

In the Supreme Court of Appeals of West Virginia

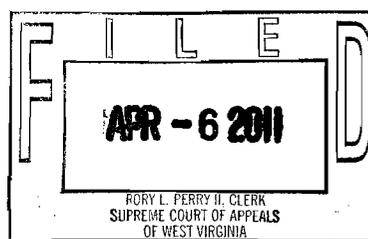
Docket No. 101327

PATRICIA JONES, formerly AKERS,
Plaintiff Below, Petitioner

V.)

Appeal from a final order
of the Circuit Court of Kanawha
County (10-C-746)

**WEST VIRGINIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM, a corporation,
d/b/a WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD; and
JUDY VANNOY AKERS,**
Defendants Below, Respondents



Respondent West Virginia Consolidated Public Retirement Board's Brief

**Counsel for Respondent, West Virginia
Consolidated Public Retirement Board**

Lenna R. Chambers (WV Bar No. 10337)
*Counsel of Record for the West Virginia Consolidated
Public Retirement Board*
BOWLES RICE MCDAVID GRAFF & LOVE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1777
E-mail: lchambers@bowlesrice.com

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I. STATEMENT OF THE CASE

Additional events have occurred since the West Virginia Consolidated Public Retirement Board (“CPRB” or the “Board”) filed its Response to the Petition for Appeal which may be relevant to the Court’s decision in this matter. On March 7, 2011, the Board received notice from Ms. Jones, the Petitioner (“Ms. Jones”), through counsel, that she did not intend to file a supplemental brief in support of her appeal, but did intend to file a reply to the Board’s previously-filed Response. On the same date, the Board received from Ms. Jones, also through counsel, an amended domestic relations order (the “Amended DRO,” attached hereto as Exhibit A), entered by the Circuit Court of Mercer County on December 9, 2010 in the divorce proceeding between Ms. Jones and her ex-husband, Danny K. Akers (“Mr. Akers”). Ms. Jones asked the Board to recognize the Amended DRO as a qualified domestic relations order (“QDRO”) and to immediately begin paying benefits to Ms. Jones pursuant to the Amended DRO.

The Amended DRO, unlike the original June 2009 DRO, is consistent in its description of how the form of benefit payment is to be elected. In paragraphs (6), (7)(b), (7)(d), and (8) the Amended DRO recognizes that the Participant has the right to choose the form of benefit at the time of his retirement or withdrawal from service. The Amended DRO, like the original June 2009 DRO, however, provides that “[t]he Alternate Payee is to be treated as the surviving spouse of the Participant for purposes of calculating benefits payable to the Participant or Alternate Payee hereunder.” Amended DRO, Paragraph (7)(b).

By letter dated April 1, 2011 (attached hereto as Exhibit B), the Board notified Ms. Jones, Ms. Akers, and their respective counsel that the Amended DRO did not meet the requirements for a QDRO, and was therefore “rejected.” The Board rejected the Amended DRO

as a QDRO for two reasons: (1) because it was issued after the death of the participant, Mr. Jones; and (2) because the Amended DRO provided that Ms. Jones, the alternate payee, was to be treated as the surviving spouse of the participant, Mr. Jones.

On April 4, 2011, Respondent Judy Vannoy Akers (“Ms. Akers”), the wife of Mr. Akers at the time of his death and the beneficiary of his disability retirement benefit, now being paid as a joint and survivor annuity, filed a Motion to Dismiss asking this Court that she be dismissed from this action.

II. SUMMARY OF ARGUMENT

Ms. Jones’ Complaint was correctly dismissed by the Circuit Court because she showed no clear entitlement to mandamus relief. The June 2009 DRO she submitted to the Board was fatally inconsistent, and without a QDRO in place, the Board could not distribute any of her ex-husband’s retirement benefits to her.

The Board’s rejection of the June 2009 DRO as a QDRO should be affirmed on the alternative ground that, because it would have required Ms. Jones to be treated as the surviving spouse for purposes of any survivor annuity, it would have resulted in Ms. Jones receiving more than what was awarded to her under the DRO (50% of the marital property portion of Mr. Akers’ benefits) and more than what is permitted to be awarded to her by W. VA. CODE R. § 162-1-6.2.

The Board’s rejection of the Amended DRO should be affirmed because, like the June 2009 DRO, it would have required Ms. Jones to be treated as the surviving spouse for purposes of any survivor annuity. In addition, the Board’s rejection of the Amended DRO

should be affirmed because the Board is not authorized by any of its governing statutes or legislative rules to enforce a QDRO after the death of a participant.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Board's position is that the Circuit Court correctly affirmed the rejection of the June 2009 DRO as a QDRO on the basis of the DRO's internal inconsistency; however, on February 24, 2011, this Court ordered that this matter is appropriate to be scheduled for oral argument and consideration under the Revised Rules of Appellate Procedure, and that the matter was to be scheduled for oral argument under Rule 19 of said rules. While the Board disputes that the Circuit Court committed any error in dismissing Ms. Jones' Complaint, the Board agrees the time allotted for argument under Rule 19 is appropriate for consideration of the issue of the June 2009 DRO's internal inconsistency, as the question involves the application of settled law to a narrow issue.

Ms. Jones' recent submission of the Amended DRO has potentially put into issue several other questions regarding the Board's criteria for acceptance of a DRO as a QDRO, but which were not considered or litigated in the Circuit Court's decision from which Ms. Jones appealed. The question of whether the Board is permitted or required to accept a posthumous DRO as a QDRO for PERS, and the question of whether a DRO for the PERS plan may require the alternate payee to be treated as the surviving spouse of a participant, are both issues of first impression. Moreover, a decision on these issues will potentially impact the thousands of members and beneficiaries of the nine plans administered by the Board (which are subject to similar statutes and legislative rules). Therefore, should the Court intend to consider and rule upon these issues as well, although they were not raised or addressed in the Circuit Court action

from which Ms. Jones appeals, the Board suggests that they may be appropriate for consideration under Rule 20 of the Revised Rules of Appellate Procedure.

Ms. Akers' Motion to Dismiss raises additional issues also not considered in the course of the Circuit Court proceedings from which Ms. Jones appealed. Ms. Akers asserts that Mr. Akers' benefits could not be paid to Ms. Jones under any QDRO because his benefits were disability benefits. Ms. Akers also asserts that she is being paid pursuant to W. VA. CODE § 5-10-27, the PERS statute governing pre-retirement death benefits, and that payment under such statute can be made only to a surviving spouse, regardless of any QDRO. According to Ms. Akers, the Mercer County Circuit Court has already concluded that Mr. Akers was not retired at the time of his death and was not disabled at the time of his death, and therefore that the QDRO would not have applied in any event, even had the Board accepted it. The Board does not take any position with respect to Ms. Akers' Motion to Dismiss, but does address some of Ms. Akers' argument in this brief. To the extent the Court wishes to consider her arguments, which were not addressed by the Circuit Court in dismissing Ms. Jones' Complaint, the Board requests an opportunity to provide a more thorough statement of its position in a supplemental brief.

IV. ARGUMENT

A. The Circuit Court Properly Dismissed the Petition for Writ of Mandamus Because There is No Duty on the Part of a Plan Administrator To Accept The Ambiguous and Internally Inconsistent DRO.

1. The DRO's Provisions Were Internally Inconsistent and Ambiguous.

The Board's Response to the Petition for Appeal sets forth in detail the provisions in the June 2009 DRO the Board found to be inconsistent. In sum, while paragraphs (7)(b), (7)(d) and (8) of the DRO clearly gave the participant, Mr. Akers, the option to choose from

among several benefit payment options, paragraph (7)(f) limited his election to a joint survivor annuity. In addition to the argument and explanation in the Board's previously-filed brief, the Board notes that in another case pending before this Court, a PERS participant has cited to language in the QDRO applicable to his benefits identical to paragraphs (7)(b), (7)(d) and (8) as support for his position that the QDRO gave him the right to choose the form of retirement benefit payment. See Brief of Petitioner, *King v. King*, Supreme Court No. 35696. The Board anticipated that Mr. Akers would make the same argument, and rejected the DRO to avoid the inevitable dispute between the parties that would have arisen if the Board had honored the DRO as written. Unfortunately, because the parties never took any action to amend the DRO until well after Mr. Akers' death and benefit payments began, the Board has nonetheless found itself at the center of a dispute over Mr. Akers' benefits.

2. The Board Could Not Resolve the Internal Ambiguity of the DRO by Referring to the Final Divorce Decree.

In her Complaint and Petition, Ms. Jones claims that the addition of Paragraph 7(f) of the DRO was added to ensure Mr. Akers would comply with the final divorce decree entered in the underlying divorce action. While perhaps relevant to Mr. Akers' obligations, the terms of the final divorce decree should not be deemed to have any implications for the Board's review and rejection of the DRO.

First, Ms. Jones' Complaint and Petition for Writ of Mandamus specifically alleges that no copy of the final divorce decree was submitted to the Board. Complaint, ¶ 17.c. Ms. Jones has not explained how the Board should be obligated to interpret the June 2009 DRO in accordance with the final divorce decree when she did not provide the Board with the same until well after Mr. Akers' death.

Second, even had a copy been submitted, the Board does not have the statutory authority to do what Ms. Jones requests, and enforce the terms of the final divorce decree. State law determines what constitutes a QDRO for PERS, a governmental plan.¹ W. VA. CODE R. § 162-1-6, the Legislative Rule setting forth the specific requirements for QDROs for Board-administered plans including PERS, states very clearly that the only way to divide a member or retirant's benefits is through a valid QDRO:

In cases of divorce or legal separation, the annuity, refund of accumulated contributions, or other provisions available to a member, retirants or beneficiary ... may only be divisible as provided in this rule. ... the Board shall not honor any Qualified Domestic Relations Order seeking to divide a members [sic] pension benefit which does not meet the requirements of this rule.

W. VA. CODE R. § 162-1-6.2. The rule ultimately gives the Board the authority, responsibility, and discretion to determine whether a DRO meets the requirements of this rule and should be “honored” as a QDRO. *See* W. VA. CODE R. §§ 162-1-6.2, 6.2.6. This rule does not, however, permit the Board to consider, interpret, or give effect to orders other than a QDRO. While this Court has not yet addressed the question, at least one other state court has held that, in the absence of express statutory authority to do so, a retirement plan administrator for a public pension plan may not, in reviewing a DRO, determine “whether it squares with the intent of the parties or the divorce court as expressed in a separate settlement agreement or divorce judgment.” *McPhee v. Maine State Ret. Sys.*, 980 A.2d 1257, 1264 (Me. 2009). Rather, the plan administrator may only determine whether the DRO meets the specific QDRO criteria set forth in the plan, is sufficiently specific concerning the exact division of benefits, and does not require the plan to provide a type or form of benefit or an option not otherwise provided for by the plan.

¹ The Board's previously-filed Response brief explains why it is state law and not the Internal Revenue Code or ERISA that governs the QDRO requirements for PERS, a governmental plan. *See* Response to Petition for Appeal, pp. 18-21.

Id. Because the Board, an agency created and governed by statute, lacks the authority to enforce anything other than a QDRO, the Board submits that it could not have resolved the DRO's ambiguities by referring to the final divorce decree, even had the parties to the underlying divorce action submitted a copy to the Board.

Finally, the Board asks this Court to rule definitively that it may not consider documents, agreements or orders other than a DRO when considering whether the same is a QDRO, so as to avoid erosion of the protections in place for retirement plan members. Generally, a retirement plan participant's benefits or interest are not subject to attachment, garnishment, assignment, or the operation of other similar legal process. *See e.g.* W. VA. CODE § 5-10-46 and W. VA. CODE R. § 162-1-6.1. In *State ex rel. Dept. of Health and Human Resources v. W. Va. Pub. Employees Ret. Sys.*, 183 W. Va. 39, 393 S.E.2d 677 (1990), this Court observed that this statutory provision is the result of a public policy that "is especially wary of allowing garnishment of pension income." This type of provision, often referred to as an "anti-assignment" or "anti-alienation" provision, is found in virtually all retirement plans, public and private, and is a reflection of a public policy decision to preserve a member's retirement plan benefits for the member's future. *See e.g. Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 492 U.S. 365, 376 (1990) (observing that ERISA's anti-assignment provision is a reflection of "a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them.") and *Kaplan v. Kaplan*, 624 N.E.2d 656 (N.Y. 1993) (observing that the purpose of an anti-assignment provision in a governmental plan is to "'protect public employee pensions against improvidence and misfortune' that might enable creditors or assignees to reach those funds.") (citations omitted).

The QDRO is one of only two exceptions to this general rule for PERS.² Pursuant to W. VA. CODE § 5-10-46, benefits and contributions under PERS “shall be subject to ‘qualified domestic relations orders.’” Thus, the QDRO is, by statute and by design, the only way the Board can permit the attachment, garnishment, or other payment of a retirement plan member’s benefits to another individual against his will.³ Any erosion of the narrow statutory exceptions to the clear anti-assignment language of W. VA. CODE § 5-10-46, including permitting orders other than QDROs to reach a participant’s benefits regardless of the purpose, threatens the viability of PERS and other CPRB-administered systems as sources of income for retirees.

Finally, the Board urges the Court to conclude that the Board had no obligation to look to the final divorce decree to resolve ambiguities in the DRO when determining whether the DRO was a QDRO because, as a practical matter, concluding otherwise would impose an enormous burden on the Board not directly related to the functions of a retirement plan administrator. The involvement of the Board is necessary to ensure that any QDRO honored by the Board is satisfactory from the standpoint of compliance with plan provisions and applicable state and federal laws; beyond that, the Board has no interest or expertise in what divorcing members may or may not agree upon in the course of dividing marital property. If the Board’s duties are expanded to include reviewing, considering, interpreting and enforcing agreements, orders and documents other than a DRO, all of the plans’ participants, beneficiaries and

² As noted in the Board’s previously-filed Response brief, and discussed in *Dept. of Health and Human Resources v. W. Va. Pub. Employees Ret. Sys.*, the other exception was created by the Family Obligations Enforcement Act of 1986, permitting automatic withholding from retirement plan payments to satisfy child support orders. The Petitioner has not asserted that this exception applies to her claim for Mr. Akers’ benefits.

³ A retirement plan participant is obviously permitted to voluntarily assign his benefits by way of a beneficiary designation, or by voluntarily making payment to creditors once he receives his benefits.

participating employers will be forced to bear the cost of these expanded duties, even though they do not truly fall within the scope of the Board's functions as plan administrator.

This is not to say that parties should have no remedy when a QDRO does not (or cannot) fully contain the agreement reached by the parties or the division of property ordered by a court. Rather, the parties, who are the ones subject to the court's full divorce decree or other agreement, can litigate these issues amongst themselves, and obtain enforcement of the divorce decree against each other or other appropriate relief outside the four corners of the QDRO, the scope of which is limited by state regulations for all the reasons described herein. While the lack of a QDRO, or the lack of a QDRO which addresses the specific point in dispute between the parties, prevents the parties from seeking relief as against the retirement plan, it should not prevent the parties from seeking relief against each other, as is possible for other provisions in a divorce decree not related to retirement benefits. *See e.g. Hawk v. Hawk*, 203 W. Va. 48, 506 S.E.2d 85 (1998) (wherein this Court reversed an order of a Circuit Court declining to enforce the visitation rights set forth in a divorce order) and *Grijalva v. Grijalva*, 172 W. Va. 676, 310 S.E.2d 193 (1983) (wherein this Court applied the doctrine of equitable estoppel to enforce the terms of a final divorce order and separation agreement relating to child support).

Notwithstanding the June 2009 DRO's internal inconsistency, Ms. Jones would have this Court look to documents other than the DRO to evaluate whether the Board correctly determined that the DRO was not a QDRO. The Board respectfully requests the Court to reject Ms. Jones' argument, and conclude that the Board could not resolve the DRO's internal inconsistency by looking to the provisions of the final divorce decree.

3. The Petitioner Has No Right to the Enforcement Of, and the CPRB Has No Duty to Comply With, an Ambiguous DRO.

The Board's previously-filed Response brief cites authority for the proposition that a plan administrator must reject a DRO which is unclear or inconsistent with respect to key matters relating to benefit payments, including the form of payment. The Board respectfully requests that this Court affirm the Circuit Court's conclusion that the Board properly exercised its discretion in rejecting the June 2009 DRO.

B. The Board Did Not Err in Refusing To Accept a DRO Requiring the Nomination of the Alternate Payee as the Surviving Spouse, Because Accepting Such a DRO as a QDRO Could Result in the Alternate Payee Receiving More Than Permitted by W. Va. Code R. § 162-1-6.

To be honored by the Board, a DRO must not award more than a maximum amount set by W. VA. CODE R. § 162-1-6.2.1. In contrast to QDRO requirements under ERISA and the Code, from which governmental plans are exempt, governmental plans are only required to honor a DRO to the extent state law so mandates, which permits the state to impose any restrictions and limitations on the recognition and enforcement of DROs in governmental plans that it chooses (or, in fact, to refuse to recognize or enforce DROs at all in the administration of a governmental plan, *see* Calhoun, Moore and Brainard, *Governmental Plans Answer Book*, Q 13:2 (attached hereto as Exhibit C)). Therefore, even if the Court were to conclude that the June 2009 DRO was not inconsistent, or that its inconsistency could be resolved by referencing the final divorce decree, the Board submits that its rejection of the DRO should stand on the alternative ground that the June 2009 DRO would have required Ms. Jones to be named as the surviving spouse. Likewise, if the Court rules on the Board's rejection of the Amended DRO, the Board submits that it was proper on this basis as well.

The Board's governing statutes and legislative rules provide that the amount of a participant or member's benefits that can be awarded pursuant to a QDRO is limited to the "marital property portion" of member's Vested Accrued Retirement Benefit ("VARB"). W. VA. CODE R. § 162-1-6.2.1 has, since 2005, specifically provided that the "marital property portion" is to be computed by:

multiplying the [VARB], less all benefits due to Exempt Service, by a fraction, the numerator being the number of years of contributing service incurred during the marriage, and the denominator being the total number of years of contributing service towards the pension at the date of separation or divorce.

This rule clearly limits the amount of a member's total accrued benefit that can be awarded through a QDRO. Amounts attributable to service incurred before the parties married or after their separation or divorce, as well as certain amounts attributable to Exempt Service⁴ cannot be awarded by any QDRO. A DRO that requires the participant to name as the sole surviving spouse the alternate payee, if honored, could result in the alternate payee receiving much more than the marital property portion of the participant's benefits he or she is awarded by the DRO, because after the participant's death, all remaining benefits, regardless of whether they constitute marital property, or are attributable to exempt service, or otherwise, would be paid only to the alternate payee.

While this result would not actually occur in every case - for example, where the alternate payee predeceases the participant - this would have occurred had CPRB accepted the July 2009 DRO or the Amended DRO submitted by Ms. Jones as a QDRO. Mr. Akers' total accrued benefit included amounts attributable to the more than three years he participated in

⁴ Exempt Service consists of noncontributory military service credit and service awarded for accrued annual and/or sick leave. W. VA. CODE R. § 162-1-6.2.1.2.

PERS after the end of his marriage to Ms. Jones.⁵ Mr. Akers' total accrued benefit also included the 50% of the marital property portion of the benefit awarded to him by the July 2009 DRO. Had the Board accepted the June 2009 DRO as a QDRO, and treated Ms. Jones as the surviving spouse, she would currently be receiving 100% of Mr. Akers' total accrued benefits, including the portion of those benefits attributable to his years of service after their separation, and including the 50% of the marital property portion awarded to Mr. Akers by the June 2009 DRO.

Assuming a 100% joint survivor annuity election naming Ms. Jones as the surviving spouse, this would translate to Ms. Jones receiving approximately \$1,500 per month.⁶ On the other hand, had Ms. Jones submitted a DRO without the provision naming her surviving spouse, but identical in all other respects, she would be receiving the 50% of the marital property portion awarded to her by the DRO, which would amount to approximately \$700 per month.⁷ On these particular facts, complying with Ms. Jones' demands to enter a DRO naming her as the surviving spouse of Mr. Akers' benefits would be tantamount to awarding her 100% of the marital property portion of Mr. Akers' PERS benefits in direct violation of the clear statement

⁵ Mr. Akers and Ms. Jones were married on August 1, 1975. Mr. Akers began participating in PERS on January 1, 1979. Mr. Akers and Ms. Jones were separated on July 8, 2006. Mr. Akers continued to accrue service credit in PERS until December 31, 2009. Thus, while Mr. Akers' total benefit was calculated on the basis of thirty (30) years of service credit, only twenty-six (26) years, six (6) months, and eight (8) days (26.51882 years) of that service accrued during the marriage.

⁶ At the date of separation, Mr. Akers had 26.51882 years of service, all of which had accrued during his marriage to Ms. Jones. Mr. Akers' final average salary was \$40,104.28. Using the annuity calculation formula found in W. VA. CODE § 5-10-22(a) (monthly annuity = years of service multiplied by 2% multiplied by final average salary, divided by twelve (12)), and after applying a reduction factor to account for the joint and survivor annuity based on Ms. Jones' birthday, the Board's calculations show that Ms. Jones would be receiving \$1,529.37 per month.

⁷ This figure assumes a 100% joint and survivor annuity with Ms. Akers as the surviving spouse, and therefore a slightly different reduction factor for the joint and survivor annuity based on her birthday. The years of service and final average salary set forth in footnotes 5 and 6 were used for this calculation.

that she was to be awarded 50%, as well as that portion of his benefits that were not marital property and therefore not subject to diversion by a QDRO at all.

Importantly, Ms. Jones did not need to be named a surviving spouse in order to receive benefits after Mr. Akers' death. The DRO specifically provided that payments to Ms. Jones would continue until the earlier of her death or the cessation of the payment of the Participant's annuity, including survivor payments under a joint and survivor or other optional form of annuity. See June 2009 DRO, ¶ (8). Therefore, pursuant to the terms of the DRO itself, even after Mr. Akers' death, Ms. Jones' payments would have continued because survivor payments were being made to his survivor, Ms. Akers.

The Board must comply with W. VA. CODE R. § 162-1-6.1, which defines for purposes of QDROs that portion of a member's benefits that constitutes marital property. By limiting the amount of a participant's interest that can be awarded by a QDRO, the Legislature has chosen to leave a participant with control over the portion of his or her benefits attributable to service before or after the marriage, as well as the portion of the marital property awarded to the participant. Honoring a DRO that requires the alternate payee to be treated as the surviving spouse eliminates the participant's ability to leave these amounts to other beneficiaries (such as children, a testamentary estate, or subsequent spouses). Accordingly, the Board respectfully requests this Court to affirm the Board's rejection of the June 2009 DRO, on the basis that the DRO could not require that Ms. Jones be named as the surviving spouse of Mr. Akers. To the extent the Court rules upon the Board's April 1, 2011 rejection of the Amended DRO as well, the Board makes the same request.

C. The Board Did Not Err in Refusing To Accept a Posthumous QDRO Because the Board's Governing Statutes and Legislative Rules Contain No Authority For Awarding Benefits Already Vested or Payable to a Different Beneficiary.

On March 7, 2011, Ms. Jones submitted to the Board an Amended DRO, which was entered in December 2010. In addition to rejecting this Amended DRO because it would require that Ms. Jones be named as the surviving spouse, the Board rejected the Amended DRO because it was issued after the death of the participant, Mr. Akers. The Board requests that the Court affirm the Board's rejection of the Amended DRO on this basis, in the event the Court rules on this notwithstanding that the question of the Amended DRO's status was not litigated in the proceedings below.

In PERS, the death of a member triggers a payment of either pre-retirement death benefits or, if the member was retired and had elected one of the two joint survivor annuity options, the payment of a survivor annuity. Pre-retirement death benefits are governed by W. VA. CODE § 5-10-27, while joint survivor annuity options for retirees are governed by W. VA. CODE § 5-10-24. In either case, the death or retirement of a member makes the beneficiary designation and payment irrevocable, except in certain limited circumstances.⁸ *See* W. Va. Code § 5-10-24 (providing, for each joint and survivor annuity option, that upon the death of a retirant who elected such an option, his or her annuity "shall" be continued and paid to the beneficiary nominated by the retirant) and W. VA. CODE § 5-10-27 (providing that upon the death of a member, his or her pre-retirement beneficiary "shall" receive the benefit provided thereunder). The Board submits that, in light of the generally vested and irrevocable nature of benefits after

⁸ A retired PERS member is permitted to revoke a joint and survivor annuity option and replace it prospectively with a straight life annuity if the spouse dies or the member becomes divorced, and similarly is permitted to prospectively elect a joint survivor annuity option if the member subsequently remarries, pursuant to W. VA. CODE § 5-10-24. Mr. Akers' divorce and remarriage occurred prior to his retirement, so these limited exceptions did not apply.

death or retirement, and the absence of any explicit statutory authority to the contrary, the Board cannot accept as a QDRO a DRO that was entered after the death of the participant, particularly where payments are already being made to another beneficiary as mandated by statute.

The Petitioner will no doubt argue that ERISA and/or the Code require the Board to accept a posthumous QDRO. *See e.g. Nat'l City Corp. v. Ferrell*, No. 1:03 CV 259, 2005 WL 2143984 (N.D. W. Va. Sep. 1, 2005) (permitting the posthumous enforcement of a QDRO in a plan governed by ERISA). The decision in *Ferrell* was based on an ERISA statute, 29 U.S.C. § 1056(H)(i), requiring plans to segregate funds for eighteen months while the question of whether a DRO is a QDRO is pending. 2005 WL 2143984, at *4. Pursuant to that statute, at the expiration of the eighteen month period, the plan is required to pay the segregated amounts to the person or persons who would have been entitled to such amounts if there had been no QDRO. 29 U.S.C. § 1056(H)(iii)(II). If during the eighteen month period a DRO is deemed a QDRO, the plan is required to pay the segregated amounts pursuant to the QDRO. 29 U.S.C. § 1056(H)(ii). Finally, even if the DRO is deemed a QDRO after the end of the eighteen month period and the commencement of payments, ERISA requires the plan to grant the alternate payee benefits prospectively. 29 U.S.C. § 1056(H)(iv). Judge Keeley concluded, as have many courts addressing the question, that the eighteen month segregation period did not terminate upon the death of a participant, and that a DRO could be deemed a QDRO after the death of a participant, provided that if this occurred after the end of the eighteen month period, the posthumous QDRO would be enforced on a prospective basis only. *Ferrell*, 2005 WL 2143984, *4-5. Department of Labor regulations issued last year now expressly recognize that posthumous QDROs may be enforced, provided that they otherwise meet the requirements of a QDRO. 29 C.F.R. §§ 2530.206(c), (d).

As was discussed in detail in the Board's previously-filed Response brief, however, PERS and other plans administered by the Board are governmental plans which are not subject to ERISA or the Code's rules regarding QDROs. Thus, the federal statutes upon which the decision in *Ferrell* relied, as well as federal regulations specifically requiring plans to permit posthumous QDROs in certain instances, do not apply to PERS. The Board respectfully requests the Court to rule that the Board's rejection of the Amended DRO is proper, since the Board is not authorized, permitted or required by law to accept a QDRO issued posthumously.

In the event this Court concludes that the Board either may, or must accept a posthumous QDRO, the Board asks the Court to rule that such QDROs would be enforceable prospectively only, and only to the extent the participant has accrued benefits standing to his or her credit in the plan at the time the DRO is received by the Board. The Board lacks the authority to impose a segregation or hold period such as that required for ERISA plans. Permitting a posthumous QDRO to be enforced retroactively could place the Board in the precarious position of having to determine whether to pay benefits to a current spouse or other named beneficiaries, when a participant's ex-spouse could conceivably submit a posthumous QDRO long after such benefits are exhausted. The Board also requests that, should this Court rule that posthumous QDROs may or must be accepted by the Board, that the Court's ruling also recognize that payment under a posthumous QDRO cannot require a reannuitization, or payment of actuarially increased benefits, unless the plan otherwise permits the same, to make clear that posthumous QDROs cannot impact the fiscal soundness of the plans to which they apply.

D. Response to Respondent Judy Vannoy Akers' Motion to Dismiss.

The Board's primary role in this matter is to ensure that its fiduciary duty to the PERS plan and its members and beneficiaries is met by enforcing the terms of the plan.

Therefore, the Board takes no position regarding whether Ms. Akers should or should not be dismissed from this action, whether on grounds of *res judicata* or otherwise. However, the Board does wish to respond to some of the factual allegations and legal arguments made in Ms. Akers' motion to dismiss, to clarify the record and submit for the Court's consideration the Board's interpretation of the statutes and rules it administers.

In her Motion to Dismiss, Ms. Akers claims that she is receiving benefits pursuant to W. VA. CODE § 5-10-27(b)(1), providing for a pre-retirement death benefit. While typically that provision might have applied upon the death of Mr. Akers, because of the unique factual circumstance of Mr. Akers' death during the pendency of his disability retirement application, such disability retirement being later granted, Ms. Akers is actually receiving a disability retirement annuity under W. VA. CODE § 5-10-25, paid in the form of a joint and survivor annuity pursuant to W. VA. CODE § 5-10-24 (W. VA. CODE § 5-10-25 provides that if a disability application is granted, payment of disability retirement benefits shall be computed in accordance with W. VA. CODE § 5-10-22 and the optional form of benefit elections under W. VA. CODE § 5-10-24).

Ms. Akers also claims in her Motion to Dismiss that Ms. Jones is not entitled to relief due to this Court's decisions holding that certain disability payments are not marital property. *See e.g. Grose v. Grose*, 222 W. Va. 722, 671 S.E.2d 727 (2008) (affirming circuit court order holding that disability component of ex-husband's pension received in connection with workplace accident was not subject to equitable distribution, while marital component was); *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005) (reversing the portion of an order of the family court that awarded the wife an equitable share of the husband's disability pension); *see also Conrad v. Conrad*, 216 W. Va. 696, 612 S.E.2d 772 (2005) (holding that courts must make

a case-by-case determination of whether disability payments are marital property, and on the specific facts of the case, finding that the long term disability benefits at issue should be characterized as marital property). This argument is inconsistent with her argument that she is receiving pre-retirement death benefits pursuant to W. VA. CODE § 5-10-27(b)(1), as opposed to disability benefits, discussed immediately above. In any event, the Board submits that it is unclear whether this Court's decisions in *Staton*, *Grose* and similar cases would apply to the situation at hand, even had a valid QDRO been in place.

These cases were decided on the basis of the definition of marital property found in W. VA. CODE § 48-1-233 and prior versions of that statute, governing domestic relations generally. For purposes of benefits in Board-administered pension plans, however, marital property is defined by W. VA. CODE R. § 162-1-6.2. This more specific legislative rule should apply instead of the general definition of marital property found at W. VA. CODE § 48-1-233. *See* Syl. pt. 4, *In re Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (2010) (observing the general rule of statutory construction requiring that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled). The Board has always interpreted its provisions as permitting a QDRO to divide a member's retirement annuity, whether the member became eligible for the annuity through reaching the plan's general age/service requirements, or by meeting the disability retirement definition. In addition, the facts of this case constitute a combination of facts from the *Staton*, *Conrad*, and *Grose* cases referred by to Ms. Akers. Finally, the Board points out that the payment to Ms. Akers may have initiated as a disability retirement, but due to Mr. Akers' death, was converted to a survivor annuity to Ms. Akers; this type of survivor payment has not been addressed by the Court in *Staton*, *Conrad* and *Grose*.

Since no QDRO was entered, the Board submits that this is not truly material to the appeal before the Court currently. Should the Court nonetheless wish to consider the question of whether a QDRO can apply to the payments to Ms. Akers given that Mr. Akers was awarded a disability retirement annuity, the Board requests an opportunity to provide the Court with a supplemental brief on that issue.

V. CONCLUSION

For the foregoing reasons, the Respondent, the West Virginia Consolidated Public Retirement Board, respectfully requests this Court to affirm the June 11, 2010 Order of the Circuit Court of Kanawha County, dismissing the Petitioner, Patricia Jones' Petition for Writ of Mandamus and Complaint for Injunction and Damages.

The West Virginia Consolidated Public Retirement Board

By Counsel,



Lenna R. Chambers (WVSB 10337)
BOWLES RICE McDAVID GRAFF & LOVE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1100
Facsimile: (304) 347-2196
E-mail: lchambers@bowlesrice.com

In the Supreme Court of Appeals of West Virginia

Docket No. 101327

PATRICIA JONES, formerly AKERS,
Plaintiff Below, Petitioner

V.)

Appeal from a final order
of the Circuit Court of Kanawha
County (10-C-746)

**WEST VIRGINIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM, a corporation,
d/b/a WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD; and
JUDY VANNOY AKERS,**
Defendants Below, Respondents

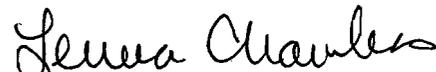
CERTIFICATE OF SERVICE

I, Lenna R. Chambers, counsel for the Respondent West Virginia Consolidated Public Retirement Board, do hereby certify that I have caused copies of the hereto attached **Response Brief** to be served upon:

Anthony R. Veneri, Esquire
Veneri Law Offices
1600 W. Main Street
Princeton, West Virginia 24740

Randal Roahrig, Esquire
1512 Princeton Avenue
Princeton, West Virginia 24740

by placing the same in the regular United States mail postage prepaid on this 6th day of April, 2011.



Lenna R. Chambers (WVSB 10337)

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE