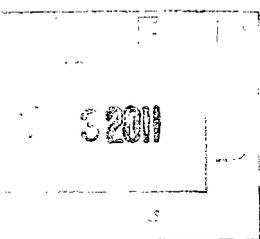


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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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**PETITIONERS' REPLY BRIEF**

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This is the reply of the petitioners to respondents' brief in opposition to 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. This case was filed as a class action seeking declaratory and injunctive relief. Petitioners assert that they are being subjected to a termination of their vested disability pension benefits without any opportunity to be heard prior to the termination. Petitioners claim that, without the relief requested, they and the class are at risk of being left without retirement benefits and without medical insurance. This action was filed because substantive changes in the law were being retroactively applied to the Petitioners and the class. The Respondents are employing procedures and rules that violate the statute and the petitioners' constitutional rights. The petitioners are without an adequate remedy, other than the relief the Circuit Court below should have granted, because the administrative process that petitioners were ordered to exhaust is futile.

The Respondents admit to substantive changes in the statute at issue, admit that those changes are being applied to disabled troopers whose rights have already vested, and admit to conduct in violation of statute. The Petitioners assertions and the Respondents' arguments show that the disabled troopers really have no adequate remedy in the administrative appeals process and stand to suffer irreparable harm and the Circuit Court erred in deciding it had no jurisdiction to remedy it.

**I. THE PETITIONERS ARE SUBJECT TO IMMINENT HARM FROM RETROACTIVE APPLICATION OF SUBSTANTIVE CHANGES IN THE STATUTE.**

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.* Thus, if their benefits were terminated, troopers were required to be placed back to work, without qualification. The 2009 version of the statute eliminated this requirement entirely. The 2011 version of the statute, enacted after the Circuit Court hearing below, requires troopers to reassume active duty, but only if they meet certain ill defined requirements that are at the wide discretion of the Superintendent. (See Petitioner's brief at pp. 17-19 for the text of the various statutes.)

In their brief, the Respondents acknowledge that the 2009 version of W.Va. Code §15-2-31 contains one "significant change as it pertains to petitioners," specifically, the removal of the requirement that the Board order the trooper to resume active duty if they were found no longer disabled. See Respondents' Brief p. 4. Thus, Respondents admit that the 2009 statute contains substantive changes that affect troopers' rights. Since this is admittedly true, the Court below should have granted the relief requested by the Petitioners to, *inter alia*, declare it inapplicable to the troopers whose rights vested prior to its enactment.

Likewise, the 2011 version contains new, ill-defined criteria. One such provision provides that a trooper will be placed back to active duty unless, he is found by the Superintendent to be unacceptable due to the retirant's performance history and evaluations during prior work with the department. This places the decision almost entirely within the discretion of the Superintendent and may force the trooper to litigate facts that supposedly happened years if not decades ago, where the evidence to refute it is impossible to obtain, and were not the subject of termination at the time. Therefore, it is a substantive change which

should not be applied to employees who had met all aspects and requirements of disability retirement including cases where retirement was ordered by the Circuit Courts of West Virginia.

## **II. THE REVIEW PROCESS BEING EMPLOYED BY THE BOARD IS IMPROPER.**

As explained in petitioners' brief, in 2008, the Respondents enacted a new rule at W.Va. C.S.R. § 162-9-13 that putatively gives the CPRB the authority to order each and every retiree to undergo *annual* re-examinations by a doctor of its choice without demonstrating any just cause for a review for the first five years. The new rule requires that the petitioners re-litigate their disability claims yearly, which is a substantive change. It takes approximately a year to get through the administrative appeals process. Since the Board does not have to show a change in circumstances or cause to have another review the following year, the new regulation in fact amounts to a complete preclusion of an award of disability benefits for the first five years, since, even if the trooper wins, he may have to start all over again.

Respondents argue that the administrative process is expedient and convenient, citing a 10<sup>th</sup> Circuit case for this proposition. This is simply not true and the administrative process will be entirely insufficient under the new regulation. Trooper Clay Hupp received his letter of impending discontinuation of his full duty disability benefits at the time of the hearing before the Court below and those benefits were terminated December of 2010. (See Transcript of Hearing, A.R. 69.) He is still litigating his denial, over nine months later, and it will proceed for many more months before the Circuit Court on appeal. Second, assume he is within his first five years of an award of benefits. Under that scenario, if he would win at the circuit court level, which will undoubtedly be at least a year from the date of his benefits being cut-off, he will have to start the whole process again, rendering his appeal remedy futile.

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. At the very least, implied is a requirement that the review process be reasonable and not make that review process an exercise in futility.

Without any supporting evidence in the record, the Respondents represent in their brief that a compliance officer on the Board suggested the enactment of § 162-9-13 because there were criticisms of the Board's "administration of the statute" during a Legislative Audit. There is no evidence in the record to support these alleged facts and petitioners dispute that the criticisms were directed toward the disability statute in the manner the Respondents' imply. The purpose of respondents' unsupported statement is for the reader to infer that the procedures enacted in § 162-9-13 were required in order to comply with law or that the Board was required by law to make the trooper plan the same as other plans. Nothing could be further from the truth. Nothing in the statute requires that the trooper's disability and pension system conform to other disability systems. Nothing in the statute required the onerous new changes contained in § 162-9-13. In fact, the troopers' pension system historically has been treated differently from the other public employee pension systems 1) because the trooper pension is all a trooper has, while other public employees have access to workers' compensation benefits and social security disability benefits when they are disabled from working, and 2) because a trooper's job bears so much more risk of injury than most other public employees. It is for these reasons that the trooper pension system has been and should continue to be treated differently than other public

employee pension systems.<sup>1</sup> Finally, employing improper, unconstitutional reviews of other disabled employees, does not justify the Board's action here.

Respondents argue that the new regulation is related to a legitimate state interest of protecting the economic interests of the fund. However, their brief goes on to expel that notion. Respondents say that at the time of the hearing, there had been thirty three re-certifications (i.e. thirty three expensive Board doctor appointments and Board doctor review of records and cost for reports), with 30 passing (so no cost savings), one being reduced from total to partial (still paying), and one cut off eligible for regular retirement (so no material cost savings). The process had only begun, with many more evaluations to take place. Then there are the associated costs of the appeals in personnel time, etc. Then the process starts all over again the very next year with the very same disabled troopers and the year after that and thereon for infinity for each trooper that becomes disabled. This rule is a boon for the Board's doctor, and an enormous cost to the Board and waste of taxpayer money.

Furthermore, the Respondents' argument on the regulation at issue fails to address the substance of petitioners' criticisms— that § 162-9-13 amounts to a substantive change in the petitioners' vested rights. Prior to the new requirements of § 162-9-13, no trooper was required to recertify once a year for five years and then periodically thereafter. By contrast, the review processes referred to in Respondents' brief used in the Public Employees Retirement System and Teachers Retirement System have been around a long time. The yearly review process for PERS in W.Va. Code § 5-10-26 was specifically enacted in a statute in 1961. The yearly review process for teachers was specifically enacted in a statute by at least 1984. Therefore, the rights

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<sup>1</sup> Respondents' repeatedly refer and rely on facts that are not in the record, including allegations that purportedly existed before the hearing, without having filed any request to supplement the record, and then object to petitioners' request to supplement the record with the subsequent Clay Hupp administrative decisions and object to petitioners' reference to those documents properly supplemented.

of those participants had not already vested when those statutes were applied. The review process for the trooper is brand new and enacted after petitioners' right have vested.<sup>2</sup>

In addition, pursuant to the new rule, a letter was sent to the disabled troopers which required, *inter alia*, that it was the disabled troopers' responsibility to provide medical records specifically related to the basis for their disability retirement award at least 10 days prior to the examination to the Board's hired doctor, even though the statute mandates that all costs of any reevaluation shall be borne by the department, and threatened them with a loss of benefits if they failed to comply, in a letter that was neither protestable nor appealable. Respondents' argument fails to address this criticism. In their brief, the Respondents' counsel admits that "They simply have to submit medical records showing that their disability continues..." and later admits that "As for the cost of producing medical records, the statute requires that said cost be paid by the fund, not the disabled retirant." See Respondents brief at p. 19. Thus, the Respondents' counsel admits that respondents were improperly and illegally applying the statute.

As explained in the cases cited by Respondents, while an agency can make regulations to implement an applicable statute, the regulation must be reasonable, conform to the laws enacted by the Legislature and conform to the legislative intent. See *Anderson & Anderson Contractors, Inc. v. Latimer*, 162. W.Va. 803, 807-8, 257 S.E.2d 878, 881, (1979) and Syl. Pt. 3, *Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 466 S.E.2d 424 (1995). The conduct of the Respondents and the application of W.Va. C.S.R § 162-9-13 to petitioners do not meet these standards. W.Va. C.S.R § 162-9-13 is not reasonable. The legislature intended that a trooper be afforded constitutional due process protections, as those protections are implied and required in all legislative enactments, even if the wording of the statute is indefinite or ambiguous.

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<sup>2</sup> It appears the Sheriffs are in a similar conundrum with the enactment of the new W.Va. C.S.R. § 162-10-13 in 2008. Therefore, a decision in this case will give proper guidance for the Sheriffs who serve our state, as well.

### III. PETITIONERS' DO NOT HAVE AN ADEQUATE ALTERNATIVE REMEDY

Respondents argue that, if petitioners had filed a declaratory action with the Board, the Board would have had a hearing and would have addressed their issues with a full record to appeal to the Circuit Court. However, the case of Clay Hupp soundly defeats Respondents' argument. His case demonstrates that it is futile to ask the Board to declare its own actions and rules unconstitutional or unlawful and 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.

As a result of the Administrative Process in Clay Hupp's case, 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 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.<sup>3</sup>

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<sup>3</sup> In fact in another case currently pending before this Court on appeal, the CPRB argued, "The Board does not have the authority to alter, amend or modify statutes." (*Bland v. State of W.Va. et al.*, Appeal No. 11-0746, A.R. 1424, 1435.)

#### IV. PETITIONERS' REQUESTS FOR RELIEF ARE NOT MOOT.

In their brief, respondents argue that all of the named plaintiffs have been recertified as disabled during the Respondents' improper reevaluation process so there is no harm or the issue is moot. However, this "no harm, no foul" argument ignores the fact that the action was filed as a class action, not simply as an action on behalf of the named plaintiffs. A main purpose for filing as a class action was to prevent irreparable harm to named plaintiffs and all others similarly situated. (See A.R. 16, Complaint at ¶ 57.) The court below, however, dismissed the action, without taking up the class action and any class certification. The imminent harm and damage to the class members, therefore, is a critical part of the determination to be made by this Court. In their brief, the respondents do not adequately address the imminent and irreparable harm to the putative class members.

The Respondents also argue that the Petitioners now have an adequate remedy and otherwise suffered no injuries (from Respondents' wrongful conduct) because, after the hearing before the Circuit Court, the legislature in House Bill 2863 amended W.Va. Code §15-2-31, and added back in the language that required troopers who are cut off of disability to be put back to work. While the legislature showed its displeasure with the Board's actions by amending the statute during the 2011 session, the 2011 version, as discussed above, 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 1994 version gave the trooper an unqualified right to be put back to work or remain on disability. The issue is not moot because it is unclear what version of the

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statute will be applied to the disabled troopers in the class. In their brief, the Respondents' counsel claims Respondents will apply the 2011 version. Even if the 2011 version of the statute is applied to the troopers in the proposed class, this would not moot the issue because, in certain substantive respects, 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.

Furthermore, House Bill 2863, reinstating the right to be returned to work in certain circumstances, did not exist at the time of the hearing. It is improper for respondents to argue that it was okay for the Circuit Court to deny it had jurisdiction to grant petitioners their requested relief because there was no other adequate remedy at the time the Court denied the relief.

In addition, the 2011 amendments are not adequate to address those troopers who, while wrongfully terminated from receiving disability benefits without due process, remain disabled from returning to work. While the statute in place since 1947 provided generally for review and termination of disability benefits, it had never been applied or used in recorded history. It was not until the mass reevaluations under § 162-9-13 that the problems with due process came to light. Petitioners are not arguing that they are not subject to reevaluation to determine if they remain disabled. They are simply saying that they should be afforded an opportunity for a meaningful hearing in accordance with constitutional protections and applicable judicial precedent, before their vested benefits are taken from them and that new rules and statutes that affect their vested rights should not be applied to them. It means nearly nothing to the Respondents to allow the relief requested by the petitioners, but it means everything to the disabled troopers.

## V. CONCLUSION

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.

The right thing to do, the thing that comports with constitutional mandate, legislative intent, legal precedent and notions of fundamental fairness, is (1) require that disabled troopers' continue to be paid their vested benefits until they have a full opportunity to be heard on the matter. If the process is as quick as the Respondents claim it will be, then it will be no hardship on the Respondents; and (2) require Respondents to pay the costs and attorney fees; (3) require just cause before a review is granted and to declare the yearly review process unconstitutional as applied to troopers whose rights already vested before the 2008 enactment of W.Va. C.S.R. § 162-9-13; and (4) declare that the non-beneficent changes in W.Va. Code §15-2-31 shall not be applied to troopers whose rights vested prior to their enactments.

WHEREFORE, petitioners pray that this Honorable Court grant their petition and appeal, reverse the order of the court below granting respondents' motions to dismiss and to further grant the relief prayed for their petition and brief in support thereof.

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

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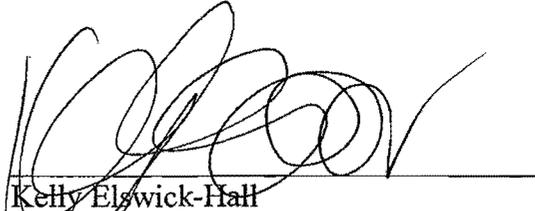
**CERTIFICATE OF SERVICE**

I, Kelly Elswick-Hall, counsel for Plaintiffs below/Petitioners, do hereby certify that true and exact copies of the foregoing "Petitioners' Reply Brief" were served upon:

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 3<sup>rd</sup> day of October, 2011.



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