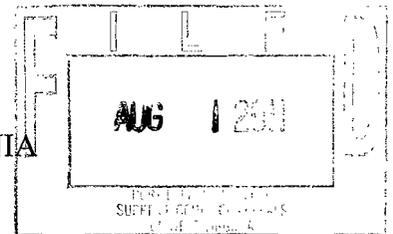


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 11-0748

RONALD J. HICKS,
ROBERT J. CLAUS, JR.,
BENSON B. FLANAGAN,
and TERRY NICHOLS,
on their own behalves and on
behalf of retired West Virginia
State Troopers similarly situated,

Plaintiffs below, Petitioners,

v.

(Civil Action No. 10-C-1502)
(Kanawha County Circuit Court)

ERICA M. MANI, Director, West Virginia
Consolidated Public Retirement Board;
WEST VIRGINIA CONSOLIDATED PUBLIC
RETIREMENT BOARD, a West Virginia
state agency and public corporate body;
COLONEL TIMOTHY S. PACK,
Superintendent, West Virginia State Police;
WEST VIRGINIA STATE POLICE, a West
Virginia state agency and public corporate body;
and STATE OF WEST VIRGINIA,

Defendants below, Respondents.

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I. ASSIGNMENTS OF ERROR

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II. STATEMENT OF THE CASE

(1) PROCEDURAL HISTORY

This is the petition for appeal of a March 30, 2011, Order of the Circuit Court of Kanawha County, Honorable James Stucky, denying the petitioners' request for equitable relief.

Petitioners filed this action on August 23, 2010, requesting an injunction and/or declaratory judgment brought on behalf of West Virginia State Troopers who had previously been awarded a disability pension by the West Virginia Consolidated Public Retirement Board and requested certification of a class for similarly situated troopers. Petitioners requested that the Circuit Court below enter an order, *inter alia*, enjoining the respondents from suspending the petitioners' vested benefits and require continued payment until full and meaningful opportunity to be heard.

In lieu of a substantive answer, the defendants filed a motion to dismiss asserting lack of jurisdiction claiming primarily that the petitioners were required to exhaust their administrative remedies and, therefore, the circuit court lacked jurisdiction in this matter.

The hearing on the petition and the defendant's motion to dismiss was held on November 22, 2010. At that hearing, the Court heard arguments on the motion to dismiss and, therefore, did not take any evidence. Petitioners asserted that the administrative process was inadequate because (a) it forces the disabled troopers to go without needed benefits while proceeding through the lengthy administrative and appeals process; (b) it allows and depends upon the CPRB deciding whether its own actions and rules are improper, something it is not going to do; and (c) an administrative proceeding is not the proper venue to challenge the constitutionality of the application of a statute or rule, as administrative hearing examiners are quasi-judicial officers that traditionally do not declare statutory applications as unconstitutional. Petitioners argued below that requiring them to file an administrative appeal to the body which had already prepared and submitted legislative rules allowing the unconstitutional misconduct would be futile and cause petitioners irreparable harm. Furthermore, petitioners asserted that because of a new rule enacted by the CPRB, the disabled troopers in the class are being improperly forced to re-litigate their disability claims *each year* without any just cause for review. Therefore, even if they win after first termination of their benefits by the Board after months of litigation during the appeals process, they will just have to start the process all over again with the next year review, effectively precluding a reinstatement of their benefits by virtue of procedural hurdles, making the remedy inadequate and in violation of what the legislature intended when it enacted the statutes under which the petitioners' rights vested.

The Circuit Court below dismissed the case on a motion to dismiss before any discovery or presentation of evidence, and denied the petitioners the relief requested, not because the petitioners' substantive arguments were incorrect, but because it incorrectly held that it lacked jurisdiction because the petitioners had failed to exhaust administrative remedies. (A.R. 102-104.)

Petitioners file the instant petition for an appeal of the circuit court order and respectfully request this Honorable Court accept and grant their Petition for Appeal, reverse the trial court's order and further order that the relief requested by petitioners, as discussed *infra*, be granted

(2) STATEMENT OF FACTS

Petitioners, Ronald J. Hicks, Robert J. Claus, Jr., Benson B. Flanagan, and Terry Nichols, for and on their own behalf and on behalf of other disabled West Virginia State Troopers similarly situated filed the instant action. Petitioner Ronald J. Hicks is 57 years of age, and was employed as a West Virginia Trooper by the West Virginia State Police on June 5, 1978¹. While he was on duty on April 15, 1989, he was shot. Another trooper was shot and killed during the incident. He is right-handed, and his right arm was almost essentially shot off and had to be surgically re-attached. Since the incident, he has had more than a dozen surgeries involving over 100 procedures in a three and one-half year period. He was disabled as a result of this incident and was awarded a permanent total disability pursuant to Chapter 15, Article 2 of the West Virginia Code, and, pursuant to that Code provision, he remains permanently and totally disabled and thereby entitled to the disability retirement benefits provided for therein. At the time of the hearing below, he had been ordered to appear for an examination by the Consolidated Public Retirement Board's hired doctor. (A.R. 1-17 at ¶ 1.)

¹ Therefore, the benefits in place under the 1974, 1977 and 1994 versions of W.Va. Code §15-2-31 are applicable to Mr. Hick's claim, as well as the other petitioners herein.

Petitioner Robert J. Claus, Jr., was employed as a West Virginia State Trooper on January 7, 1985. On or about October 27, 1990, he was injured when a drunk driver intentionally struck him with his car after a high-speed chase. He had severe back injuries and had spinal surgery at Ruby Memorial Hospital on December 18, 1990. He attempted to return to work, but was unable to perform the function of a West Virginia State Trooper. He had surgery at Roanoke Memorial Hospital in July 1992. Subsequently, he went to Johns Hopkins University Hospital where the only option was a surgery, which gave him only a 10% survival rate. Mr. Claus was determined to be permanently and totally disabled, and he was retired permanently disabled on July 17, 1992. He likewise was ordered to appear for an examination by the Consolidated Public Retirement Board's hired doctor. (A.R. 1-17 at ¶ 2.)

Petitioner Benson B. Flanagan was employed as a West Virginia State Trooper on June 5, 1978. He was injured as a result of an automobile accident involving a bank robbery in progress. He suffered spinal injuries in the wreck. He has already had two surgeries and three more are planned. He was awarded a permanent disability on March 10, 1999. Mr. Flanagan has had two surgeries and will require three more surgeries. He had been ordered to appear for an examination by the Consolidated Public Retirement Board's hired doctor. (A.R. 1-17 at ¶ 3.)

Petitioner Terry Nichols was employed as a West Virginia State Trooper on October 6, 1986. As a result of the conditions of his employment, he suffered a severe hearing loss, which evidence showed was irreversible and progressive, as well as an aggravation or exacerbation of a heart condition. Mr. Nichols suffered duty-related disability and was awarded a permanent partial disability award on October 17, 2007, which was ordered by the Circuit Court of Pleasants County, West Virginia. He has been ordered to appear for an examination by the Consolidated Public Retirement Board's hired doctor. (A.R. 1-17 at ¶ 4.)

Clay R. Hupp, putative class member, had been employed as a West Virginia State Trooper for 22 years. As a result of conditions of his employment, he suffered severe hearing loss, which was determined to be a duty-related disability. He was adjudicated disabled and awarded a partial disability pension on December 1, 1999. It is well known that hearing loss of the type sustained by Mr. Hupp is irreversible and, therefore, does not improve, but can be progressive. Nevertheless, he had been ordered to appear for an examination by the Consolidated Public Retirement Board's hired doctor and, as petitioner explained to the Court at the time of the hearing, he had received notice dated November 5, 2010 that his benefits were to be terminated on December 1, 2010, without the opportunity for a hearing or proper due process prior to the termination. (A.R. 52.) While he can and did file an administrative appeal, his benefits, his property, are being taken in the meantime without due process. (A.R. 106-113.)

All petitioners and others similarly situated have been subjected to medical examinations that may or will result in imminent termination of their disability benefits prior to any hearing. (A.R. 1-17 at ¶¶ 36-45.)² In some of these cases, troopers have been found long ago to have disabilities that do not improve and, if anything, are progressive, for example in the case of noise induced hearing loss discussed above. These troopers are being reevaluated by a physician who deemed herself medical director of the West Virginia State Police and who is regularly employed by the West Virginia State Police and the Board, and who is, therefore, not a neutral evaluator. In those cases, the evidence did not show that the disabling condition had improved, since that is not medically possible. Instead, the Board's doctor said that she did not believe the trooper was ever disabled, a finding that is clearly in violation of concepts of *res judicata*.

² Subsequent to the hearing, other members of the putative class have had their vested disability benefits terminated prior to an opportunity for hearing, including George Denkins.

In addition, the process the Board is using is devoid of important protections the trooper had available during the initial evaluation of his disability. For example, during the initial assessment of his disability, a trooper has the right to submit treating physician forms and opinions to counter the forms and opinions of the Board's doctor. If the forms and opinions conflict, the disabled trooper has the right to request that he be examined by a third doctor, perhaps one with more specialized knowledge. Under the reevaluation practices the Board is currently using, there is no mention of the right to a third examination. Whatever the Board's doctor says is simply accepted and benefits terminated based solely on that one opinion.

This type of conduct is unprecedented in the history of the disability for state troopers. Petitioners know of no time that a trooper has been cut off from disability benefits in this manner. There is a reason for this. In the law that existed at the time these troopers began working for and continued to serve the State of West Virginia until being found disabled, if a disabled trooper was determined to be no longer disabled, the statute required that he be returned to work, without qualification. *See* W.Va. Code § 15-2-31 (1977, 1994). (A.R. 53-55.) The state could ill afford to risk the safety of the officers and the general public by placing a physically compromised trooper back to work. However, in 2009, long after the petitioners had been awarded benefits and long after their rights had vested, the legislature changed the law and omitted the section of the statute that required that the disabled troopers found no longer disabled be returned to work. *See* W.Va. Code § 15-2-31 (2009).

Under the law that existed at the time of the petitioners' service, the troopers had a fall back if they lost their disability status -- they had the unqualified right to be put back to work and have a job to support themselves and their family and would have attendant medical insurance benefits. With the 2009 version of the statute, when cut off, the disabled troopers in the class

here risked being dumped with nothing, since the 2009 statutory change does not mandate their reemployment. This is a significant, substantive change in the law. This Court has made it crystal clear that retroactive, substantive changes to state trooper benefits are prohibited by our state constitution. Therefore, the application of the 2009 version of the statute by the CPRB would be clearly unlawful.

To complicate matters further, after the actions of the Board and decision by the court below, the legislature showed its displeasure by amending the statute during the 2011 session. The 2011 version, which will be discussed below, states that the trooper will be placed back to work if he is found not disabled, but only if he meets certain, ill-defined standards that give wide discretion to the superintendent to decide whether or not to put the trooper back to work. The issue is not moot, however, because it is unclear what version of the statute will be applied to the disabled troopers in the class. In addition, even if the 2011 version of the statute is applied to the troopers in the class, this would not moot the issue because it is more restrictive of the rights of the troopers to be put back to work than the 1994 version, in place when the troopers' rights vested.

Even if the Board could legally retroactively apply the 2009 or the more restrictive parts of the 2011 version of the law to the petitioners, which they cannot, they are doing it without affording the petitioners any due process *before* taking their benefits, in further contravention of our constitution.

III. SUMMARY OF ARGUMENT

The petitioners filed this action on behalf of similarly situated disabled state troopers and themselves for injunctive and declaratory relief because their vested disability pensions were subject to being taken from them before any opportunity to be heard, in violation of established

precedent and their due process rights. Second, the CPRB was retroactively applying to the disabled troopers a 2009 version of a statute which made substantive, detrimental changes to their rights, in violation of established legal doctrine. Third, the CPRB enacted a new rule which required the disabled trooper to be automatically evaluated, without any just cause for review, every year for the first five years. Therefore, even if they won after the lengthy administrative appeals process, they would have to start the process all over again, effectively precluding an award of benefits for the first five years, which is a further violation of their due process rights and a wrongful deprivation of their vested rights and benefits. The new rule also placed an improper burden upon disabled troopers to obtain their own medical records for the Board's doctor on short notice and threatened termination of benefits if they could not comply, which contradicts the applicable statute, which puts that duty on the Board, not the trooper.

The circuit court improperly held that it lacked jurisdiction to hear the case, not because the petitioners' substantive arguments were incorrect, but because the petitioners were required to exhaust their administrative remedies. The circuit court decision was erroneous because the members of the class stood to suffer immediate and irreparable harm if forced to proceed through the lengthy appeals process because they would have to go without benefits upon which to live and, for some, suffer a loss of attendant medical insurance to treat their disabilities during the appeal process. Even if they won their appeal, they would have to start the process all over again the next year and be subject to being cut off again because there is no requirement that there be just cause for another review. The circuit court decision was erroneous because it is futile to ask the Board to declare its own actions and rules unconstitutional or unlawful. The circuit court decision was erroneous because it is futile to request an administrative hearing examiner to declare a statute or rule unconstitutional because the hearing examiners maintain that they lack

jurisdiction to do this and, in fact, held exactly that in the case of one of the putative class members who is now embroiled in the administrative process. For these reasons, the circuit court had jurisdiction to and should have granted the petitioners injunctive and declaratory relief.

As a result of the circuit court's decision, the petitioners and the class are left without an adequate remedy. Because of the danger of immediate and irreparable harm, this Honorable Court has jurisdiction not only to reverse the Circuit Court Order, but to rule substantively on the petitioners' requests for injunctive and declaratory relief. Therefore, the petitioners on behalf of the class, request that this Honorable Court (1) reverse the order below and find that the circuit court had jurisdiction to decide the petition and should have exercised that jurisdiction, (2) order that the CPRB reinstate and continue the petitioners' and class members' benefits until they have had a full opportunity to be heard, (3) order that the CPRB shall not retroactively apply the 2009 version of the statute at issue to troopers whose benefits vested prior to its enactment, (4) order that the disability statute at issue be declared unconstitutional because it contains no provision for just cause for a review and termination of vested disability benefits, and (5) order that the CPRB rule requiring automatic, yearly review violates the intent of the statute and declare it invalid as an unconstitutional deprivation of the petitioners' vested rights.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be set for Rule 20 argument since it is a case involving issues of fundamental constitutional and public importance. Any decision in this case could have significant precedential value in the interpretation of the statutes and rules at issue in this and other cases, and in defining or clarifying the jurisdictional authority of the Courts and of quasi judicial officers.

V. ARGUMENT

(1) **STANDARD OF REVIEW**

In the recent case of *M & J Garage and Towing, Inc. v. West Virginia State Police*, 709 S.E.2d 194, 198 (W.Va. 2010), this Court reiterated that the standard of review for a motion to dismiss under West Virginia Rule of Civil Procedure 12(b)(1), concerning lack of jurisdiction, and Rule 12(b)(6), concerning the failure to state a claim is *de novo*. (Citing syl. pt. 2 of *State ex rel. McGraw v. Scott Runyan Pontiac–Buick*, 194 W.Va. 770, 461 S.E.2d 516 (1995): “Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*,” and Syl. pt. 1, *Lontz v. Tharp*, 220 W.Va. 282, 647 S.E.2d 718 (2007); syl. pt. 1, *Rhododendron Furniture & Design v. Marshall*, 214 W.Va. 463, 590 S.E.2d 656 (2003)). “In fact, appellate review is *de novo* of both an order granting a motion to dismiss and the entry of a declaratory judgment.” *M & J Garage* at 198, citing Syl. pt. 1, *Randolph County Board of Education v. Adams*, 196 W.Va. 9, 467 S.E.2d 150 (1995); syl. pt. 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995).

In the case of *Associated Press v. Canterbury*, 224 W.Va. 708, 712, 688 S.E.2d 317, 321 (2009), this Court discussed the standard of review for injunctive relief:

[i]n reviewing the exceptions to the findings of fact and conclusions of law supporting the granting [or denial] of [an] ... injunction, we will apply a three-pronged deferential standard of review. We review the final order granting [or denying] the ... injunction and the ultimate disposition under an abuse of discretion standard, we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law *de novo*. Citing Syl. pt. 1, *State v. Imperial Mktg.*, 196 W.Va. 346, 472 S.E.2d 792 (1996). *Accord Weaver v. Ritchie*, 197 W.Va. 690, 693, 478 S.E.2d 363, 366 (1996).

In this case, the circuit court ruled on a motion to dismiss on the pleadings without any discovery or taking of evidence and without making any findings of fact, presumably making only a ruling of law regarding jurisdiction. Therefore, the denial of injunction in this case is reviewed *de novo*.

(2) **POINTS OF LAW**

1. “A “property interest” includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.’ Syl. Pt. 3, *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977).” *Id.*, at Syl. Pt. 15.

2. The West Virginia Supreme Court of Appeals has held that “the State’s promise results in the recruitment of many state troopers, who, although they may not attain the rank of Captain, may nevertheless complete twenty years service and receive substantial retirement payments.” *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167, 183 (1994).

3. “The State’s employment system for state troopers, then, not only results in a smooth recruitment of troopers, but also resembles the compensation system of the armed forces of the United States.” *Id.*

4. “Employees join the ranks early, complete their service during their most productive years, and then leave the system. By providing pensions, the State clearly entices troopers to remain in the government's employ, and it is the enticement that is at the heart of employees’ constitutionally protected contract right after substantial reliance not to have their own pension plan detrimentally altered.” *Id.*

5. “If the State (or its political subdivisions) promise to defer salary benefits until a person’s retirement from State (or local) employment, and then promises to pay those deferred salary benefits in the form of a pension, the State (or its political subdivisions) cannot eliminate this expectancy without just compensation once an employee has substantially relied to his or her detriment. To permit otherwise would be tantamount to allowing the State (or its subdivisions)

to steal a car an employee might have purchased had he or she not been required to allow part of the wage fund to be diverted to pension funding.” *Id.*

6. “Thus, when a public employee has devoted substantial service to the state that translates into substantial detrimental reliance, the State must provide just compensation for any pension expectancy it eliminates.” *Id.*

7. “Unfortunately, the state troopers, secretaries, school service personnel, teachers, highway workers, maintenance employees, assistant prosecuting attorneys and other ordinary state and local workers are not sophisticated politicians who expect their government to lie to them.” *Id.*, at 183-4.

8. “[T]hose workers believe the promises and organize their lives in the expectation that their government and their employer will treat them honorably. In these circumstances, the rules cannot be changed after employees have substantially relied to their detriment.” *Id.*, at 184.

9. “The cynosure, then, of an employee's *W.Va. Const.* art. III, § 4 contract right to a pension is not the employee's or even the government's contribution to the fund; rather, it is the government's *promise to pay.*” *Id.*

10. “Upon attaining eligibility, workers expect to collect their pensions, and their contracts do not condition these benefits upon actuarial soundness of the system. Consequently, the funding of any pension program is the legislature's problem--not the state employees'-- and once the legislature establishes a pension program, it must find a way to pay the pensions, at least to those persons who have substantially relied.” *Id.*

11. “[T]he pension rights of *all* current plan members who have substantially relied cannot be detrimentally altered at all, and that any alterations to keep the trust fund solvent must

be directed to the infusion of additional money.” *Id.*, at 185. *See also*, Syl. Pt. 3, *Adams v. Ireland*, 207 W.Va. 1, 528 S.E.2d 197 (1999).

12. “‘Detrimentially alter’ means the legislature cannot reduce the existing benefits (including such things as medical coverage) of the pension plan or raise the contribution level without giving the employee sufficient money to pay the higher contributions.” *Id.*

13. Benefits associated with State Trooper retirement pensions are a constitutionally protected contract right that cannot be taken or detrimentally altered at all without stringent due process and without just compensation once an employee has substantially relied to his detriment. *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816, 828 (1988). *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167, 183 (1994). *See also*, Syl. Pt. 3, *Adams v. Ireland*, 207 W.Va. 1, 528 S.E.2d 197 (1999).

14. “[P]olice officers are uniquely susceptible to injuries in the line of the duty and that the physical requirements of their work necessarily means they are more likely to suffer disabling injuries, the Legislature promised police officers that if they became disabled, they would be provided a disability pension. Essentially, disability pension benefits are a part and parcel of a mandatory benefit package promised to police officers at the time of their employment.” *Board of Trustees of Police Officers Pension and Relief Fund of City of Wheeling v. Carenbauer*, 211 W.Va. 602, 607-09, 567 S.E.2d 612, 617-19 (2002).

15. “‘The doctrine of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility. Syl. Pt. 1, *State ex rel. Bd. of Educ. v. Casey*, 176 W.Va. 733, 349 S.E.2d 436, 437(1986).” Syl. Pt. 2, *Beine v. Bd. of Ed. of Cabell County*, 181 W.Va. 669, 383 S.E.2d 851 (1989).

16. The general rule of exhaustion of administrative remedies is inapplicable where there is a lack of agency jurisdiction or the constitutionality of the underlying statute is being challenged. *State ex rel. Arnold v. Egnor*, 166 W.Va. 411, 421, 275 S.E.2d 15, 22 (1981); *Mounts v. Chafin*, 186 W.Va. 156, 411 S.E.2d 481 (1991). See also, 4 K. Davis, *Administrative Law Treatise* §§ 26:1, 26:4 (2d ed. 1983); 2 Am.Jur.2d *Administrative Law* §604 (1962); 73 C.J.S. *Public Administrative Law & Procedure* § 41 (1983). The Court has held that “the rule which requires the exhaustion of administrative remedies is inapplicable where no administrative remedy is provided by law.” Syl. Pt. 2, *Daurelle v. Traders Federal Savings & Loan Ass’n of Parkersburg*, 143 W.Va. 674, 104 S.E.2d 320 (1958).

(3) ASSIGNMENTS OF ERROR

A. THE TRIAL COURT ERRED IN FINDING THAT IT LACKED JURISDICTION TO DETERMINE THAT TROOPERS’ DISABILITY BENEFITS ARE A VESTED PROPERTY RIGHT THAT CANNOT BE TAKEN WITHOUT DUE PROCESS.

The West Virginia State Constitution provides protection for public pension participants independent of the federal constitution’s contract clause. *W. Va. Const.* art. III, § 4. The West Virginia Supreme Court has made findings of fact and law which preclude the actions taken by the respondents and hold that the benefits associated with State Trooper retirement pensions (which includes disability pensions at issue here), are a constitutionally protected contract right that cannot be taken or detrimentally altered at all without stringent due process and without just compensation once an employee has substantially relied to his detriment. *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816, 828 (1988). *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167, 183 (1994). See also, Syl. Pt. 3, *Adams v. Ireland*, 207 W.Va. 1, 528 S.E.2d 197 (1999). “[P]olice officers are uniquely susceptible to injuries in the line of the duty and that the physical

requirements of their work necessarily means they are more likely to suffer disabling injuries, the Legislature promised police officers that if they became disabled, they would be provided a disability pension. Essentially, disability pension benefits are a part and parcel of a mandatory benefit package promised to police officers at the time of their employment.” *Board of Trustees of Police Officers Pension and Relief Fund of City of Wheeling v. Carenbauer*, 211 W.Va. 602, 607-09, 567 S.E.2d 612, 617-19 (2002).

The West Virginia Supreme Court of Appeals explained the policy and purpose of the disability pension and the protections it affords: “These troopers are charged with protecting the life, liberty and property of our citizens, and this Court takes judicial notice that law enforcement is a physically demanding and dangerous occupation.” Rule 201, *W. Va. Rules of Evidence.*” *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167, 173-4 (1994). “Law enforcement is dangerous. Injuries and loss of life are inherent in the occupation. In order to protect the public as well as themselves, therefore, law enforcement officers must necessarily have certain characteristics. They must be agile, strong, flexible, resilient and have great stamina—all qualities associated with youth.” *Id.*, at 182. “Because the State understands this, the State seeks to recruit young persons for employment as state troopers. Until 1994, *W.Va. Code* 15-2-7(c) [1985] provided, in part, that ‘[e]ach applicant for appointment shall be a person not less than twenty-one nor more than thirty years of age, of sound constitution and good moral character; shall be required to pass such mental examination and meet other requirements as may be provided for in regulations promulgated by the cadet selection board; and shall be required to pass such physical examination as may be provided for in regulations promulgated by the retirement board: . . .’” *Id.*

Our highest court has explained the promises made to troopers create contractual, vested property rights: “When the legislature structures the state troopers’ pension system to allow for retirement before age fifty, the legislature encourages suitable candidates to forego other employment opportunities today for real pension benefits tomorrow.” *Id.* “[T]he State’s promise results in the recruitment of many state troopers, who, although they may not attain the rank of Captain, may nevertheless complete twenty years’ service and receive substantial retirement payments.” *Id.*, at 183.

Likewise, the Court has expressly determined that those vested property rights apply to disability benefits: “[P]olice officers are uniquely susceptible to injuries in the line of the duty and that the physical requirements of their work necessarily means they are more likely to suffer disabling injuries, **the Legislature promised police officers that if they became disabled, they would be provided a disability pension. Essentially, disability pension benefits are a part and parcel of a mandatory benefit package promised to police officers at the time of their employment.**” *Board of Trustees of Police Officers Pension and Relief Fund of City of Wheeling v. Carenbauer*, 211 W.Va. 602, 607-09, 567 S.E.2d 612, 617-19 (2002).

Petitioners have a vested property right in the disability pension benefits they have been awarded as stated in *Booth*, *Carenbauer* and *Waite*. Those benefits may not be taken without due process of law afforded by our constitution. It is undisputed that the newly amended procedures that were being utilized by the Board allow petitioners’ benefits to be taken by respondents *before* the petitioners have an opportunity for a hearing. This is improper and the Board should be ordered to continue the vested disability benefits until a full and meaningful opportunity to be heard.

B. THE TRIAL COURT ERRED IN FINDING THAT IT LACKED JURISDICTION TO DETERMINE THAT

**SUBSTANTIVE CHANGES IN THE LAW ARE BEING
IMPROPERLY AND RETROACTIVELY APPLIED TO
PETITIONERS AND ARE THEREFORE
UNCONSTITUTIONAL.**

The petitioners in the class risk imminent harm by having substantive changes in the law applied to their claims. The applicable statute in effect when the petitioners were hired and performed substantial work and upon which they relied is W. Va. Code, Chapter 15, Article 2, Section 31, enacted in 1947, and amended in 1977 and 1994, which 1994 version states that, if a disability pensioner's benefits are terminated, *the board shall order such member to reassume active duty as a member of the division.* The 1994 version states as follows:

The consolidated public retirement board may require any member who has been or who shall be retired with compensation on account of disability to submit to a physical and/or mental examination by a physician or physicians selected or approved by the board and cause all costs incident to such examination including hospital, laboratory, X-ray, medical and physicians' fees to be paid out of funds appropriated to defray the current expense of the division, and a report of the findings of such physician or physicians shall be submitted in writing to the consolidated public retirement board for its consideration. **If from such report or from such report and hearing thereon the retirement board shall be of opinion and find that such disabled member shall have recovered from such disability to the extent that he or she is able to perform adequately the duties of a member of the division, the board shall order such member to reassume active duty as a member of the division** and thereupon all payments from the death, disability and retirement fund shall be terminated. If from the report or the report and hearing thereon, the board shall be of the opinion and find that the disabled member shall have recovered from the disability to the extent that he or she is able to engage in any gainful employment but unable to adequately perform the duties required as a member of the division, the board shall order the payment, in monthly installments of an amount equal to two thirds of the salary, in the case of a member retired under the provisions of section twenty-nine of this article, or equal to one half of the salary, in the case of a member retired under the provisions of section thirty of this article, excluding any compensation paid for overtime service, for the twelve-month employment period preceding the disability: Provided, That if the member had not been employed with the division for twelve months prior to the disability, the amount of monthly salary shall be annualized for the purpose of determining the benefit. [Emphasis added.]

Thus, under this version of the statute, the trooper has an unqualified right to be returned to work. The above statute as amended in 2009, provides as follows:

The board may require any retirant who has been retired with compensation on account of disability to submit to a physical and/or mental examination by a physician or physicians selected or approved by the board and cause all costs incident to the examination including hospital, laboratory, X-ray, medical and physicians' fees to be paid out of funds appropriated to defray the current expense of the agency and a report of the findings of the physician or physicians shall be submitted in writing to the board for its consideration. **If, from the report or from the report and hearing on the report, the board is of the opinion and finds that the disabled retirant has recovered from the disability to the extent that he or she is able to perform adequately the duties of a law-enforcement officer, the board shall order that all payments from the fund to that disabled retirant be terminated.** If, from the report or the report and hearing on the report, the board is of the opinion and finds that the disabled retirant has recovered from his or her previously determined probable permanent disability to the extent that he or she is able to engage in gainful employment but remains unable to adequately perform the duties of a law-enforcement officer, the board shall order the payment, in monthly installments of an amount equal to two thirds of the salary, in the case of a retirant retired under the provisions of section twenty-nine of this article or equal to one half of the salary, in the case of a retirant retired under the provisions of section thirty of this article, excluding any compensation paid for overtime service, for the twelve-month employment period immediately preceding the disability award: *Provided*, That if the retirant had not been employed with the fund for twelve months immediately prior to the disability award, the amount of monthly salary shall be annualized for the purpose of determining the benefit.

As such, the 2009 statute eliminates entirely the troopers' right to be returned to work if his disability benefits are terminated. To complicate matters further, after the actions of the Board and decision by the court below, the legislature showed its displeasure by amending the statute during the 2011 session. That version, effective on June 8, 2011, is as follows:

(a) The board may require any retirant who has been retired with compensation on account of disability to submit to a physical and/or mental examination by a physician or physicians selected or approved by the board and a report of the findings of the physician or physicians shall be submitted in writing to the board for its consideration. All medical costs associated with the examination shall be paid by the fund. **If, from the report or from the report and hearing on the report, the board is of the opinion and finds that the disabled retirant has**

recovered from the disability to the extent that he or she is able to perform adequately the duties of a law-enforcement officer, the board shall within five working days provide written notice of the finding to the Superintendent of State Police, who shall reinstate the retirant to active duty as a member of the department at his or her rank or classification prior to the disability retirement within forty-five days of the finding, unless the retirant declines to be reinstated, is found by a background check to be ineligible for reinstatement, or is found by the Superintendent to be unacceptable due to the retirant's performance history and evaluations during prior work with the department. The Superintendent shall promptly notify the Board when the retirant is reinstated, is found ineligible for reinstatement due to a background check or unacceptable prior performance history or evaluations, or refuses reinstatement. The board shall order disability payments from the fund to be terminated at the earlier of the date of the retirant's reinstatement, regular retirement, failure of a background check, finding of unacceptable prior performance history or evaluation with the department, failure to accept reinstatement or forty-five days from the board's finding. If, from the report or the report and hearing on the report, the board is of the opinion and finds that the disabled retirant has recovered from his or her previously determined probable permanent disability to the extent that he or she is able to engage in gainful employment but remains unable to adequately perform the duties of a law-enforcement officer, the board shall order the payment, in monthly installments of an amount equal to two thirds of the salary, in the case of a retirant retired under the provisions of section twenty-nine of this article or equal to one half of the salary, in the case of a retirant retired under the provisions of section thirty of this article, excluding any compensation paid for overtime service, for the twelve-month employment period immediately preceding the disability award: *Provided*, That if the retirant had not been employed with the fund for twelve months immediately prior to the disability award, the amount of monthly salary shall be annualized for the purpose of determining the benefit.

(b) A disability retirant who is returned to active duty as a member of the West Virginia State Police shall again become a member of the retirement system in which he or she was originally enrolled and the retirant's credited service in force at the time of retirement shall be restored.

Acts 1947, c. 66; Acts 1977, c. 149; Acts 1994, c. 135; Acts 2005, c. 201, eff. April 9, 2005; Acts 2007, c. 150, eff. June 8, 2007; Acts 2011, c. 159, eff. June 8, 2011.

The 2011 statute eliminates the immediate cut off of benefits based upon the Board's doctor's examination (which is what was done to the putative class members here) and postpones it for 45 days, and requires that certain classes of troopers be put back to work. Unfortunately, the amendment does not address all of the problems and constitutional issues raised by petitioners

herein because (1) it is different (and more restrictive to petitioners' rights) than the versions that were in place when the petitioners' rights vested because it creates all of these qualifiers that allow the Superintendent discretion to decide who will be offered reinstatement based upon poorly defined or undefined criteria; (2) it does nothing to help those disabled troopers whose benefits are cut off before a hearing and who truly cannot return to work because their benefits will be cut off in 45 days; (3) it still does not require that the trooper be allowed opportunity to be heard before his vested benefits are terminated; and (4) it is unclear based upon prior actions by the Board which version of the statute it will apply to petitioners' claims. Therefore, the 2011 statute also contains substantive changes in the law. So even if the 2011 version of the statute is applied to the troopers in the class, this would not moot the issue because it is more restrictive of the rights of the troopers to be put back to work than the 1994 version, in place when the troopers' rights vested. In addition, the issue is not moot because it is unclear what version of the statute will be applied to the disabled troopers in the class.

Under the pre-2009 and 2011 law that should apply to petitioners' claims, if the Board determined that the trooper was no longer disabled, the state was required to put them back to work without qualification. However, under the 2009 amendments, if the Board's doctor decides the retiree is capable of "gainful employment" and the CPRB agrees, then the retiree is cut off from any future benefits (again *before any hearing*), and the West Virginia State Police is *not* required to put them back to work. This is a significant, substantive change. Even under the 2011 amendment, the trooper does not have an unqualified right to be returned to work, also a significant, substantive change.

The disabled troopers in the class were issued cut off letters by the CPRB without any order restoring them to their former duty. To the extent the CPRB was applying the 2009

version, or intends to apply the detrimental portions of the 2011 statute to petitioners, *Booth*, *Carenbauer* and *Waite* make it very clear that respondents cannot do this.

Under the pre-2009 and 2011 law, a disabled trooper relied on the fact that, if he lost his disability pension, he had the unqualified right to be provided a job with pay and medical insurance to support himself and his family. Troopers are not eligible for state Workers' Compensation or Social Security disability benefits, so their disability pension is all they have.

What is clear is that *any* statute that detrimentally alters substantive rights cannot be retroactively applied. The circuit court should have declared as much to prevent immediate and irreparable harm to the petitioners and the class.

C. THE TRIAL COURT ERRED IN FINDING THAT THE COURT LACKED JURISDICTION TO DETERMINE THAT THE RESPONDENTS WERE EMPLOYING AN IMPROPER REVIEW PROCESS WHICH IS UNCONSTITUTIONAL.

In 2008, the West Virginia Consolidated Public Retirement Board adopted a regulation, W.Va.C.S.R. §162-9-13, as follows:

At least once each year during the first five years following the retirement of a member on account of disability, as provided in this rule, and at least once in each three-year period thereafter, the Board may require a disability retiree, who has not attained age sixty years, to undergo a medical examination to be made by or under the direction of a physician designated by the Board. If the disability retiree refuses to submit to the medical examination in any period, his or her disability annuity may be discontinued by the Board until his or her withdrawal of the refusal. If the refusal continues for one year, all of his or her rights in and to his or her annuity may be revoked by the Board. If upon medical examination of a disability retiree, the physician reports to the Board that the retiree is physically able and capable of resuming employment, his or her disability annuity shall terminate: Provided, That the Staff Review Committee, the Board's Review Committee and the full Board concur with the report of the physician: Provided, however, That after the member attains age fifty years, the Board may require the medical examination only once in each five year period thereafter.

This rule change putatively gives the CPRB the authority to order each and every retiree to undergo *annual* re-examinations by a doctor of its choice without any sort of just cause for a

review for the first five years. None of petitioners were determined to be *temporarily* disabled, but, due to their injuries and disabilities, were found and adjudicated to fit the definition of *permanent* disability. Even if permanent does not mean permanent, no evidence was submitted to the CPRB, which indicated that the petitioners' circumstances have changed and no good cause or reason exists to require petitioners to re-submit to examination and to re-litigate the previous findings by the West Virginia court system and boards that they met the requirements of being permanently disabled. The petitioners should not be compelled to re-litigate their permanent disability under the original statutes, rules and regulations since the same is barred due to collateral estoppel, waiver and *res judicata*. **Regardless, in essence, the new rule requires that the petitioners re-litigate their disability claims yearly, which is a substantive change. Since it takes on average over a year to get through the administrative appeals process, and the Board does not have to show a change in circumstances or cause to have another review the following year, the new regulation amounts to a complete preclusion of an award of disability benefits for the first five years, since, even if the trooper wins, by the time he wins, he has to start all over again.**

While the language of the statute is not express with regard to the review process, implied in notions of due process is a requirement that there be just cause before a disabled trooper with a vested property right be subject to a review of his claim. In addition, these examinations are very invasive and personal, and since the physician is hired by the respondents, the disabled worker feels as if the physician is hostile to his interests.

Second, the CPRB, without justification or basis, unilaterally issued orders compelling petitioners and at least 25 other retired members to appear before a physician hired by the CPRB

and to submit to a medical examination. The letter issued to the retirees receiving either total or partial disability is set forth below:

Our records reflect that you are currently receiving a total [or partial] duty disability retirement benefit from the West Virginia State Police Death, Disability, and Retirement Fund (Plan A). In accordance with WV Code § 15-2-31 and WVCSR § 162-9-13, your disability status must be recertified by a medical examination in order for you to continue receipt of your disability retirement benefits. The recertification should occur at least once each year for the first five years following disability retirement, and at least once in each three-year period thereafter. After you reach age 50, the medical recertification is required only once in each five year period until age 60. A medical recertification will no longer be required after you reach age 60.

Please contact the office of Dr. Marsha Bailey at (304) 757-0270 within 10 days of your receipt of this correspondence to arrange for the scheduling of a medical examination. You will not be billed for the cost of the examination. **It is your responsibility to provide medical records specifically related to the basis for your disability retirement award at least 10 days prior to your examination to:**

Dr. Marsha Bailey
Occupational and Environmental Health, PLLC
1203 Hospital Drive
Suite 1203
Hurricane, WV 25526

Pertinent medical records include, but are not limited to:

- a. Consultation reports from specialists (orthopedic surgeons, neurosurgeons, internists, pulmonologists, psychiatrists, etc.)
- b. Reports of operation or "op reports"
- c. Reports related to X-ray, MRI, nerve conduction studies, electromyelograms and pulmonary function (Actual films are not necessary)
- d. Most recent reports (2 or 3) from the treating physician, even if he/she is your family doctor

If, from the report of the physician, the board is of the opinion that you have recovered from the disability to the extent that you are able to perform adequately the duties of a law-enforcement officer, the board shall order the termination of your disability retirement benefits. If the board is of the opinion that you have recovered to the extent you are able to engage in gainful employment, but remain unable to perform the duties of a law-enforcement officer, your disability retirement award will be reduced to an amount paid in monthly installments, equal to 2/3 of the salary you earned during the twelve-month employment period immediately preceding your disability award, excluding compensation paid for overtime service (WV Code § 15-2-31).

Remember: It is imperative that you provide a copy of your medical records related to the basis of your disability retirement at least 10 days

prior to your examination to the above physician. Ask your medical provider what records to send if you are unsure, as he or she will know what records are important. Please do not send illegible hand written reports, and medical records should not be forwarded to the Consolidated Public Retirement Board. If you are unable to arrange for the records to be provided to the examining physician's office ten days before your appointment, you must contact Dr. Bailey's office for your examination to be rescheduled. Failure to be reexamined will result in the suspension and potential termination of your disability benefit pursuant to WVCSR § 162-9-13. **Please be aware that your PEIA insurance coverage will be affected if your disability retirement benefit is suspended or terminated.**

If you have any questions regarding this matter, you may contact me at the above telephone number.

Sincerely,

/s/ Deana Gose

Uniformed Services Manager

deana.l.gose@wv.gov

(A.R. 1-17 at ¶ 36.) [Emphasis added.]

That letter required, *inter alia*, that it was the disabled troopers' responsibility to provide medical records specifically related to the basis for your disability retirement award at least 10 days prior to the examination to the Board's hired doctor. Thus, while the statute mandates that all costs of any examinations shall be borne by the department, all petitioners and retirees are ordered according to the appointment letter to obtain and provide medical records and appear before the physician chosen by the CPRB, who is also the regularly employed physician of the WVSP and, therefore, is not independent of the State of West Virginia. Petitioners do not have all of their records, many records have been destroyed, and some medical providers either cannot or refuse to produce some of the documents as quickly as the CPRB demands and may never be found and produced, making it unfair and incomplete. In addition, many providers charge hefty fees for medical records and require a particular process be followed, which the petitioners are required to pay in order to comply with the respondents' process. If the petitioner does not comply, he faces a termination of his benefits. This entire burden is improperly placed upon the disabled trooper. Furthermore, the letters improperly requiring the disabled trooper to obtain his

medical records was not appealable, so the petitioners had no administrative remedy for respondents' conduct in this regard, other than to seek the help of the court.

Moreover, the Board's doctor called many putative class members before the appointment, asked them about their disability, and instructed them to obtain only certain records from certain providers. Thus, while the decision of the Board's doctor is supposed to be neutral and based upon the entirety of the medical information available, she is picking and choosing the records she wants to use, in contravention of the Board's letter to the disabled trooper. She has berated and yelled at another putative class member during his examination, who was disabled in part due to psychological issues. None of these issues can be brought by the disabled trooper to the attention of a reviewing body *before* his benefits are terminated.

Some disabled troopers have been found to have disabilities that do not improve, as explained above in the example of hearing loss. These troopers have been adjudicated as disabled from working as a trooper based upon that condition. However, there is no requirement that there be just cause for a reevaluation. Then evidence shows that the trooper's condition has not improved, but the doctor believes he was never disabled because hearing loss should not be a basis for disability. This violates concepts of *res judicata*.

In summary, the respondents are employing an improper review process by virtue of a regulation that respondents enacted, which amounts to a complete preclusion of an award of disability benefits for the first five years, since, even if the trooper wins, by the time he wins, he has to start all over again, which amounts to a substantive change not intended by the statute and because the Board does not have to show cause for the reevaluation. This constitutes a deprivation of due process. In addition, the regulation requires that the disabled retirees bear the

burden to obtain their own medical records or risk having their benefits cut off, which violates the language of the applicable statute.

Therefore, the trial court should have granted petitioners' relief and ordered that petitioners are entitled to a fair process that complies with minimal due process.

D. THE COURT ERRED IN FINDING THAT THE COURT LACKED JURISDICTION BECAUSE THE PETITIONERS HAD FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES BECAUSE THE ADMINISTRATIVE REMEDY WAS FUTILE AND INADEQUATE AND THE PETITIONERS STOOD TO SUFFER IMMEDIATE AND IRREPARABLE HARM.

Petitioners are at risk to have their vested pension benefits terminated without an opportunity for a pre-termination hearing. The only doctor who is involved in the process prior to termination is a doctor hired by the West Virginia Consolidated Public Retirement Board, who deems herself the medical director of the West Virginia State Police, who is regularly retained by the West Virginia State Police and who is not qualified to decide disability on all medical issues.

The trial court's decision to require petitioners to wait and file appeals, which traditionally take years to process, in front of the very Board whose procedures petitioners are objecting to and further ask that the Board rule the statutes and procedures of the Board and the West Virginia Legislature unconstitutional, is futile and not required by the doctrine of exhaustion of administrative remedies.

“The doctrine of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility. Syl. Pt. 1, *State ex rel. Bd. of Educ. v. Casey*, 176 W.Va. 733, 349 S.E.2d 436, 437(1986).” Syl. Pt. 2, *Beine v. Bd. of Ed. of Cabell County*, 181 W.Va. 669, 383 S.E.2d 851 (1989). The Court has also recognized that the general rule of exhaustion of administrative remedies is inapplicable where there is a lack of agency jurisdiction

or the constitutionality of the underlying statute is being challenged. *State ex rel. Arnold v. Egnor*, 166 W.Va. 411, 421, 275 S.E.2d 15, 22 (1981); *Mounts v. Chafin*, 186 W.Va. 156, 411 S.E.2d 481 (1991). *See also*, 4 K. Davis, *Administrative Law Treatise* §§ 26:1, 26:4 (2d ed. 1983); 2 Am.Jur.2d *Administrative Law* §604 (1962); 73 C.J.S. *Public Administrative Law & Procedure* § 41 (1983). Finally, the Court has held that “the rule which requires the exhaustion of administrative remedies is inapplicable where no administrative remedy is provided by law.” Syl. Pt. 2, *Daurette v. Traders Federal Savings & Loan Ass’n of Parkersburg*, 143 W.Va. 674, 104 S.E.2d 320 (1958).

The petitioners are subject to being cut off from disability benefits (and as a result, medical insurance) *before* a hearing. As a result, petitioners could be without benefits upon which to live and without medical insurance to treat their service related disabilities. They will have to do this for months or years while litigating their disability claims (again) through the administrative appeal process. Because of the regulation enacted recently, by the time that litigation is done, they will have to submit to another examination by the Board’s hired doctor and start the process all over again because the new regulation requires yearly review. Thus, petitioners have no *adequate* remedy at law. Petitioners will suffer irreparable harm without benefits upon which to live and medical insurance to treat their service-related disabilities unless this Honorable Court enjoins and restrains respondents from enforcing their directives and orders and carrying out the intended acts to discontinue petitioners’ disability benefits.

In addition, the application of a 2009 statute, W.Va. Code §15-2-31, to petitioners is unconstitutional because that statute substantively changes vested rights of the petitioners. An administrative proceeding is not the proper venue to challenge the constitutionality of the application of a statute, as administrative hearing examiners are quasi-judicial officers that

traditionally do not declare statutory applications as unconstitutional. That determination is within the purview and jurisdiction of the circuit court to decide. Therefore, the administrative appeal process is or will be fruitless, also showing that the remedy is inadequate.

The futility of the administrative appeal process is illustrated in the case of putative class member, Clay R. Hupp.³ (A.R. 106-113.) Specifically, in the Circuit Court, part of the basis for the petitioners' request for extraordinary relief was that the Board's hearing examiners traditionally took the position that they did not have the authority to rule on constitutional issues such as those raised by the petitioners and, therefore, the administrative process did not provide an adequate remedy to the petitioners. Following the Order of the Circuit Court, Clay Hupp, one of the petitioners in the underlying case, had no choice but to proceed through the administrative process.

As a result of the Administrative Process, Hearing Officer Jack Debolt prepared a recommended decision. That decision addressed several issues, but one issue was the petitioners' motion to stay pending opportunity to be heard, which was based upon the petitioners' assertion that the Board was retroactively applying substantive changes to petitioners' vested rights. (A.R. 107-113.) In that recommended decision, the Hearing Officer essentially ruled that he was without authority to rule on constitutional issues raised by the petitioners because he was without authority to declare a statute unconstitutional. The Board adopted the decision of the hearing examiner. (A.R. 106.) In other words, the Circuit Court below ruled that the petitioners' constitutional issues would need to be dealt with in the administrative process, and then the hearing examiner in the administrative process ruled that he

³ The Circuit Court never reached the issue of class certification because it dismissed the case before any discovery or argument on the issue. Nevertheless, the case of Clay Hupp and his pending termination of benefits was brought to the Circuit Court's attention at the oral argument on the motion to dismiss.

was without jurisdiction to decide petitioners' constitutional issues. Thus, these orders show that the petitioners are entirely without an adequate remedy as a result of the Circuit Court's Order.

The respondents argued below that they are simply trying to bring the State Trooper pension plan in line with every other pension plan of other state employees and the troopers should be treated no differently than any other state pensioner. First of all, there is no evidence in the record to show that other state disability pensioners are being similarly treated, and the petitioners do not concede that respondents' unsupported statement is accurate. Even if true, troopers *are* different. Unlike other West Virginia State employees, petitioners and other West Virginia State Troopers do not qualify for workers' compensation benefits, social security benefits or other disability, retirement or medical benefits other than their benefits from the West Virginia trooper disability and retirement fund, and neither the West Virginia Consolidated Public Retirement Board nor any other state agency pays any benefits to petitioners except for the above retirement fund. Therefore, a trooper only has his disability retirement when disabled on the job, while other state employees can file for workers' compensation benefits and social security disability benefits and, therefore, have other means to seek benefits to support themselves and their families.

Second, troopers are different than most state employees in that they risk their lives daily and bear a much larger risk of significant injury or death and their job requires a much higher physical standard than many state employees to maintain successful employment. It is for these good reasons that the Trooper's disability pension has been rightfully considered sacrosanct (until now).

Respectfully, even if all other state employees are subject to yearly cut off of their benefits without the opportunity for a hearing and without due process, does not mean this

wrongful conduct should continue and be applied to the troopers. The saying: “two wrongs do not make a right,” applies to this case. Respondents’ argument is that it should be allowed to do what is constitutionally and legally prohibited to do simply because it is doing it elsewhere. That does not pass legal muster.

Even if respondents argue that, by the time this Court rules, many of the putative class members will have proceeded to an administrative hearing, this does not resolve the matter. The constitutionality of the rule, the proper application of the statutes and the constitutionality of the process is still very much at issue for the disabled troopers currently going through the administrative process without any benefits and other putative class members who will be subjected to this in the future.

There is hardly a case stronger than the facts of this one that would qualify for extraordinary relief. The case involves significant constitutional issues and issues of the application of legal precedent to many troopers, such that an administrative proceeding is inadequate to address what this Court can settle and clarify with its one decision. Finally, the Court should review this case because the Troopers need this Court’s help to prevent irreparable harm.

VI. CONCLUSION

The application of the statutes, rules and regulations by the respondents violates the West Virginia Constitution and the United States Constitution. The petitioners’ benefits are being subjected to termination without any prior opportunity for hearing in violation of their due process rights and substantial precedent of this Court. The respondents are retroactively applying substantive changes in the law to petitioners’ claims, whose rights to their disability benefits vested long before such changes. The actions of the respondents in forcing the

petitioners and the class to produce medical records and submit to annual physical examinations and review of their claims without just cause violates the applicable statute, their human rights and the West Virginia Constitution and/or the United States Constitution and effectively precludes an award of disability benefits for the first five years of disability. Requiring the petitioners to proceed through the administrative appeals process to address these constitutional issues is futile and entirely inadequate. The petitioners are entitled to an injunction to enjoin the actions of the respondents.

WHEREFORE, petitioners pray that this Honorable Court grant their petition and appeal and reverse the order of the court below granting respondents' motions to dismiss. The petitioners further pray, given the delay caused by the order of the court below and the impending harm resulting from respondents' actions, that this Honorable Court find and declare that applying the changes in the statutes, rules and regulations as addressed herein pertaining to petitioners' disability benefits be declared unconstitutional, void and of no effect, and/or that this Court enjoin and restrain respondents from causing petitioners to undergo medical examinations, produce medical records, and to then make any other decision with respect to the previous findings and/or decisions of the CPRB or the West Virginia court system as to whether petitioners are entitled to disability benefits and, further, that this Court enter an order enjoining and restraining respondents from requiring petitioners to perform the above and enjoining the respondents from stopping any trooper benefits unless and until this Court can determine finally the constitutionality of said statutes, rules and regulations, that this action be certified as a class action pursuant to West Virginia Rule of Civil Procedure 23, for payment of petitioners' attorney fees and costs by respondents, and for such other, further and general relief as the Court deems just and proper.

RONALD J. HICKS,
ROBERT J. CLAUS, JR.,
BENSON B. FLANAGAN,
and TERRY NICHOLS,
on their own behalves and on
behalf of retired West Virginia
State Troopers similarly situated

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0748

RONALD J. HICKS,
ROBERT J. CLAUS, JR.,
BENSON B. FLANAGAN,
and TERRY NICHOLS,
on their own behalves and on
behalf of retired West Virginia
State Troopers similarly situated,

Plaintiffs below, Petitioners,

v.

(Civil Action No. 10-C-1502)
(Kanawha County Circuit Court)

ERICA M. MANI, Director, West Virginia
Consolidated Public Retirement Board;
WEST VIRGINIA CONSOLIDATED PUBLIC
RETIREMENT BOARD, a West Virginia
state agency and public corporate body;
COLONEL TIMOTHY S. PACK,
Superintendent, West Virginia State Police;
WEST VIRGINIA STATE POLICE, a West
Virginia state agency and public corporate body;
and STATE OF WEST VIRGINIA,

Defendants below, Respondents.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Plaintiffs below/Petitioners, do hereby certify that true and exact copies of the foregoing "Petitioners' Brief" and "Appendix Record" were served upon:

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 1st day of August, 2011.



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