

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

101327

PATRICIA JONES,

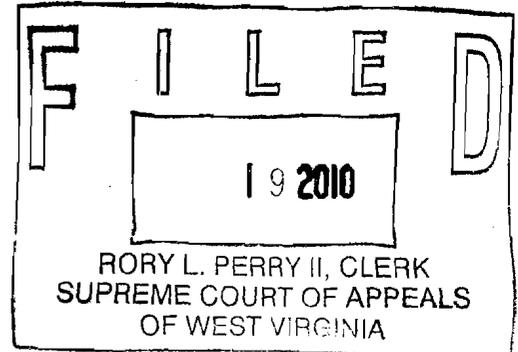
Plaintiff/Petitioner,

v.

WEST VIRGINIA CONSOLIDATED PUBLIC  
RETIREMENT BOARD and JUDY VANNOY  
AKERS

Defendants/Respondents.

From the Circuit Court of Kanawha County  
The Honorable Todd J. Kaufman  
Civil Action No. 10-C-746



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**RESPONSE ON BEHALF OF RESPONDENT WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD TO AMENDED PETITION FOR APPEAL**

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## **I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL**

This appeal is brought by Petitioner Patricia Jones (“Petitioner” or “Ms. Jones”) from the June 11, 2010 Order of the Circuit Court of Kanawha County, West Virginia (J. Kaufman) dismissing the Petitioner’s Petition for Writ of Mandamus and Complaint for Injunction and Damages (the “Complaint”). The Petitioner’s Complaint sought to compel the West Virginia Consolidated Public Retirement Board (“CPRB” or the “Board”) to execute a Domestic Relations Order (“DRO”) entered by the Family Court of Mercer County, West Virginia, on June 4, 2009, in a divorce proceeding involving the Petitioner and Danny K. Akers, a member of a public retirement plan administered by the Board. The Complaint also named as a defendant Judy Vannoy Akers, Mr. Akers’ wife, who began receiving benefits from Mr. Akers’ retirement plan as his duly nominated beneficiary and surviving spouse after his death in December 2009.

The Circuit Court’s June 11, 2010 Order granted the CPRB’s Motion to Dismiss the Complaint, concluding that the Complaint failed to state a claim upon which relief could be granted as required by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The Petitioner appealed the Circuit Court’s final order by filing a Petition for Appeal with the Circuit Court of Kanawha County, West Virginia on or about September 17, 2010. On or about September 23, 2010, the Petitioner filed with the Supreme Court of Appeals of West Virginia a Motion to File Amended Petition for Appeal, along with an Amended Petition. The CPRB does not oppose the Motion to Amend and has responded herein to the Amended Petition, although the Court has not yet ruled upon the Motion.

## II. STATEMENT OF FACTS

In June 2009, the West Virginia Consolidated Public Retirement Board (“CPRB” or the “Board”) received a Domestic Relations Order (the “DRO”) entered by the Family Court of Mercer County, West Virginia (the “Family Court”), in a divorce proceeding<sup>1</sup> involving Danny K. Akers, a member of the Public Employees Retirement System<sup>2</sup> (“PERS”). The DRO, entered by the Family Court on June 4, 2009, purported to set forth the manner in which the CPRB was to divide Mr. Akers’ PERS benefits between himself and his ex-wife, Petitioner Patricia Jones. The DRO was prepared and submitted by counsel for Ms. Jones.

Although a member’s interest in PERS is generally not subject to execution, attachment, garnishment, or other legal process, and is generally not assignable or transferable, in cases of divorce or legal separation, a PERS member’s interest is divisible pursuant to a Qualified Domestic Relations Orders (“QDRO”). W. Va. Code § 5-10-46. The CPRB can only honor a QDRO meeting certain requirements, which are set forth in Legislative Rules. W. Va. Code R. § 162-1-6.2. Thus, the receipt of the DRO triggered CPRB’s obligation, as the administrator of the PERS plan, to review the Order to determine whether it was a “Qualified” Domestic Relations Order that operated to enforce the division of Mr. Akers’ benefits.

The CPRB reviewed the DRO and concluded that it could not be “Qualified” or honored because it contained internally inconsistent provisions. The internally inconsistent provisions, which were incorporated by reference in the Petitioner’s Complaint, provided on the one hand that Mr. Akers could choose any form of benefit allowable by the plan at the time of

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<sup>1</sup> *In re: Marriage of Patricia Akers and Danny K. Akers*, Civil Action No. 06-D-604-EW (Family Court of Mercer County, West Virginia) (hereinafter referred to as the “Divorce Proceeding”).

<sup>2</sup> CPRB is the statutorily-appointed administrator of PERS, along with eight other public retirement plans operating in the State. W. Va. Code § 5-10D-1(a).

his retirement, and on the other hand, directed the CPRB to pay benefits accrued to Mr. Akers in the form of a joint and survivor annuity. The following portions of the DRO contemplated that the form of benefit was to be elected by Mr. Akers at the time of his retirement<sup>3</sup>:

- Paragraph (7)(b), stating that “if, at the time benefit payout commences, the Participant elects a benefit in the form of an annuity, then the VARB shall be the annuitized benefit which would have been available to the Participant as of the [QDRO] Determination Date ... If, at the time benefit payout commences, the Participant elects a return of contributions...”;
- Paragraph (7)(d), providing that “nothing in this Order shall be construed as granting the Alternate Payee any election rights with respect to the form of benefit; rather, the form of benefit at time of payment shall be elected by the Participant”; and
- Paragraph (8), providing that “if the Participant elects to be paid retirement benefits in the form of an annuity, the annuity payable to the Alternate Payee shall continue until the earlier of ...”

The paragraph added to the DRO by the Petitioner, however, provided that the CPRB had to pay Mr. Akers’ benefits as a joint and survivor annuity, effectively eliminating his election rights:

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<sup>3</sup> These are all statements found in the Board’s model QDRO mirroring the language of the PERS Plan itself, which generally grants only participants the right to elect the form of benefit they wish to receive at the time of retirement. See W. Va. Code § 5-10-22(a), which provides for a member to receive a straight life annuity, unless the member elects a joint and survivor annuity or modified joint and survivor annuity as permitted by W. Va. Code § 5-10-24.

- Paragraph (7)(f), providing that “The participant shall designate the Alternative Payee as the surviving spouse or survivor beneficiary of his retirement benefits and he shall elect a joint survivor annuity and name the Alternate Payee as the beneficiary thereof.”

These inconsistent statements directly relate to matters falling within the scope of the Board’s duties and responsibilities as administrator of the PERS Plan. Had the Board accepted the DRO as a “Qualified” DRO, it could have then been subject to competing claims with respect to the form of benefit to be paid to these individuals: Mr. Akers could claim a right to elect the form of benefit of his choosing upon retirement on the basis of the PERS statutes and the three provisions of the QDRO conforming with those statutes, while Ms. Jones could claim CPRB had no choice but to pay pursuant to the joint survivor annuity option on the basis of the paragraph added to the DRO on her behalf.

Because the DRO was ambiguous with respect to the form of benefit, the Board rejected the DRO. By letter dated July 6, 2009, Board staff wrote to the Petitioner’s counsel that the DRO could not be accepted as a QDRO because of the addition of paragraph 7(f), the paragraph containing the statement conflicting with the form of benefit language found in the other provisions of the DRO. This letter was addressed to Petitioner’s counsel, and copies were mailed to counsel for Mr. Akers, as well as Mr. Akers and Ms. Jones themselves. The Petitioner alleged in her Complaint that neither she nor her attorney received this letter, but acknowledged that counsel for Mr. Akers did receive the letter. The DRO itself contemplated that it was the Board, and not the Court, that would ultimately determine whether the DRO was a QDRO, and directed the parties to cure any defect should one be identified by the Board:

In the event that the Plan Administrator does not approve the form of this Order, or should be subsequently determined that

amendment of this Order is necessary to ensure its status as a Qualified Domestic Relations Order, then each party shall cooperate and do all things reasonably necessary to devise a form of Order acceptable to the Plan Administrator consistent with applicable law.

DRO, ¶ (13). Despite this directive, none of the parties to the Divorce Proceeding took any further action with respect to the DRO for more than seven months.

During this interim period, on September 15, 2009, Mr. Akers submitted an application for disability retirement benefits to the Board. Pursuant to the procedural requirements for disability requests, an applicant must submit a report from his own physician, and then must be evaluated by a Board-selected physician. *See* W. Va. Code § 5-10-25 and W. Va. Code R. § 162-2-1, *et seq.* These reports are then considered by a Board staff review committee, a Board committee, and ultimately by the full Board of Trustees, which at each regular meeting, awards or denies disability benefits to applicants who have completed this process. *Id.* Mr. Akers died on December 16, 2009, before the process could be completed, and before he had sufficient years of service to qualify for a non-disability retirement annuity.

Pursuant to Board practice, when a PERS member who has applied for disability benefits dies during the pendency of his application, the Board will continue to process the application and, if the member is found to have been entitled, award a posthumous disability retirement award. This protects surviving spouses of such members, who would otherwise receive nothing or only a distribution of the member's contributions, due only to the member's death prior to the completion of the application process and prior to eligibility for retirement benefits. At its March 3, 2010 meeting, the Board concluded that Mr. Akers was entitled to a disability retirement award retroactive to the date of application, and the posthumous disability benefit was granted to Mr. Akers wife, Judy Vannoy Akers. Due to the failure of the parties to

the Divorce Proceeding to cure the defect in the DRO, the Board had no choice but to pay the benefits to Mr. Akers' surviving spouse and appointed beneficiary, Mrs. Akers.

On January 19, 2010, while the Board was still processing Mr. Akers' disability retirement application, Ms. Jones, through counsel, wrote to the Board to inquire as to the status of payment of Mr. Akers' benefits. By letter dated February 3, 2010, the Board's then-Director explained the internal inconsistency in the DRO and the effect of the parties' failure to cure this defect prior to Mr. Akers' death, which was that no QDRO was in place when Mr. Akers' disability benefits commenced.

By letter dated February 4, 2010, Ms. Jones, through counsel, provided notice to the Board of her intent to sue, as required by W. Va. Code § 55-17-3. The Board responded on February 10, 2009, explaining that the internal inconsistency resulting from the addition of paragraph 7(f) led to the rejection of the DRO. The Complaint at issue in this appeal was ultimately filed on April 21, 2010, after Ms. Jones was denied relief from the Circuit Court of Mercer County<sup>4</sup>, where she sought an injunction prohibiting the CPRB from paying benefits to Mrs. Akers. The instant appeal constitutes Ms. Jones' most recent attempt to avoid the prejudice caused by the parties' failure to correct the error in the DRO. The Complaint did not allege that the CPRB had any duty to comply with the DRO despite the fact that it was rejected; rather, the sole relief sought by the Petitioner was an injunction and a writ of mandamus directing the CPRB to accept the DRO as submitted in June 2009.

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<sup>4</sup> Civil Action No. 10-C-66-OA, *Patricia Jones (formerly Akers) v. Judy Akers, individually and as the Administratrix of the Estate of Danny K. Akers* (Circuit Court of Mercer County, West Virginia).

### **III. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR**

- 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 an Ambiguous or Internally Inconsistent DRO.**
  - 1. The DRO's Provisions Were Internally Inconsistent and Ambiguous.**
  - 2. The Petitioner Has No Right to the Enforcement Of, and The CPRB Has No Duty to Comply With, an Ambiguous DRO.**
  
- B. Whether the QDRO Complied With Other Applicable Law, Absent the Internally Inconsistent Provisions, is Not Yet Ripe for Review.**
  - 1. Neither the Code nor ERISA Apply to the Determination of Whether a DRO is a QDRO for Governmental Plans, or to the Procedure Required of a Governmental Plan Administrator in Accepting or Rejecting DROs.**
  - 2. Whether the QDRO Otherwise Complied With State Law is Not Ripe for Review.**
  
- C. The Petitioner Was Not Entitled To Injunctive Relief Because She Did Not Suffer an Irreparable Injury and Was Not Entitled to Enforcement of the DRO.**

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## V. DISCUSSION OF LAW

The Petitioner has asked this Court to reverse the Circuit Court's dismissal of her Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. This Court reviews a trial court's order granting a motion to dismiss under a de novo standard. Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995); accord Syl. Pt. 2, *Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (2009). "The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint. A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice." *Cantley v. Lincoln County Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007). When ruling on a motion to dismiss, courts are to "construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008). A trial court's dismissal of a complaint is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977).

### 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 an Ambiguous or Internally Inconsistent DRO.**

This Court recently summarized the standards applicable to a petition for mandamus in *State ex rel. Maple Creative LLC v. Tincher*, \_\_\_ W. Va. \_\_\_, 697 S.E.2d 154, 156 (2010):

[T]he purpose of mandamus is to enforce "an established right" and a "corresponding imperative duty created or imposed by law." *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999) (citation omitted). "Mandamus [also] lies to control the action of an administrative officer in the exercise of his

discretion when such action is arbitrary or capricious.” *State ex rel. Affiliated Cons. v. Vieweg*, 205 W. Va. 687, 693, 520 S.E.2d 854, 860 (1999) (quoting Syllabus, *Beverly Grill, Inc. v. Crow*, 133 W. Va. 214, 57 S.E.2d 244 (1949) (additional citations omitted). Finally, in determining the appropriateness of mandamus in a given case, this Court adheres to the following oft-repeated axiom:

A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

This Court has also noted that “[s]ince mandamus is an ‘extraordinary’ remedy, it should be invoked sparingly,” and only “in extraordinary circumstances.” *State ex rel. Crist v. Cline*, 219 W. Va. 202, 208, 632 S.E.2d 358, 364 (2006) (citations omitted).

**1. The DRO’s Provisions Were Internally Inconsistent and Ambiguous.**

The Petitioner’s Complaint sought a writ of mandamus to compel the CPRB to accept the DRO as it was submitted in June of 2009. Complaint, ¶ 17. The Circuit Court concluded that the Petitioner had no clear right to relief, since the CPRB timely reviewed the DRO<sup>5</sup> and identified the DRO’s inconsistency in its response to Ms. Jones rejecting the DRO<sup>6</sup>. The DRO itself was incorporated by reference into the Complaint, and therefore was available to and properly reviewed by the Court in ruling on the CPRB’s Motion to Dismiss.<sup>7</sup> See Complaint, ¶ 9, incorporating the DRO at Exhibit C.

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<sup>5</sup> See Complaint, ¶ 11, alleging that the CPRB rejected the QDRO on or about July 6, 2009.

<sup>6</sup> See Complaint, ¶ 11, alleging that the CPRB’s rejection letter explained that the rejection occurred because of the addition of paragraph (7)(f), and incorporating the rejection letter into the Complaint at Exhibit E.

<sup>7</sup> Thus, contrary to the argument made at Section V (p. 16) of the Petition, it must be presumed that the Circuit Court did review the DRO before issuing a decision.

The DRO was ambiguous and inconsistent on its face. This Court has held that “[c]ontract language is considered ‘ambiguous’ where an agreement’s terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.” Syl. pt. 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002). The inconsistencies referred to by the Circuit Court resulted from Ms. Jones’ failure to modify the language found in the model DRO to comport with the language she inserted into the DRO in an attempt to compel the CPRB to pay Mr. Akers’ retirement benefits using the joint and survivor annuity method.

The model DRO was drafted in contemplation of the many PERS provisions that permit the participant to choose, at the time he retires, the form of benefit he wishes to receive. *See e.g.* W. Va. Code § 5-10-22 (providing for a “default” form of benefit of a straight life annuity) and W. Va. Code § 5-10-24 (permitting the participant to elect, in lieu of a straight life annuity, a 100% joint and survivor annuity or a modified 50% joint and survivor annuity); see also W. Va. Code R. § 162-1-6.2.3 (wherein the Legislative Rules governing QDROs provide that all QDROs shall adopt the “shared payment approach”, pursuant to which the Alternate Payee receives his or her portion of the marital property at the same time and in the same manner as is elected by the Participant). Thus, paragraphs (7)(b), (7)(d) and (8) of the model DRO, all of which were incorporated verbatim into the DRO submitted by the Petitioner, referred to a participant’s option to elect from among several forms of payment. Paragraph (7)(f), on the other hand, which was added by Ms. Jones, directed the CPRB to pay the benefits pursuant to the joint and survivor annuity method. The addition of paragraph (7)(f), without any changes to the model DRO language, created an inconsistency on the face of the DRO.

The tension between these provisions is even more apparent when considered in light of CPRB's duties and responsibilities as the administrator of PERS. As the plan administrator, it would be CPRB which would have received and processed Mr. Akers' application for retirement, and which would have been called upon to determine whether Mr. Akers could choose from among all of the forms of benefit typically available to PERS members, or whether he had no choice at all. While the Petitioner has argued that the addition of this provision imposed no additional duties on the CPRB, it was ultimately the CPRB that would be interpreting and enforcing the DRO, and which could have been subject to competing claims from Mr. Akers and Ms. Jones as to the proper form of benefit payable upon his retirement. Despite the cursory allegation in the Complaint that these provisions were not inconsistent, see Complaint, ¶ 25, there is a clear basis for the Circuit Court to have concluded that a conflict existed.

That paragraph (7)(f) was added pursuant to the Divorce Decree's direction to require Mr. Akers to appoint Ms. Jones as the beneficiary for a joint and survivor annuity does not render the DRO any less ambiguous. The Petitioner did not allege that the CPRB was supplied with a copy of the Divorce Decree when reviewing the DRO, nor should the CPRB have been required to consider the Divorce Decree when reviewing whether the DRO complied with applicable requirements. The QDRO is the exclusive method authorized by statute for the division of PERS benefits, a Legislative decision which ensures that notice is provided to the plan of any agreement impacting the administrator. *Cf. Metropolitan Life v. Pettit*, 164 F.3d 857, 864 (4th Cir. 1998) (in considering proper beneficiary for life insurance policy, refusing to hold plan administrator liable for failing to make payments based on contract external to beneficiary designation held by the plan, because to do so would impact plan relationships based on "outside

agreements of which the administrator will likely be unaware.”) and *McPhee v. Maine State Ret. Sys.*, 980 A.2d 1257, 1264 (Me. 2009) (holding that the director of a governmental retirement plan was neither permitted nor required by statute to consider the intent of the parties expressed in a settlement agreement or divorce judgment separate from a QDRO when reviewing the enforceability of the QDRO). From the CPRB’s point of view, the DRO was unable to be enforced in the form in which it was submitted.

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

There is no factual dispute as to the language the DRO contained. Rather, the question before the Circuit Court as a result of the Complaint was whether the Petitioner had a right to the enforcement of this DRO, or alternatively stated, whether the CPRB had a duty to accept it?

As was discussed in more detail above, the problem with the inconsistent provisions in the DRO is that it could have subjected the CPRB to competing claims at the time of Mr. Akers’ retirement. This is the very reason that the Legislative Rule governing the QDRO procedures gives CPRB, as plan administrator, the authority to determine whether such an order should be honored. W. Va. Code R. § 162-1-6.2; *cf.*<sup>8</sup> *Trustees of the Directors Guild of America-Producer Pension Benefits v. Tise*, 234 F.3d 415, 420 (9th Cir. 2000) (holding that plan administrators have “primary responsibility” for determining whether a DRO is a QDRO. This explains why the Legislature has provided such specific requirements for QDROs in the CPRB’s Legislative Rules. As described by the Ninth Circuit Court of Appeals in the context of ERISA

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<sup>8</sup> As is discussed in more detail below in Section B. 1., ERISA and the Code do not apply to governmental plans directly; however, to the extent these provisions are in some ways similar to those governing CPRB, judicial opinions issued in the ERISA and Code context may still be instructive.

plans, the specificity requirements reduce the expense of administering a plan “by sparing plan administrators the grief they experience when because of uncertainty ... they pay the wrong person, or arguably the wrong person, and are sued by a rival claimant.” *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1149 (9th Cir. 2000) (citation omitted); see also *Williams v. Williams*, 50 F. Supp. 2d 951, 957 (C.D. Ca. 1999) (describing the “central concern” in a QDRO evaluation as “whether an administrator would be confused or subject to litigation in implementing a plan”).

Plan administrators are the appropriate body to make the initial determination as to the enforceability of a DRO, as a plan’s administrator is familiar with the terms of the plan, and it is the administrator that must ultimately give effect to the DRO in the context of the plan. The CPRB, well aware of the many statutory and other provisions providing the participant the option to elect a form of benefit of his choosing upon retirement, and of the impact that choice has on the amount of benefit ultimately paid out, foresaw the potential for this conflict, and determined that the appropriate course of action was to reject the DRO and ask the parties to submit another DRO without the conflicting provisions. The Circuit Court correctly concluded that, taking the Petitioner’s allegations regarding the substance of the DRO as true, no cause of action in mandamus could lie to force the CPRB to accept the DRO submitted by the Petitioner in June 2009.

The Petitioner claims that the CPRB was required to accept the DRO because it substantially complied with applicable requirements; however, the only case cited by the Petitioner addressed this obligation in the context of minor deficiencies found in a DRO. In *Metropolitan Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2nd Cir. 2002), the Second Circuit Court of Appeals held that a judgment order was a QDRO, notwithstanding that it failed to specify the

names and addresses of the participant and the alternate payees or the name of the plans to which it applied, relying on precedent stating that as long as an order is “specific enough to substantially comply with ERISA,” and “no essential information is lacking,” it should be considered a QDRO. The DRO submitted by Ms. Jones is ambiguous and unclear with respect to information that is vital to the CPRB’s duties as administrator - the form of benefit to be used when paying Mr. Akers’ benefits. Unlike the deficiencies at issue in *Bigelow*, this was not a rejection based on form over substance.

The right to the enforcement of a QDRO does not accrue unless and until the plan administrator actually determines that a DRO is Qualified (or, stated in the terms used by the Legislative Rule applicable to PERS, until the administrator determines that the QDRO meets the requirements of the Rule and should be “honored”). In enacting W. Va. Code § 5-10-46, the Legislature declared that QDROs are the exclusive method for assigning a plan participant’s interest to another individual.<sup>9</sup> Faced with a Complaint seeking the enforcement of a DRO that was deficient and unacceptable on its face, the Circuit Court had no choice but to conclude that no cause of action was stated, because pursuant to governing statutes, the CPRB was prohibited from giving effect to the DRO.

Although not raised in her Complaint, the Petitioner seems to make an argument that the Court should have granted her relief through equitable remedies, citing *Perkins v. Prudential Life Ins. Co. of Am.*, 455 F. Supp. 499 (S.D. W. Va. 1978). In *Perkins*, the District Court held that when a judicial decree or agreement required an insured to designate or change a

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<sup>9</sup> In *State ex rel. Dep’t of Health and Human Resources v. W. Va. Pub. Employees Ret. Sys.*, 183 W. Va. 39, 393 S.E.2d 677 (1990), this Court held that the Family Obligations Enforcement Act of 1986, created an additional exception to this statutory protection for purposes of greater enforcement of support orders in favor of children and spouses. The Petitioner has not identified a similar statute which would create an exception for the division of marital property in a divorce proceeding.

beneficiary under an insurance policy and the insured failed to do so, an equitable assignment arose in favor of the person designated by the judicial decree as the beneficiary. *Id.* at 501. Aside from the fact that this basis for relief was not asserted in her Complaint, this argument should now fail because, unlike the life insurance policy at issue in *Perkins*, the statutes governing PERS specifically provide that a member's interest in that plan can only be assigned to another by virtue of a QDRO meeting the specific requirements of W. Va. Code R. §§ 162-1-6, *et seq.*

This Court has held that DROs “must contain specific instructions and directives to the plan administrator” in order to be correct and enforceable. *Chenault v. Chenault*, 224 W. Va. 141, 146, 680 S.E.2d 386, 391 (2009). Simply put, the Circuit Court ruled that Petitioner could not force the CPRB to accept a DRO that clearly failed to meet this standard. While the Petitioner's Complaint asserted that the DRO substantially complied with Federal and State requirements, the Circuit Court ultimately concluded that the Board's rejection was proper because of the internally inconsistent provisions found in the DRO. Thus, even if all of the other allegations in the Petitioner's Complaint were taken as true for purposes of considering the Motion to Dismiss, the Circuit Court's dismissal had a valid basis and should be affirmed.

**B. Whether the QDRO Complied With Other Applicable Law, Absent the Internally Inconsistent Provisions, is Not Yet Ripe for Review.**

**1. Neither the Code nor ERISA Apply to the Determination of Whether a DRO is a QDRO for Governmental Plans, or to the Procedure Required of a Governmental Plan Administrator in Accepting or Rejecting DROs.**

As the Amended Petition concedes, it is clear that governmental plans are exempt from ERISA's QDRO provisions. *See e.g. Brown v. City of Fairmont*, 221 W. Va. 541, 655

S.E.2d 563 (2007). However, PERS is also exempt from the Internal Revenue Code's (the "Code") provisions governing the substance of QDROs.<sup>10</sup>

Code Section 401(a)(13) generally prohibits assignment and alienation of benefits provided under a "qualified" plan; however, Code Section 401(a)(13)(B) establishes special rules for domestic relations orders meeting requirements set forth in Code Section 414(p). Code Section 414(p)(9) contains an express exception for plans to which Code Section 401(a)(13) does not apply - this includes governmental plans. *See* Code Section 401(a) (providing that paragraph (13) of Code Section 401(a) shall apply only to plans to which Code Section 411 (relating to minimum vesting standards) applies, and Code Section 411(e)(1), providing that Code Section 411 does not apply to governmental plans); *see also In re Marriage of Burns*, 903 S.W.2d 648, 652 (Mo. App. E.D. 1995). The Code does "recognize" QDROs in governmental plans for purposes of income tax liability for plan participants and alternate payees. Code Section 414(p)(11) provides that, for purposes of Title 26 of the United States Code, a distribution or payment from a governmental plan shall be treated as made pursuant to a QDRO if it is made pursuant to a DRO creating or recognizing the existence of an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under a plan. Thus, if a DRO is treated as a QDRO by a governmental plan, the alternate payee will be taxed on the amount if the distribution is in the same manner as an alternate payee receiving a distribution from an ERISA plan. *See* 26 U.S.C. § 402(a)(9).

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<sup>10</sup> In *Brown v. City of Fairmont*, the parties "appear[ed] to agree" that the QDRO at issue was governed by the Code. *Brown*, at 567, 545. Accordingly, this Court applied the Code's provisions to the QDRO in that case. CPRB does not agree that the Code applies to the Petitioner's QDRO, as the Code expressly exempts governmental plans from its QDRO provisions.

Because of this exemption, whether the DRO submitted by Ms. Jones met the QDRO requirements set forth in Code Section 414(p)(2) and (3) is not directly relevant to whether the CPRB's rejection of the DRO was valid. Given the similarities between CPRB's Legislative Rule governing QDROs and the requirements for QDROs in ERISA and Code-governed plans, the CPRB does often look to ERISA and the Code, and cases decided thereunder, for guidance in implementing its responsibilities with respect to QDROs; however, this guidance is not binding and cannot be applied blindly, as the laws are not identical. For example, in *Trustees v. Tise*, 234 F.3d at 421-3 and *National City Corp. v. Ferrell*, No. 1:03 CV 259, 2005 WL 2143984 at \* 4-6 (N.D. W. Va. Sept. 1, 2005), relief was based in large part on the interpretation of an ERISA statute requiring a plan to segregate funds during the time period in which the question of whether a DRO is a QDRO is at issue, and further providing that if a valid QDRO is not issued until after the close of that period, payments to the alternate payee can be made prospectively only. There is no similar statute or legislative rule governing PERS.

Although not directly applicable, these cases do raise the question of whether Ms. Jones could obtain relief by obtaining and submitting an amended DRO which does comply with all applicable laws and resolves the internal ambiguity, and if so, whether that relief would be prospective only or whether she would be entitled to all or a portion of the payments already made to Mrs. Akers; however, in the absence of a statute similar to 29 U.S.C. § 1056, providing for an 18-month review period for a DRO and the segregation of funds during that period, it would appear that the benefits vested in Mrs. Akers at the time Mr. Akers' disability application was granted. *Cf. Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153 (4th Cir. 1997) (holding that surviving spouse benefits vested in participant's spouse on date he retired, and that DRO issued after that date could not be a QDRO because it no longer related to the

benefits of a participant, but rather a beneficiary). Moreover, it should be noted that Ms. Jones has not attempted to submit a revised DRO, and did not in her Complaint or Petition allege she should be able to do so in order to obtain relief.

Although federal law does not specify the substance of the QDRO requirements for governmental plans, there are potentially significant implications under federal law if a governmental plan fails to operate in accordance with its own QDRO procedures. The failure of a plan “qualified”<sup>11</sup> under Code Section 401(a) to comply with its own terms can potentially lead to significant adverse tax consequences for all members of a plan; accordingly, the qualified status of PERS is implicated by any request to pay benefits contrary to the manner set forth in governing statutes.

**2. Whether the QDRO Otherwise Complied With State Law is Not Ripe for Review.**

The Circuit Court did not make any conclusions with respect to whether, absent the conflicting provisions, the DRO otherwise complied with State law; therefore, even if this Court determines that the DRO should not have been rejected on the basis of the internal inconsistencies, the only relief the Petitioner is entitled to is a remand to Circuit Court for consideration of the additional issues raised in the Petitioner’s Complaint. Among the other legal issues potentially raised by the DRO, which have not yet been addressed by the Circuit Court, are: whether a DRO can eliminate a PERS member’s ability to elect the form of benefit of

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<sup>11</sup> Federal law establishes a series of requirements which, if followed, allow an employer to deduct annual contributions for a retirement plan participant and allow the participant to defer the tax on those contributions. In addition, a qualified trust holding assets of a qualified plan is allowed to accrue earnings on the plan assets tax-free until withdrawn by the participant at retirement, or in some cases, even later. Plans like CPRB-administered plans that meet the applicable requirements of the Internal Revenue Code (“IRC”) and the Employee Retirement Income Security Act of 1974 (“ERISA”) are referred to as “qualified” plans, meaning that they qualify for this favorable tax treatment.

his choosing upon retirement, and whether a DRO can require a PERS member to appoint only his or her ex-spouse for purposes of pre- and/or post-retirement survivor benefits.

The answers to these questions are less than clear. For example, at least one other court has concluded that a DRO cannot operate to eliminate a member's options with respect to the form of benefit under a public retirement plan. *Beddell v. Beddell*, No. 2008 CA 00292, 2009 WL 4263631 at \*3 (Ohio App. 5 Dist. Nov. 23, 2009). Like PERS, the plan considered in *Beddell* did not otherwise permit an alternate payee to decide what type of benefit a member could elect; rather, the statutes permitted the member to choose from various annuities or a lump sum payment. With respect to that plan, the Court of Appeals of Ohio held that a DRO could only provide for a division of the funds paid to the member pursuant to the option he or she elected. Thus, if the conflicting provisions of the DRO addressing the form of benefit payable are ignored and the DRO is construed to provide for a mandatory joint and survivor annuity, consideration of the DRO's qualified status should be remanded for a determination of whether the DRO could effectively eliminate Mr. Akers' form of benefit options under the PERS plan, given the statutory requirement that he be afforded the option of his choice.

Moreover, the DRO's attempt to restrict Mr. Akers from appointing any other beneficiary for purposes of surviving spouse benefits may also be prohibited under governing law. The Legislative Rules governing PERS and other CPRB-administered plans limit the portion of a member's retirement account which is subject to division by a DRO. W. Va. Code R. § 162-1-6.2.1 provides that the marital property portion of a member's retirement account is calculated based on the following formula: the Vested Accrued Retirement Benefit or "VARB" of the member (defined as the benefit due to the member as of a date specified in the DRO which is either the date of separation or the date of divorce), less all benefits due to Exempt Service

(such as certain military service or accumulated sick or annual leave), divided by a fraction, the numerator being the years of contributing service incurred during the marriage, and the denominator being the total number of years of service incurred as of the date of separation or divorce. W. Va. Code R. § 162-1-6.2.

The DRO submitted by the Petitioner required Mr. Akers to appoint only Ms. Jones as the surviving spouse for purposes of all of his pre- and post-retirement death benefits. The effect of this, which is what is sought by the Petitioner in her appeal, is to award all of the benefits payable from Mr. Akers' PERS account to the Petitioner after his death, rather than only the 50% specified in the Divorce Decree. While the Petitioner correctly notes that State law contemplates that a QDRO may operate to prohibit a member from changing the type of annuity he or she is receiving upon divorce, see W. Va. Code § 5-10-24, this provision applies only to individuals who have actually retired and are already receiving retirement benefits. In those cases, it may be necessary for the ex-spouse to continue to be treated as the only surviving spouse in order to receive the percentage specified in the divorce decree since benefit payment has already begun prior to the divorce. There are no such statutory provisions contemplating this in the context of a divorce prior to the time retirement benefits commence.

Until the Circuit Court has had an opportunity to consider and rule upon these issues, they are not ripe for review on appeal to this Court. Accordingly, CPRB requests that, should the Court determine that there is no ambiguity in the DRO with respect to the form of benefit to be awarded, the matter be remanded to the Circuit Court for further consideration of the DRO's compliance with the terms governing the PERS plan.

**C. The Petitioner Was Not Entitled To Injunctive Relief Because She Did Not Suffer an Irreparable Injury and Was Not Entitled to Enforcement of the DRO.**

Although the Petition asks the Court to reverse the Circuit Court's June 11, 2010 Order because it failed to address whether the Petitioner was entitled to injunctive relief, this Court is free to affirm the order under independent grounds. *Brown v. City of Fairmont*, 221 W. Va. 541, 547, 655 S.E.2d 563, 568 (2007) (citing *W. Va. Human Rights Comm'n v. Garretson*, 196 W. Va. 118, 468 S.E.2d 733 (1996)). Moreover, the review of a circuit court's decision to grant or deny a motion to dismiss is plenary; this Court need not be wed to a lower court's rationale, and may rule on any alternate ground manifest in the record. *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996). Because such grounds exist in this case, the CPRB respectfully requests this Court deny the Petition and affirm the June 11, 2010 Order of the Circuit Court of Kanawha County dismissing the Petitioner's Complaint.

With regard to claims for injunctive relief, this Court has held that:

The granting or refusal of an injunction, whether mandatory or prohibitive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

Syl. Pt. 2, *Camden-Clark Memorial Hospital Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002); see also Syl. Pt. 4, *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E.154 (1932).

As described by this Court, the balancing test requires a consideration of: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. *Camden-Clark*, 212 W. Va. at 756.

As CPRB argued in its Motion to Dismiss, the Petitioner was not entitled to injunctive relief because her Complaint did not allege an irreparable injury. The harm alleged by the Petitioner is the payment of Mr. Akers' PERS benefits to Judy Vannoy Akers. This harm does not satisfy the requisite standard. In order to establish an "irreparable injury," a plaintiff must establish an injury that is unlikely to be made whole by an award of monetary damages or some other legal remedy. 42 Am. Jr. 2d Injunctions § 33. Monetary damages would have clearly made the Petitioner whole had she prevailed in the mandamus action. In fact, the payment of money to the Petitioner is at the very heart of this case. Accordingly, even though the Circuit Court's June 11, 2010 Order did not expressly dismiss her Complaint for Injunctive Relief, CPRB asks this Court to deny the Petition on the independent grounds that Petitioner's Complaint did not allege an irreparable injury.

In addition, the Petitioner is not entitled to injunctive relief because, as is discussed above in Sections A, B and C, the Petitioner has no right to the enforcement of a DRO containing a significant internal inconsistency. Having not stated an underlying claim for mandamus relief, the Petitioner's Complaint for Injunctive Relief should have been dismissed as well.

**VI. RELIEF PRAYED FOR**

Respondent, the West Virginia Consolidated Public Retirement Board, respectfully requests that this Court deny the Petition for Appeal submitted by Petitioner Patricia Jones, and affirm the Circuit Court's June 11, 2010 Order dismissing her Complaint.

The West Virginia Consolidated Public Retirement Board

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PATRICIA JONES,

Plaintiff/Petitioner,

v.

WEST VIRGINIA CONSOLIDATED PUBLIC  
RETIREMENT BOARD and JUDY VANNOY  
AKERS

Defendants/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 to Amended Petition for Appeal on Behalf of Respondent West Virginia Consolidated Public Retirement Board** 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 19th day of October, 2010.

  
Lenna R. Chambers (WVSB 10337)