of local governments and with nonprofit agencies performing work for the municipality under contract.⁹⁷ These are exactly the type of positions to which WEP participants are commonly assigned, namely assisting in city agencies and nonprofits under contract with the city.⁹⁸ The court in *Young* agreed that such activities are public works.⁹⁹ Moreover, the *Bruckman* court noted that workfare assignments historically have been public work.¹⁰⁰

For AFDC recipients, the former statute provided that "a recipient may be assigned to participate in such work experience program only if: . . . (i) the project to which the participant is assigned serves

⁹⁴ 670 N.Y.S.2d 283 (4th Dep't 1998).

⁹⁵ See *id.*

⁹⁶ The New York State Constitution mandates that prevailing wages be paid for public works: "No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any *public work*, . . . shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used." N.Y. CONST. art. I, § 17 (emphasis added).

⁹⁷ N.Y. SOC. SERV. LAW § 164(2)(a) (McKinney 1996) (repealed 1997).

⁹⁸ See Plaintiffs' Memorandum of Law at 2-5.

⁹⁹ See *supra* note 45. The decision in *Young v. Toia* provided a more detailed analysis of "public works" than the offhand remark found in *Bruckman*. 678 N.Y.S.2d 45, 47 (1st Dep't 1998).

¹⁰⁰ See *Bruckman v. Giuliani*, 174 Misc.2d 26, 36, 662 N.Y.S.2d 914, 919 (N.Y. Sup. Ct. 1997), *rev'd* 678 N.Y.S.2d 45 (1st Dep't 1998).

a *useful public purpose*.”¹⁰¹ Clearly, this language references public work. Moreover, the activities of WEP participants, i.e., cleaning parks and city streets, helping in public hospitals, and providing social services are consummate examples of public work, activities that provide a “useful public purpose.” In fact, the social services law offers those same examples when defining projects that serve a useful public purpose.¹⁰²

Under the new statute, the language requiring that work projects for public assistance recipients be for a “useful public purpose” has been retained and now applies to all public assistance recipients who participate in such activities.¹⁰³ This language maintains the historical notion that workfare assignments to city agencies and non profits for which recipients perform activities that serve a “useful public purpose” constitute public work. Despite the legislative changes discussed *supra* Part III, since New York’s constitution cannot be changed with simple legislation,¹⁰⁴ article I, section 17, still applies to the vast majority of WEP workers who are performing jobs that serve a “useful public purpose.” Thus, by virtue of the New York State Constitution, article I, section 17, public assistance workers performing public works are required to be paid prevailing wage.¹⁰⁵ Given the disagreement on this issue in the Appellate Division, ultimately the New York State Court of Appeals will have to decide whether the constitutional provision mandating prevailing wages for public works applies to WEP workers.

A. *Anti-Displacement Protection*

The anti-displacement statute merely prevents New York City from replacing regular city jobs with WEP workers, rather than mandating any particular pay rate for WEP employees.¹⁰⁶

¹⁰¹ N.Y. SOC. SERV. LAW § 336-c(2)(i) (McKinney 1996) (amended 1997) (emphasis added).

¹⁰² See *id.*

¹⁰³ See N.Y. SOC. SERV. LAW §§ 336-c(2)(d) (McKinney Supp. 1998).

¹⁰⁴ Changes to the state constitution require either two votes of the legislature and a vote by the electorate at large or a constitutional convention. N.Y. CONST. art. XIX, §§ 1, 2. The electorate votes every 20 years whether or not to hold a constitutional convention and such a convention was recently rejected on Election Day, November 4, 1997. See Richard Perez-Peña, *Voters Reject Constitutional Convention*, N.Y. TIMES, Nov. 5, 1997, at B1.

¹⁰⁵ See N.Y. CONST. art. I, § 17.

¹⁰⁶ See N.Y. SOC. SERV. LAW § 336-c(2)(e) (McKinney 1998).

However, if the City were required to pay WEP workers prevailing wages rather than minimum wage, the financial incentive to substitute WEP workers for existing city workers or work activities would be at least partially eliminated. Without a financial incentive, the most detrimental aspects anticipated by the anti-displacement statute would be eliminated. In fact, if there were no financial benefit for preferring WEP workers over regular workers, the City would prefer to retain its long-term, experienced workers. Alternatively, if the City chose to assign and train WEP workers, it would have a greater incentive to maintain them in positions long enough to take advantage of the experience they acquire, thereby providing them long-term employment.

The City's WEP program violates the anti-displacement provision of both the PRWORA and the New York statute.¹⁰⁷ The original anti-displacement provision prevented the use of workfare employees to displace current employees or positions; to fill positions of employees on layoff, termination or other workforce reductions; or to eliminate promotional opportunities.¹⁰⁸ In fact, New York strengthened its anti-displacement provision with the enactment of the Welfare Reform Act of 1997.¹⁰⁹ The legislation enhanced the anti-displacement protection by prohibiting use of workfare participants to perform "a substantial portion of the work ordinarily performed by regular employees."¹¹⁰

In *Bruckhman*, the WEP workers were found to be doing exactly what the statute prohibits, performing virtually the identical work performed by regular employees.¹¹¹ Even if one accepted the City's argument that the WEP workers did not perform all the tasks of the regular city employees, the court held that the tasks performed were at least similar, and, therefore, the job functions were equivalent to that of regular city workers.¹¹² Therefore, the City is violating the anti-displacement provision by permitting WEP workers to perform "a substantial portion of the work ordinarily per-

¹⁰⁷ See 42 U.S.C. § 607(f)(2) (Supp. II 1996); N.Y. SOC. SERV. LAW §§ 336-c(2)(f) (McKinney Supp. 1998).

¹⁰⁸ See N.Y. SOC. SERV. LAW § 336-c(2)(f) (McKinney 1996) (amended 1997).

¹⁰⁹ 1997 N.Y. Laws Chap 436, § 148. Since the law has yet to be fully interpreted, this assessment is based on an analysis of the Welfare Reform Act of 1997. See Friedman, *supra* note 87.

¹¹⁰ 1997 N.Y. Laws Chap 436, § 148.

¹¹¹ See *Bruckhman v. Giuliani*, 174 Misc.2d 26, 34, 662 N.Y.S.2d 914, 918 (N.Y. Sup. Ct. 1997), *rev'd* 678 N.Y.S.2d 45 (1st Dep't 1998).

¹¹² See *id.*

formed by regular employees."¹¹³ Given that the WEP worker is paid merely at minimum wage, the City has a strong incentive to prefer WEP workers to regular employees. Paying WEP workers comparable wages, however, would eliminate the need for protections of the anti-displacement statute.

Even without the strengthened anti-displacement statute, both the PRWORA and state anti-displacement statute bar displacing current employees or positions.¹¹⁴ Although difficult to prove as the City takes great pains to deny it,¹¹⁵ evidence exists that jobs are being lost through attrition and positions replaced by WEP workers. Approximately 22,000 public-sector jobs were lost from December, 1993 to June, 1997,¹¹⁶ between 11,000 and 17,000 from the membership of the City's major union, District Council 37 ("DC 37"), in 1994 alone.¹¹⁷ Even the Parks Commissioner has noted that substantial numbers of jobs have been lost through attrition.¹¹⁸ Probably not by mere coincidence, the City now has approximately 38,000¹¹⁹ WEP workers.

There are many indications that these WEP workers are now presently responsible for maintaining city functions. Commissioner Stern admitted that the WEP workers, whose numbers have increased from 600 to 5,400 in his agency alone, perform a valuable service, and enable the Parks Department to meet the standards to keep the New York City parks clean.¹²⁰ Others have noted that in the Parks Department, which has been the most severely decimated by personnel cutbacks, "the only paid employees left are supervisors—the rest are WEP workers."¹²¹ Further, "[P]arks isn't the only

¹¹³ N.Y. SOC. SERV. LAW § 336-c(2)(e) (McKinney Supp. 1998).

¹¹⁴ See 42 U.S.C. § 607(f)(2) (Supp. II 1996); N.Y. SOC. SERV. LAW §§ 336-c(2)(e); see also N.Y. SOC. SERV. LAW § 336-c(2)(f) (McKinney 1996) (amended 1997).

¹¹⁵ See Louis Uchitelle, *Welfare Recipients Taking Jobs Often Held by the Working Poor*, N.Y. TIMES, Apr. 1, 1997, at A1.

¹¹⁶ See THE CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT, FISCAL 1997 SUMMARY VOL. at 22.

¹¹⁷ See Bob Fitch, *Sleeping with the Enemy: Why New York's Unions Backed the Most Antilabor Mayor in History*, VILLAGE VOICE, Nov. 4, 1997, at 53.

¹¹⁸ See New York City Parks Comm'r Henry Stern, Address at New York Law School City Law Breakfast (Sept. 27, 1996) (on videotape).

¹¹⁹ See THE CITY OF NEW YORK MAYOR'S MANAGEMENT REPORT, FISCAL 1997 SUMMARY VOL. at 67.

¹²⁰ See New York City Parks Comm'r Henry Stern, Address at New York Law School City Law Breakfast (Sept. 27, 1996) (on videotape).

¹²¹ Telephone interview with Bill Henning, Vice-President, Communications Workers of America, Local 1180 (Oct. 1997) (representing city employees).

department that has lost positions through attrition only to see those functions replaced by WEP workers; it is only the most egregious. This is happening in agencies throughout the city."¹²²

Union leaders and WEP supervisors, who face this situation daily, have also noticed this trend. District Council 37 Local President James Butler testified that 472 WEP workers had filled the positions of 896 city hospital employees who had accepted severance packages from the Giuliani administration.¹²³ WEP supervisors admitted in interviews with the Community Food Resource Center that the WEP workers were desperately needed in their agencies to fill the positions of lost civil service employees.¹²⁴ Further, in 1996, the Transport Workers Union agreed to allow WEP workers to fill slots lost by attrition in return for a promise of no layoffs.¹²⁵

The same trend of attrition and replacement by workfare participants has been observed elsewhere. In Buffalo, a local union leader noted that "[e]very time one of our laborers leaves, especially on the cleaning staff, they are replaced by workfare people."¹²⁶ A Jersey City welfare program administrator noted, "'What infuriates me . . . is that you read in the newspapers that hospitals like the Jersey City Medical Center are laying off workers, or cutting their hours. And at the same time, we get requests from the Medical Center for welfare people.'"¹²⁷

The Mayor's management reports exhibit further evidence of a trend in the reduction of city jobs through attrition in agencies that receive the most WEP workers: Department of Parks and Recre-

¹²² *Id.*

¹²³ See Liz Krueger et al., *Workfare: The Real Deal II* 10 (Community Food Resource Center, Inc. July 1997) (citing testimony of James Butler, President, DC 37, Local 420) (representing municipal hospital workers before the New York City Council in March 1996).

¹²⁴ See Krueger et al, *supra* note 123, at 10. Some supervisors stated that their entire staff consisted of WEP workers. *Id.*

¹²⁵ See Richard Perez-Peña, *Transit Pact is Approved by Workers*, N.Y. TIMES, Oct. 23, 1996, at B1. The Mayor publicly refused to approve this deal since it would blatantly violate his agreement with DC 37 which said no union jobs would be replaced by welfare recipients. However, the Community Food Resource Center, through interviews with WEP participants, supervisors, City agency personnel, and labor unions found that the Mayor is replacing workers with WEP participants—albeit not publicly. See Krueger et al., *supra* note 123, at 10.

¹²⁶ Susan Schulman, *Workfare Recipients Hope for Steady Jobs*, BUFFALO NEWS, Oct. 1, 1996, at A1 (quoting John M. Orlando, President, Local 1095).

¹²⁷ Uchitelle, *supra* note 115.

ation, 30% reduction from fiscal year 1994 to 1997; Health and Hospitals Corporation, 27% reduction from fiscal year 1993 to 1997; Department of Transportation, loss of 6,418 from fiscal year 1996 to 1997, loss of 4,001 from fiscal year 1997, and loss of 3,921 from proposed fiscal year 1998.¹²⁸ Further, the report notes that custodial staff employed by the Department of Citywide Administrative Services (formerly Department of General Services) has more WEP workers than full-time employees—322 full-time employees and the equivalent of 429 full-time WEP worker positions.¹²⁹

The City argues that it just cannot afford the jobs lost through attrition and would not replace them if WEP workers were not available. However, it seems an unlikely coincidence that at least one agency has been virtually decimated of regular employees and its functions filled with WEP workers just as WEP workers became available in such massive numbers. Moreover, regular positions are being lost to attrition and buyouts while the WEP program has been expanding. In addition, it is unreasonable that a city agency could continue to function with a substantial cut in its workforce as has the Parks Department or the custodial staff of the Department of Citywide Administrative Services.

Moreover, the City's arguments fall under the sheer weight of the numbers. The 100,000 WEP participants expected to be enrolled in the program by 2001 will amount to one-third of the city's entire workforce.¹³⁰ A study of the impact of adding WEP workers to the workforce, based on an elasticity of demand analysis, shows that the effect is displacement of workers, depression of wages for the workers that remain, or a combination of both.¹³¹ In fact, economists say that given the thriving economy and low unemploy-

¹²⁸ See THE CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT, FISCAL 1997, SUMMARY VOL. at 27; THE CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT, FISCAL 1997, VOL. II, AGENCY AND CITYWIDE INDICATORS at 203-209.

¹²⁹ See THE CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT, FISCAL 1997, VOL. II, AGENCY AND CITYWIDE INDICATORS at 181. This means there are far more WEP workers than indicated since each WEP worker performs about 20 hours of work per week.

¹³⁰ See David Firestone, *New York Girding for Surge in Workfare Jobs*, N.Y. TIMES, Aug. 13, 1996, at A1.

¹³¹ TILLY, *supra* note 12, at 2. Ms. Tilly, Associate Professor of Policy and Planning at the University of Massachusetts, has found that every 1,000 workfare participants working 26 hours per week results in 660 workers being displaced or results in wages being depressed by .3% for the bottom third of the workforce or results in some combination of both. *Id.*

ment, employers generally have to scramble to find entry-level workers by raising wages.¹³² However, the pressure to increase wages for such jobs has been dulled because of the injection of workfare participants.¹³³ A Salt Lake City temporary employment service enjoyed this consequence and would have been unable to fill its orders for temporary employees without paying higher hourly wages but for the influx of welfare workers.¹³⁴

B. Public Policy

Even if, in light of the City's vehement denial, one cannot definitively prove that the City is actually replacing jobs it would be forced to fill but for the availability of WEP participants, one can clearly show that the City's denial is highly suspect. Further, the great financial incentive alone to use a WEP worker, who is paid no more than the benefit she or he would have received anyway, makes it more probable than not that regular positions are being replaced or wages depressed as a result of WEP workers, and the threat is greater as the WEP program expands. Such a threat, however, could be eliminated if the City were required to pay WEP workers at prevailing rates—city workers would face less potential loss of regular wage positions from layoffs and attrition, and their wage depression would be reduced.

Paying prevailing wages would also be a public benefit to the WEP workers, themselves. First, many would be credited at higher wages, thereby reducing the number of hours they had to spend at their workfare assignment. This would enable them to spend more time searching for permanent jobs, tending to child care, or participating in education or job training to improve their skills and marketability. Furthermore, if WEP workers were paid prevailing wages, the City would cease trying to artificially distinguish their jobs from those of regular workers, making them more employable when they try to obtain permanent jobs. Moreover, if the financial incentive to use WEP workers as opposed to regular workers was reduced, there would be more job opportunities overall, and, therefore, WEP workers would have increased opportunities for meaningful employment.

¹³² See Uchitelle, *supra* note 115.

¹³³ See *id.*

¹³⁴ See *id.*

Before adding almost 30,000 WEP workers to the program next year and 100,000 WEP workers by 2001,¹³⁵ all at minimum wage, the detrimental effects of the program on the City's regular, unionized workforce, on future city jobs, and on WEP workers must be addressed.

V. FURTHER PROBLEMS WITH THE PRWORA

A. *Detrimental Financial Incentives*

The PRWORA and its implementation in New York are fraught with financial implications that tend to harm the participants. For instance, as the program is fully implemented, states will receive less funding for welfare.¹³⁶

Given this reduction in actual funding, states are worried about additional costs mandated by the PRWORA. In fact, the Congressional Budget Office estimated that states would have to spend approximately \$13 billion between 1997 and 2002 to administer workfare programs.¹³⁷ In New York, when the PRWORA passed, there were dire predictions about the cost its implementation would have on the state. Senator Daniel Patrick Moynihan estimated that implementing the workfare portion of the welfare bill would cost Erie County \$55 million.¹³⁸ State government officials estimated that implementing workfare would cost the state \$1.3 billion over the next five years for public works projects, subsidies to private companies to hire recipients, day care and job training.¹³⁹ The potential cost burden feared by the state and local governments is worrisome in that it provides an incentive to cut some of the most expensive aspects of workfare, namely education and job training.¹⁴⁰ For a sizable portion of the workfare participants, these aspects of the program are more effective in helping them obtain and keep permanent jobs and, consequently, remain off public assistance.¹⁴¹

¹³⁵ See Fitch, *supra* note 117, at 53.

¹³⁶ See Super et al., *supra* note 22, at Part II.

¹³⁷ *What Workfare Means*, BUFFALO NEWS, Oct. 1, 1996, at 6A.

¹³⁸ See Schulman, *supra* note 126, at A1.

¹³⁹ See Jon R. Sorensen, *Only Thing That's Certain is Reform Will Cost State*, BUFFALO NEWS, Oct. 3, 1996, at 1A.

¹⁴⁰ See Sennott, *supra* note 4, at 1.

¹⁴¹ See Schulman, *supra* note 126, at A1.

B. *Elimination of Preferred Hiring Status*

The Welfare Reform Act of 1997,¹⁴² in addition to the aforementioned elimination of references to public works in the social services law, removed provisions that would have enhanced workfare participants' chances of finding permanent jobs. The legislature eliminated a provision that required the City to interview and consider WEP participants for openings in job titles similar to their placements.¹⁴³ Removal of this provision severely injures WEP workers' opportunities to obtain jobs in the sites they are already placed.

The legislature further eliminated a requirement that "the prior training, experience and skills of a person . . . are taken into account in making [workfare] assignments."¹⁴⁴ This provision, had it been adhered to, could have helped enhance a workfare participant's existing skills. Instead, without this provision, welfare recipients are being required to work in positions in which they have little training or inclination, making placements more likely to be in dead end positions.

The Welfare Reform Act also eliminated a section noting that the workfare assignment was intended to improve employability of the participant.¹⁴⁵ Removing this section is a further indication of the legislature's tendency to put a higher priority on easy implementation of a social program than on long-term benefits afforded to welfare recipients.

C. *Workfare does not Lead to Jobs*

Despite the hope that national welfare reform, especially workfare, would be a panacea for many ills,¹⁴⁶ it has not even been particularly effective at taking participants off the welfare rolls and placing them into permanent jobs. Just over a year after enactment of the PRWORA, evidence suggests that only about one-half of

¹⁴² 1997 N.Y. Laws Chap 436, § 148.

¹⁴³ See N.Y. SOC. SERV. LAW, § 336-c(4) (McKinney 1996) (amended 1997); 1997 N.Y. Laws, Chap. 436, § 148.

¹⁴⁴ N.Y. SOC. SERV. LAW § 336-c(2)(g) (McKinney 1996) (amended 1997); 1997 N.Y. Laws, Chap. 436, § 148.

¹⁴⁵ See N.Y. SOC. SERV. LAW § 336-c(2)(j) (McKinney 1996) (amended 1997); 1997 N.Y. Laws Chap 436, § 148.

¹⁴⁶See 42 U.S.C. 601(a) (1998).

those leaving the welfare rolls have jobs, a percentage no better than in periods of weaker economies and less stringent welfare rules.¹⁴⁷ Moreover, a New York State survey found that after three months off of the welfare rolls, fewer than one-third had found full or part-time employment.¹⁴⁸ In New York City, data from the Human Resources Administration show that since the expansion of WEP, movement from welfare to work is much lower than in previous years.¹⁴⁹

Unions, social service workers, people who run training programs and participants, themselves, do not believe that workfare adequately prepares welfare recipients for entering the job market and retaining employment. Many believe that people assigned to workfare are not only untrained but are virtually "no hires."¹⁵⁰ This belief is exacerbated by the fact that the major placement for WEP workers—city agencies—are not hiring, and nonprofits, which face funding cuts, cannot absorb the labor.¹⁵¹ To make matters worse, workfare participants are not evaluated based on employability, work experience or advanced degrees, often making their placements inappropriate.¹⁵² Participants, themselves, feel the workfare experience does not provide training.¹⁵³ Instead, many believe

¹⁴⁷ See DeParle, *supra* note 1, at A1.

¹⁴⁸ Alan Finder, *Evidence is Scant that Welfare Leads to Full-Time Jobs*, N.Y. TIMES, April 12, 1998, at A1.

¹⁴⁹ See Krueger et al., *supra* note 123, at 7. From October 1993 through September 1994, 862 people per month moved from welfare to work as compared to 420 in 1995-1996. *Id.*

¹⁵⁰ Joel M. Poch, *Workfare—An Analysis of a Doomed Elixir*, 69 N.Y. ST. B.J. 42, 43 (1997).

¹⁵¹ See Krueger et al., *supra* note 123, at 6.

¹⁵² See Krueger et al., *supra* note 123, at 6.

¹⁵³ See, e.g., Firestone, *supra* note 130, at A1; Schulman, *supra* note 126, at A1. Further, the need for real training and assistance with full-time job placement, rather than restricted work activities, is illustrated by the case of E. Margarita Maldonado. She was a welfare recipient who was enrolled in a training program run by Cooperative Home Care Associates, an organization which trains welfare recipients and then hires them to work as home health care aides in their organization.

While participating in the program, Ms. Maldonado was called by the City for a WEP assignment cleaning parks and was forced to choose between taking the WEP assignment or remaining with the training program and risk losing her welfare benefits. While comparing the benefits of the training program over the WEP assignment, she noted, "Picking up, I do that in my house. I don't call that experience." Elizabeth Kolbert, *Workfare Makes a Break Hard to Give*, N.Y. TIMES, Oct. 6, 1997, at B1.

that classroom training, employment training programs, and general education are more effective in moving welfare recipients into permanent employment.¹⁵⁴

CONCLUSION

The impetus for welfare reform, and subsequent passage of the PRWORA, arose from grossly inflated figures about the cost of welfare¹⁵⁵ and resentment for those receiving free benefits.¹⁵⁶ The government, at the federal, state and local levels, has been able to use these fictions to create a program that generates virtually free workers and, therefore, depresses wages for all affected.

New York's workfare program, WEP, has provided approximately 35,000 additional city workers, a figure which has steadfastly risen in the past few years and is intended to increase to 100,000 by 2001.¹⁵⁷ This labor is virtually cost free compared with regular city workers. The City is already paying the WEP workers their benefits, whether or not they work, in the form of welfare grants and food stamps, and the City saves additional salary costs by crediting this salary at minimum wage, rather than the living wage negotiated over the years by the municipal unions.

The City comes out the winner—it obtains additional labor to improve and maintain city services at minimal budgetary cost. However, the victory is a hollow one because it comes at too great an expense. Welfare workers, no matter what their experience or expertise, work for minimum wage. They work in jobs that the City characterizes as having far less experiential value than is the reality in order to ensure that the City can pay only minimum wage and avoid violating the anti-displacement statute. This has the effect of hindering welfare recipients' chances of entering the permanent job market. Additionally, the program either takes away permanent job slots or depresses wages by paying WEP workers to do the same work as regular city workers but for a substantially lower wage.

Before we expand this program, we should examine whether the cost is really worth the short-term financial benefit. We must decide whether we want to risk creating a city where the living

¹⁵⁴ See Krueger et al., *supra* note 123, at 8; Schulman, *supra* note 126, at A1.

¹⁵⁵ See *supra* Introduction.

¹⁵⁶ See Clines, *supra* note 7, at A1.

¹⁵⁷ See *supra* note 130 and accompanying text.

standard is depressed for much of the workforce to a standard below that of a living wage. "A 'workfare' workforce without training, without hope, and without both actual job placement and job creation programs is a recipe for disaster" ¹⁵⁸

Lauri Cohen

¹⁵⁸ See Poch, *supra* note 150, at 42.

