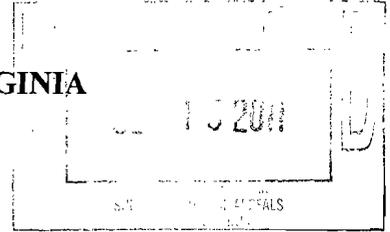


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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
(Judge Stucky)

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.

**RESPONDENT WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT
BOARD'S BRIEF IN OPPOSITION TO APPEAL**

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I. PETITIONERS' ASSIGNMENTS OF ERROR

Counsel for Petitioner alleges the lower Court committed the following errors:

- A. The trial Court erred in finding that it lacked jurisdiction to determine that troopers' disability benefits are a vested property right which cannot be taken without due process;
- 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;
- C. The trial Court erred in finding that it lacked jurisdiction to determine that the Respondents were employing an improper review process which is unconstitutional; and,
- D. The Court erred in finding that it 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.

II. RESPONDENT'S STATEMENT OF THE CASE

On August 23, 2010, Petitioners, former West Virginia State Troopers who are currently receiving disability retirement benefits administered by the Respondent West Virginia Consolidated Public Retirement Board, filed a *Petition for Injunctive Relief* in the Circuit Court of Kanawha County against the Board and the West Virginia State Police seeking judicial intervention to declare the legislative rule and statute regarding the medical re-certification of their disabilities unconstitutional and to further halt and enjoin any and all future medical re-certifications for all individuals who are receiving disability retirement benefits from that retirement plan. (A.R. 1-17)

On October 25, 2010 Respondent West Virginia Consolidated Public Retirement Board filed a *Rule 12(b) Motion to Dismiss* on the grounds that the lower Court currently lacked jurisdiction because Petitioners had failed to exhaust their administrative remedies and had failed to prove the inadequacy of other available legal remedies. Additionally, pursuant to West Virginia Code §55-13-11 and West Virginia Code §55-17-3, Respondents moved to dismiss on the basis of insufficiency of process and service of process. (A.R. 18-28).

On October 28, 2010 Respondent West Virginia State Police filed a *Motion to Dismiss* essentially joining Respondent West Virginia Consolidated Public Retirement Board's *Rule 12(b) Motion to Dismiss*. (A.R. 29-31).

On November 22, 2010, the Court heard oral argument on the *Petition for Injunctive Relief* and the *Motion to Dismiss*. (A.R. 62-101). At the time of the hearing none of the Petitioners had sought relief through the administrative process either by filing an administrative appeal or declaratory action with the Respondent Board prior to seeking extraordinary relief from the Court. Also, at the time of the hearing all of the named Petitioners had successfully completed the medical re-certification process and their disability retirement benefits remained unaffected. This case has never been certified by any Court as a class action.

By Order entered on March 30, 2011, the Circuit Court granted Respondents' *Motion to Dismiss* finding that the West Virginia Administrative Procedures Act governs the review of contested administrative decisions and the Court lacks jurisdiction because the Petitioners had failed to exhaust their administrative remedies. The Court made no findings or ruling as to the substantive issues raised by Petitioners. (A.R. 102-104).

Petitioners filed a *Petition for Appeal* with this honorable Court of the lower Court's *Order Dismissing Petition for Injunctive Relief*. On June 27, 2011, Petitioners filed *Petitioners' Motion for Leave to Supplement the Record for Appeal*. With this motion, Petitioners are seeking to supplement the record with the *Recommended Decision* and *Final Order* of the Respondent Board involving a Board decision regarding a disabled retirant named Clay Hupp. On July 5, 2011, Respondent Board filed a *Response in Opposition to Petitioner's Motion to Supplement the Record* asserting that Mr. Hupp is not a party to this action, that the supplement was not part of the record

in the lower court, and that Mr. Hupp currently has an administrative appeal pending in the Circuit Court of Tyler County (11-AA-1). Respondent Board continues to object to this being part of the *Appendix Record* and its use in opposing counsel's brief to this Court.

III. SUMMARY OF ARGUMENT

The medical re-certification process of disability retirants of the West Virginia State Police is governed by West Virginia Code § 15-2-31, originally enacted in 1947, and West Virginia Code of State Rules § 162-9-13, enacted in 2008.

Until 2010, the statute had been sporadically utilized due mostly to a staff shortage problem with Respondent Board. The July 2003-2005 Legislative Audit was critical of Respondent Board's irregular administration of this statute. In December 2007 and February 2008, the Compliance Officer for the Board recommended that during the first five years following the retirement of a member on account of disability and at least once every three year period thereafter until age sixty that the Board should require medical re-certification, noting that this is currently the practice and law in many of the other retirement plans including deputy sheriffs, public employees, and teachers.

For instance, the Public Employees Retirement System requires the disability retirant to undergo a medical examination once each year for the first five years and once each three year period thereafter til age sixty. *See W. Va. Code §5-10-26*. Deputy Sheriffs Retirement System requires medical re-certification once each year for the first five years and once each three year period thereafter til age sixty. *See W. Va. Code §7-14D-16 and §162-10-13 Code of State Rules*. The Teachers Retirement System requires re-certification once each year for the first five years and then thereafter as required by the Board. *See W. Va. Code §18-7A-25(f)*.

Then, in 2008, legislative rule, C.S.R. § 162-9-13, was enacted which essentially mirrors the

legislative rule in Public Employees and Deputy Sheriffs plans and the Compliance Officer's recommendation. The legislative rule eliminated the subjective and sporadic implementation of the medical re-certification statute and replaced it with an objective and uniform process similar to the other plans. Prior to the enactment of the legislative rule, the statute authorized the Respondent Board to require re-certification for anyone at any time.

Beginning in 2010 and pursuant to the legislative rule and statute, Respondent Board sent letters to all disability retirants in the West Virginia State Police Retirement System (Plan A) requesting that he or she schedule an appointment with Dr. Bailey for the purpose of re-certification of his or her disability.

On August 23, 2010, Petitioners, by counsel, filed a *Petition for Injunctive Relief* against the Board and the State Police in the Circuit Court of Kanawha County, West Virginia seeking judicial intervention to declare the rule and statute unconstitutional and to halt the medical re-certification process for troopers. The Petitioners asserted that the 2005 amendments to West Virginia Code §15-2-31, originally enacted in 1947, and West Virginia Code of State Rules § 162-9-13, enacted in 2008 were unconstitutional and could not be retroactively applied to Petitioners.

The 2005 amendment to West Virginia Code § 15-2-31 had one significant change as it pertains to Petitioners. The amendment removed the statutory requirement that the Board order the member to resume active duty if the member was found to no longer be totally or partially disabled.

Opposing Counsel's references to res judicata or collateral estoppel as to the finding of the initial disability are illogical since "totally and partially disabled" has always been defined by statute as suffering from a disability that can be expected to last twelve (12) months or longer.

In response to the *Petition for Injunctive Relief*, Respondent Board filed a *12(b) Motion to*

Dismiss for lack of jurisdiction because Petitioners had failed to exhaust their administrative remedies and had other adequate remedies available. At the time of the hearing, none of the Petitioners had requested an administrative appeal and the Petitioners had passed re-certification. Shortly thereafter the troopers successfully lobbied the legislature.

The Respondent Board never articulated a position as to whether this amendment was a substantive change and whether the State Police would be required to give those who did not pass re-certification their job back. There was no need to take a position because on March 10, 2011, House Bill 2863 (effective June 8, 2011) passed and the statute was amended to restore the provision which essentially requires the State Police to reinstate the member to active duty at his or her rank prior to the disability and delayed the termination of benefits once a member was found to no longer disabled.

Thus, when the Circuit Court granted Respondent Board's *12(b) Motion to Dismiss* for lack of jurisdiction because Petitioners had failed to exhaust their administrative remedies and had other adequate remedies available, the Petitioners had suffered no injuries because they had all passed re-certification; and, due to another adequate remedy, House Bill 2863, Petitioners will now be afforded more protection than that which they were ever given pursuant to the prior versions of West Virginia Code §15-2-31, and more than that afforded member of other public retirement plans.

IV. STATEMENT REGARDING ORAL ARGUMENT & DECISION

Counsel for Respondent does not believe this case meets the criteria for oral argument because the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Additionally, none of the named Petitioners have suffered any

harm and now with the passage of new legislation will be afforded more protection and safeguards for all future re-certifications than the statute has ever provided in the past. However, should this honorable Court deem oral argument necessary, Counsel for Respondent would respectfully request the right to present argument.

V. ARGUMENT

A. The Trial Court did not err in finding that it lacked jurisdiction because Petitioners had failed to exhaust their administrative remedies and had failed to prove the inadequacy of other available legal remedies. No disability benefits were taken away from the named Petitioners.

"[A]ppellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 461 S.E.2d 516 (1995).

Clear evidence that the trial court did not err in dismissing the *Petition for Injunctive Relief* on the basis that the Petitioners had failed to exhaust their administrative remedies and had failed to prove the inadequacy of other available legal remedies is the fact that none of the named Petitioners suffered any harm and later successfully lobbied the legislature to amend the statute to provide more safeguards than the statute ever had in the past.

All of the named Petitioners are currently receiving and have received uninterrupted disability retirement benefits from the West Virginia State Police Death, Disability and Retirement Fund. The Petitioners are requesting that this honorable Court reverse the lower Court and enjoin the Respondent, West Virginia Consolidated Public Retirement Board, from administering the disability re-certification statute which requires them to submit to a medical examination to determine whether their disabilities have terminated.

The Petitioners have suffered no harm or injury. They are seeking injunctive relief because

they believe they may, in the future, suffer harm should they fail to pass medical re-certification. Even if one were to assume that having to submit to a medical evaluation and/or produce medical records was in some manner onerous resulting in "injury", then Petitioners would still not be entitled to injunctive relief because they have failed to exhaust their administrative remedies. None of the Petitioners requested an administrative appeal regarding the letters they received from the Respondent Board's staff requesting that they be re-certified by a medical examination. Instead, Petitioners sought an extraordinary remedy by filing a *Petition for Injunctive Relief*.

The Court in *Strum* granted the Respondent's Rule 12(b)(6) *Motion to Dismiss* for failure to state a claim, holding that the general rule with respect to the exhaustion of administrative remedies provides "that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." Syllabus Point 2, Strum v. Kanawha County BOE, 672 S.E.2d 606 (2008), Daurette v. Traders Fed. Sav. & Loan Assn., 143 W.Va. 674, 104 S.E.2d 320 (1958). See also State ex rel. Fields v. McBride, 216 W.Va. 623, 609 S.E.2d 884 (2004) (same); State ex rel. Miller v. Reed, 203 W.Va. 673, 510 S.E.2d 507 (1998) (same); Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985) (same); McGrady v. Callaghan, 161 W.Va. 180, 244 S.E.2d 793 (1978) (same); State ex rel. Burchett v. Taylor, 150 W.Va. 702, 149 S.E.2d 234 (1966) (same).

Courts have recognized that this rule serves several useful functions including:

(1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established

by Congress [or the Legislature]; and (4) avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error. Association for Commun. Living v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993).

The West Virginia Administrative Procedures Act, § 29A of the West Virginia Code, governs the review of contested administrative decisions that do *not* involve a disciplinary matter and issues by a circuit court. The Act was enacted, in part, to provide individuals with an inexpensive, efficient and expedited means of contesting adverse staff decisions and to afford Boards, like Respondent, the opportunity to review in greater depth those decisions of its employees.

The Board routinely issues written final orders on all administrative appeals brought before it, and such orders are accompanied by written recommended decisions containing detailed findings of fact and conclusions of law which are expressly incorporated into the final order. The Board's final orders are then served upon the parties to the administrative appeal by registered mail pursuant to *West Virginia Code* §29A-5-3. Receipt of the final order by a party adversely affected by the Board's final decision triggers a statutory right to judicial review that is codified in *West Virginia Code* §29A-5-4(b). Until the issuance of a final order or decision, or initiation of judicial review, the Board retains jurisdiction over the matter.

In *Young v. Sims*, 192 W.Va. 3, 449 S.E.2d 64 (1994), the West Virginia Supreme Court of Appeals held that the proper method of contesting an adverse agency decision regarding disability retirement benefits is to follow the procedures outlined in the Administrative Procedures Act as set forth in *West Virginia Code* § 29A-1-1 to -7-4 (1993). *Syllabus point 1 and p. 12, 73*. In that case, the writ was granted *only* for the purpose of permitting an administrative hearing. In essence, the Court remanded the case to the agency for an administrative hearing rather than ruling on the

ultimate issue.

Opposing counsel's claim that "it is undisputed that the newly amended procedures utilized by the Respondent Board allow Petitioners' benefits to be taken without an opportunity for a hearing" is simply not true.¹ Respondent Board's 2008 legislative rule merely outlined the process in which the statute West Virginia Code §15-2-31 would be implemented.

This statute was enacted in 1947 and until this year provided that "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 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." *W. Va. §15-2-31*.

The 2008 legislative rule, C.S.R. § 162-9-13, essentially mirrors the legislative rule in the other plans and requires re-certification every year for the first five years following the retirement of a member on account of disability and at least once every three year period thereafter until age sixty. The legislative rule eliminated the subjective and sporadic implementation of the medical re-certification statute and replaced it with an objective and uniform process similar to the other plans. Prior to the enactment of the legislative rule, the statute authorized the Respondent Board to require re-certification for anyone at any time. The statute, not the legislative rule, addressed when benefits were to terminate and the statute had been in effect since 1947. There is no inconsistency with this Court's holding in *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167, the statute, "the promised

¹See Petitioners' brief page 16.

benefit”, did not require hearings prior to the administrative review process and has remained unchanged until this year.

Once again, all of the named Petitioners passed re-certification and thus there was no need for them to invoke the administrative appeals process or any judicial process. Additionally, now with the passage of House Bill 2863 with respect to all future re-certifications upon finding that the disability has terminated, benefits are 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 revaluation with the department, failure to accept reinstatement or forty-five days from the Board’s finding.

B. The Trial Court did not err in finding that it lacked jurisdiction because Petitioners had failed to exhaust their administrative remedies and had failed to prove the inadequacy of other available legal remedies. No substantive changes in the law were ever retroactively or unconstitutionally applied to Petitioners.

All of the named Petitioners passed re-certification so no changes were ever retroactively or unconstitutionally applied to them. As for future re-certifications, on March 10, 2011, House Bill No. 2863 passed (effective June 8, 2011) and amended West Virginia Code §15-2-31, which now states as follows:

§15-2-31. Disability physical examinations; termination.

(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.

Opposing counsel incorrectly asserts that the issue is not moot because the 2011 amendment does not address all of the issues raised and sites the following four reasons: (1) it is more restrictive because it creates qualifiers that give the Superintendent discretion to decide who will be offered reinstatement based upon poorly defined or undefined criteria; (2) it doesn't help disabled troopers

whose benefits are cut off before a hearing and who 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 benefits are terminated; and (4) it is unclear based upon prior actions of the Board which version of the statute it will apply to Petitioners' claims.²

As to the first issue, the qualifiers are certainly not based upon poorly defined or undefined criteria. West Virginia Code §15-2-31 states, in pertinent part, "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 criteria is clearly defined and is practical, reasonable and necessary for the safety of the public and their fellow colleagues.

Opposing counsel incorrectly states that the disability retirant is cut off if capable of "gainful employment".³ The statute clearly states that in such a case the disability retirant is reduced from a total to partial disability award.

As for the second and third issues, prior to the 2011 legislation, the statute did not afford the Petitioners any delay in termination of benefits or an immediate right to a hearing. The Court in *Booth* held that the legislature could not retroactively apply amendatory changes to alter pension rights of individuals who had detrimentally relied upon the promise of those benefits. Members cannot reasonably or detrimentally rely upon a property right that never existed. From 1947 through

² See Petitioners' brief page 20.

³ See Petitioners' brief page 20.

2011, the statute §15-2-31 terminated disability benefits based upon a medical finding that the disability no longer continued. The 2011 legislation requires that they be reinstated at their previous rank and gives them a 45 day window within which to begin the administrative appeals process.

As for issue four, unequivocally, the Board will apply the 2011 version of the statute to all future re-certifications, including all named Petitioners in this case.

C. The Trial Court did not err in finding that it lacked jurisdiction because Petitioners had failed to exhaust their administrative remedies and had failed to prove the inadequacy of other available legal remedies. The Respondent Board did not employ an improper review process.

The legislative rule at issue in this case, West Virginia Code of State Rules §162-9-13, enacted in 2008 and states as follows:

§162-9-13. Disability Re-certification.

13.1. 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 retirant, 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 retirant 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 retirant, the physician reports to the Board that the retirant 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 legislative rule merely outlines how the Respondent Board will administer the accompanying statute, West Virginia Code § 15-2-3 1, enacted in 1947. There was no legislative rule regarding trooper re-certification until 2008. Without the legislative rule the statute authorized the Board to conduct re-certifications as to anyone at any time without restrictions on frequency. The legislative rule resulted in the trooper re-certification statute being uniformly and objectively implemented, like in the other retirement plans, as opposed to sporadically and subjectively implemented prior to the rule's enactment.

Pursuant to West Virginia Code §5-10D-1(a) and (e), the Legislature created the West Virginia Consolidated Public Retirement Board to administer public retirement plans for this state and specifically authorized the Board to “propose rules for legislative approval, in accordance with article three [§29A-3-1 et seq.] chapter twenty-nine-a of this code, necessary to effectuate its powers, duties and responsibilities”. *See W. Va. §5-10D-1(e)*.

Recently, the Supreme Court rejected a similar *Petition* against the state board of education seeking declaratory, equitable and injunctive relief regarding a legislative rule . In *Jones v. West Virginia State Board of Education*, 622 S.E.2d 289 (2005), the Supreme Court reversed the lower court's decision which enjoined a state agency from enforcing a legislative rule prohibiting home-schooled children from participating in interscholastic athletics. The Court held that the legislative rule was not unconstitutional, in that, it did not violate equal protection; and, that the School Officials had not breached their duty to make reasonable rules and regulations.

In reversing the circuit court's holding that the board had breached the duty to promulgate reasonable rules and regulations by implementing a total ban rather than crafting fair rules tailored

to any legitimate concerns that may flow from allowing home schooled students to participate, the Court held as follows:

“With respect to legislative rules, this Court has explained that”[i]t is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.” Syllabus Point 3, Rowe v. Department of Corrections, 170 W.Va. 230, 292 S.E.2d 650 (1982). Syl. pt. 3, Ney v. State Workmen's Comp. Comm'r. 171 W.Va. 13, 297 S.E.2d 212 (1982). See also Anderson & Anderson Contractors, Inc. v. Latimer, 162 W.Va. 803, 807-08, 257 S.E.2d 878, 881 (1979) (“Although an agency may have power to promulgate rules and regulations, the rules and regulations must be reasonable and conform to the laws enacted by the Legislature.” (citation omitted)).

With respect to whether a specific legislative rule comports with its statutory authority, the Court further held that “[j]udicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage. Syl. pt. 3, Appalachian Power Co. v. State Tax Dep't of

West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995).

When legislative intent is silent or ambiguous, the Court has held that “[i]n the absence of . . . [legislative] direction as to what elements are to be considered in promulgating. . . [a] rule, the presumption is that . . . [the Legislature] is entrusting the decision as to what to consider to the hands of the agency in deference to the agency expertise.” (alteration in original) (quoting *Kennedy v. Block*, 606 F.Supp. 1397, 1403 (W.D.Va.1985), *vacated on other grounds* by 784 F.2d 1220 (4th Cir.1986)).

The question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va.Code, 29A-4-2 (1982). Syl. pt. 4, *Appalachian Power*. Likewise, the Court has held that “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syl. Pt. 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp.[, Inc.]*, 166 W.Va. 775, 277 S.E.2d 613 (1981).” Syl. pt. 3, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003). *See also Board of Educ. of County of Taylor v. Board of Educ. of County of Marion*, 213 W.Va. 182, 188, 578 S.E.2d 376, 382 (2003) (same); Syl. pt. 3, *Smith v. Board of Educ. of Logan County*, 176 W.Va. 65, 341 S.E.2d 685 (1985) (same).

Although the legislative rule was not enacted until 2008, its accompanying statute was enacted in 1947. Additionally, the legislative rule was subjected to the same legislative process and approval as was the statute. The impetus for the rule’s enactment came from the recommendation of the Compliance Officer for the Board in December 2007 and February 2008, which

recommendation now mirrors the current legislative rule and what the practice and law has been in the other retirement plans administered by the Board. Clearly, the Respondent Board has not exceeded its statutory or constitutional authority by promulgating a legislative rule which sets forth what procedure will be utilized to administer the statute regarding the medical re-certifications of disabilities. Nor can it be said that the rule is arbitrary and capricious as it is rationally relates to the legitimate state purposes of protecting the economic interests of the fund and is a rule which is common to most retirement plans administered by the Respondent Board.

Oposing counsel incorrectly asserts that this legislative rule will force Petitioners to re-litigate their disabilities every year and further that such action is barred by res judicata, waiver, and collateral estoppel. Oposing counsel also implies that the trooper will have to go through an administrative appeal every year for the first five years which takes approximately a year.⁴

This is simply not the case. Both “partially disabled” and “totally disabled” are statutorily defined as disabilities that “can be expected to last for a continuous period of not less than twelve months.” *W.Va. §15-2-25b*. The issue on re-certification which is governed by *W.Va. Code §15-2-31* is whether the disability has terminated or should be reduced from total to partial.

The doctrines of collateral estoppel and res judicata are simply not applicable. Before such doctrines can be applied, the following four conditions must exist: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity in the quality of the persons for or whom the claim is made.⁵ All four elements must exist. There

⁴See Petitioners’ brief page 22.

⁵Schenerlein & Sliger, Inc. v. Hancock County S & L Assoc., 176 W.Va. 98, 341 S.E.2d 844 (1986).

must be a final adjudication as to the ultimate issue for which the doctrine is being applied. The inquiry is whether the same evidence would support both actions.

The re-certification statute is a separate and distinct inquiry from the initial disability inquiry. These doctrines cannot be properly applied to the administration of two separate and distinct statutes.

Additionally, Petitioners do not have to re-litigate their disabilities every year through a lengthy administrative appeals process. They simply have to submit medical records showing that their disability continues and/or submit to a medical examination if the Doctor deems it necessary.

At the time of the hearing, there had been thirty three (33) re-certification, with 30 passing, one being reduced from total to partial, and two partials that were not re-certified with one of them returning to work for the State Police and the other eligible for regular retirement. As for the cost of producing medical records, the statute requires that said cost be paid by the fund, not the disabled retirant.

D. The Trial Court did not err in finding that it lacked jurisdiction because Petitioners had failed to exhaust their administrative remedies and had failed to prove the inadequacy of other available legal remedies. Petitioners did not attempt to utilize their administrative remedies. The administrative remedies were not futile or inadequate.

The named Petitioners in this case never sought an administrative remedy prior to filing for extraordinary relief in Circuit Court. In the sixty days it took to serve and file an answer and another thirty days to get a hearing, Petitioners could have (pursuant to the Administrative Procedures Act) filed a declaratory action with the Respondent Board, raised all of their issues, had detailed findings of fact and conclusions of law from which, if necessary, to appeal to Circuit Court so that the Court and now this honorable Court could have had a full record for consideration as opposed to self-serving statements contained in a Petition.

Counsel for Respondent continues to object to the inclusion of pleadings and arguments involving Clay Hupp which is currently in litigation in Tyler County. However, Counsel for Respondent would note that the Circuit Court in Tyler County has a full administrative record including a transcript of the administrative hearing to review involving the identical issues this honorable Court has been asked to consider with a meager record consisting of mostly unsubstantiated facts and attorney argument.

As for Dr. Bailey, she is not an employee of the Respondent Board or the Respondent State Police; however, she is an occupational and rehabilitation specialist who works closely with the state police and is intimately familiar with the essential duties a trooper is required to perform and whether he can perform such duties.

Petitioners are not required to re-litigate their disability claims over and over again each year. They are simply required to submit proof through medical records and/or examination that the disability has not terminated.

VI. CONCLUSION

Clear evidence that the trial court did not err in dismissing the *Petition for Injunctive Relief* on the basis that the Petitioners had failed to exhaust their administrative remedies and had failed to prove the inadequacy of other available legal remedies is the fact that none of the named Petitioners suffered any harm and later successfully lobbied the legislature to amend the statute to provide more safeguards than it ever provided in the past, more than that provided in other public retirement plans.

Since its enactment in 1947, W.Va. Code §15-2-31 has always required disability retirants to undergo medical examinations and directed Respondent Board to terminate the benefit upon a

medical finding that the disability has terminated.

Although the legislative rule was not enacted until 2008, its accompanying statute West Virginia Code §15-2-31 was enacted in 1947. Additionally, the legislative rule was subjected to the same legislative process and approval as was the statute. The legislative rule resulted in the trooper re-certification statute being uniformly and objectively implemented, like in the other retirement plans, as opposed to sporadically and subjectively implemented prior to the rule's enactment. The impetus for the rule's enactment came from the recommendation of the Compliance Officer for the Board in December 2007 and February 2008, which recommendation now mirrors the current legislative rule and what the practice and law has been in most other public plans administered by the Board.

Clearly, the Respondent Board has not exceeded its statutory or constitutional authority by promulgating a legislative rule which sets forth what procedure will be utilized to administer the statute regarding the medical re-certifications of disabilities. Nor can it be said that the rule is arbitrary and capricious as it is rationally relates to the legitimate state purposes of protecting the economic interests of the fund and is a rule which is common to most retirement plans administered by the Respondent Board.

The general rule with respect to the exhaustion of administrative remedies provides "that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." Syllabus Point 2, Strum v. Kanawha County BOE, 672 S.E.2d 606 (2008).

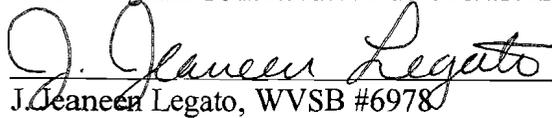
The West Virginia Administrative Procedures Act, § 29A of the West Virginia Code, governs

the review of contested administrative decisions that do *not* involve a disciplinary matter and issues by a circuit court. The Act was enacted, in part, to provide individuals with an inexpensive, efficient and expedited means of contesting adverse staff decisions and to afford Boards, like Respondent, the opportunity to review in greater depth those decisions of its employees. Until the Respondent Board issues a *Final Order*, it retains jurisdiction over the matter.

Wherefore, Respondent West Virginia Consolidated Public Retirement Board respectfully requests that this honorable Court dismiss the *Petition for Appeal* and affirm the lower court's *Order Dismissing Petition for Injunctive Relief*.

RESPECTFULLY SUBMITTED,
West Virginia Consolidated Pubic Retirement Board,

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 W.V. State Troopers similarly situated,**

Plaintiffs below, Petitioners,

v.

**Civil Action #10-C-1502
(Judge Stucky)**

**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;
STATE OF WEST VIRGINIA,**

Defendants below, Respondents.

CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, Counsel to the West Virginia Consolidated Public Retirement Board, do hereby certify that the *Respondent West Virginia Consolidated Public Retirement Board's, Brief in Opposition to Appeal*, filed herein on September 15, 2011, was forwarded to Counsel for Petitioner by U.S. Mail with proper postage affixed on the same day of said filing, and further certify that same was mailed to the following addresses:

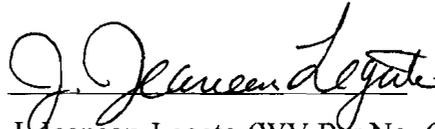
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Respectfully Submitted,

THE WEST VIRGINIA CONSOLIDATED
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