14-0764

7/11/14

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GAT[illegible] CLERK
KANAWHA COUNTY CIRCUIT COURT

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PATRICIA JONES (FORMERLY AKERS),

Petitioner/Plaintiff,

v. Civil Action No.: 10-C-746

WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT SYSTEM, a Corporation D/B/A WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Respondent/Defendant,

and

JUDY VANNOY AKERS,

Respondent/Defendant.

FINAL ORDER GRANTING THE BOARD'S MOTION FOR SUMMARY JUDGMENT AGAINST PETITIONER/PLAINTIFF PATRICIA JONES AND RESPONDENT/DEFENDANT JUDY VANNOY AKERS

Pending before the Court is a Motion for Summary Judgment filed by Respondent/Defendant, the West Virginia Consolidated Public Retirement Board (the Board), against Petitioner/Plaintiff Patricia Jones (Ms. Jones) and Respondent/Defendant Judy Vannoy Akers (Mrs. Akers).

Upon review of the briefs, motions, memoranda of law and proposed orders of the parties, the Court GRANTS the Board's Motion and issues the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Court finds no genuine issue with respect to the following material facts:

1. On June 9, 2009, the Board received a Domestic Relations Order (DRO) entered by the Family Court of Mercer County, West Virginia in the divorce proceeding of Mr. Akers and Ms. Jones. Ex.[1] 1.

2. The DRO, entered on June 4, 2009, purported to set forth the manner in which the Board was to divide Mr. Akers' PERS benefits between himself and his ex-wife Ms. Jones. Ex. 1.

3. The DRO was prepared and submitted by counsel for Ms. Jones. *Id.*; *see also* Ex. 2.

4. The following portions of the DRO stated that the form of benefit was to be elected by Mr. Akers at the time of his retirement:

> (7)(b) ... if, at the time benefit payout commences, the Participant elects a benefit in the form of an annuity, then the VARB shall be the annuitized benefit which would have been available to the Participant as of the [QDRO] Determination Date .... If, at the time benefit payout commences, the Participant elects a return of contributions ...
>
> ***
>
> (7)(d) The Alternate Payee shall be entitled to 50% of the marital property portion of the Participant's VARB [Vested Accrued Retirement Benefit] ... payable at the same time and in the same manner (either in the annuity form or, if allowed, in a lump sum) as paid to the Participant or, if a joint and survivor or other optional form of annuity is elected by the Participant, at the same time as paid to the Participant and the Participant's beneficiary. Provided, however, that nothing in this Order shall be construed as granting the Alternate Payee any election rights with respect to the

[1] References to "Ex." refer to the exhibits attached to the Index of Exhibits in Support of the Board's Motion for Summary Judgment Against Petitioner/Plaintiff Patricia Jones and Co-Defendant/Co-Respondent Judy Vannoy Akers.

form of benefit; rather, the form of benefit at time of payment shall be elected by the Participant

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(8) ... if the Participant elects to be paid retirement benefits in the form of an annuity, the annuity payable to the Alternate Payee shall continue until the earlier of ...

Ex. 1.

5. In other provisions, the DRO purported to require the Board to force Mr. Akers to select a joint and survivor annuity and further provided that Mr. Akers was required to select Ms. Jones as the sole survivor beneficiary:

(7)(b) ...The Alternate Payee is to be treated as the surviving spouse of the Participant for purposes of calculating benefits payable to the Participant or Alternate Payee hereunder.)

***

(7)(f) The participant shall designate the Alternative Payee as the surviving spouse or survivor beneficiary of his retirement benefits and he shall elect a joint survivor annuity and name the Alternate Payee as the beneficiary thereof."

Ex. 1.

6. The DRO provided that the parties would seek approval from the Plan Administrator as to whether the DRO was a Qualified Domestic Relations Order (QDRO):

(13) In the event that the Plan Administrator does not approve the form of this Order, or should it be subsequently determined that amendment of this Order is necessary to ensure its status as a Qualified Domestic Relations Order, then each party shall cooperate and do all things reasonably necessary to devise a form of Order acceptable to the Plan Administrator consistent with applicable law. ....

(16) Payments to the Alternate Payee under this Order shall be prospective only, and shall commence only after benefits are

available to the Participant and following the Board's receipt and acceptance of the entered Qualified Domestic Relations Order.

(17) Copies of this Order shall be furnished to the Qualified Domestic Relations Order manager of the Consolidated Public Retirement Board, and the Qualified Domestic Relations Order Manager shall notify the Participant and the Alternate Payee of the qualification status (i.e., acceptance or rejection) of this Order.

Ex. 3.C.

7. By letter dated July 6, 2009, Board staff wrote to Ms. Jones, Mr. Akers and their attorneys that the DRO could not be accepted as a QDRO. Ex. 3.E.; Ex. 6.

8. This letter was addressed to Petitioner's counsel at the address supplied when he submitted the DRO. Exs. 1-2.

9. Copies were also mailed to Ms. Jones, Mr. Akers and his attorney. Ex. 6.

10. The Petitioner alleges in her Amended Petition that neither she nor her attorney received their copies. Ex. 3, ¶ 11

11. Counsel for Mr. Akers did receive the letter. Exs. 7-8.

12. Ms. Jones made no attempt to obtain pre-approval of the DRO prior to submitting it to the Family Court. Ex. 9, Answer to Interrogatory No. 3. .

13. Her attorney was aware that the Board routinely rejected DROs which deviated from the model QDRO form, as did the June 2009 DRO. Ex. 9, Response to Request for Production No. 2.

14. Neither Ms. Jones nor Mr. Akers nor their respective counsel took any further action with respect to the DRO for more than six months after it was sent to the Board. Ex. 7; Ex. 9, Answer to Interrogatory No. 5.

15. On September 15, 2009, Mr. Akers submitted an application for disability retirement benefits to the Board. Ex. 10, Answer to Interrogatory No. 8; Ex. 11.

16. On that date, he also submitted a marriage certificate to the Board, indicating that he had married Judy Vannoy, Co-Respondent and Co-Defendant, on September 5, 2009. Ex. 12.

17. Mr. Akers died on December 16, 2009, while his disability application was still being processed by the Board. Exs. 13-14.

18. At the time of his death, he was receiving paid sick leave through his employer. Ex. 15.

19. At its March 3, 2010, meeting, the Board of Trustees concluded that Mr. Akers was entitled to a disability retirement from PERS. Ex. 14.

20. His disability retirement became effective January 1, 2010, in the form of a 100% joint and survivor monthly annuity payable to his surviving spouse, Mrs. Akers. Ex. 14.

21. Mr. Akers' retirement benefit was calculated on the basis of 30 years of contributing service. Ex. 30.

22. Of the total 30 years, Mr. Akers accrued X years of contributing service during his marriage to Ms. Jones. Ex. 1, ¶ (2); Ex. 30.

23. The Board's file contained two pre-retirement beneficiary forms: one, dated August 2, 2007, indicated Mr. Akers was married and chose a 100% joint and survivor annuity payable to his spouse in the event of his death before retirement, and another dated May 7, 2009, indicated Mr. Akers was not married and elected a lump sum payment in equal amounts to two named beneficiaries, Judy Vannoy (designated as fiancé) and Jordan Smith (designated as grandson), in the event of his death before retirement. Exs. 19-20.

24. A third pre-retirement beneficiary form, dated June 4, 2009, selected a lump sum benefit payable solely to Patricia L. Akers Jones, designated as ex-wife, but this was not provided to the Board until after the commencement of this litigation. Ex. 9, Answers to Interrogatories Nos. 11 and 12; Ex. 21.

25. In December 2010, Ms. Jones obtained another DRO from the Family Court of Mercer County. Ex. 3.H.

26. The December 2010 DRO provided, in paragraphs (6), (7)(b), (7)(d), and (8), that the Participant would have the right to choose the form of benefit at the time of his retirement or withdrawal from service, but continued to provide, in paragraph (7)(b), that Ms. Jones would be treated as the sole surviving spouse of Mr. Akers. Ex. 3.H.

27. The December 2010 DRO was provided to the Board on March 7, 2011. Ex. 3.I.

28. The Board rejected the December 2010 DRO as well. Ex. 3.I.

CONCLUSIONS OF LAW

Standard of Review

1. Summary judgment should be granted "where the record demonstrates 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Mack-Evans v. Hilltop Healthcare Ctr., Inc.*, 226 W. Va. 257, 261, 700 S.E.2d 317, 321 (2010) (quoting W. Va. R. Civ. P. 56(c)).

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Thus, if one element fails, there is no possibility for recovery[.]" Syl. pt. 2, *Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 568 S.E.2d 19 (2002) (per curiam).

3. Where, as here, "the record could not lead a rational trier of fact to find for the nonmoving party," a court should grant summary judgment in favor of the moving party. Syl. pt. 2, *Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 568 S.E.2d 19 (2002) (per curiam).

The Board is Entitled to Summary Judgment Against Ms. Jones For All Claims Based on the June 2009 DRO Because the Board Correctly Determined that the DRO Could Not Be Considered a QDRO Under Applicable Law

4. "A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." *State ex rel. Maple Creative LLC v. Tincher*, 226 W. Va. 118, 120, 697 S.E.2d 154,

156 (2010) (quoting Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

5. The Declaratory Judgments Act provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. ... The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." W. Va. Code § 55-13-1.

6. "The granting or refusal of an injunction, whether mandatory or prohibitive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." Syl. Pt. 2, *Camden-Clark Memorial Hospital Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002); syl. Pt. 4, *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E.154 (1932).

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

8. The burden lies with the plaintiff to show that he or she is entitled to injunctive relief. *Camden-Clark*, 212 W. Va. at 756.

9. Each of these claims, as well as the claim for damages asserted by the Petitioner/Plaintiff in her Amended Petition for Writ of Mandamus and Complaint for Declaratory Relief, Injunction and Damages, requires the Petitioner/Plaintiff to establish as a matter of law that the Board should have accepted the June 2009 DRO as a QDRO.

10. Therefore, the Board is entitled to summary judgment on each of these claims because it had two legitimate bases for rejecting the June 2009 DRO on which Ms. Jones' claims rest: first, because the DRO contained an internal inconsistency making it unenforceable, and second, because even if any ambiguity were resolved in favor of the Petitioner/Plaintiff, the DRO conflicted with applicable law.

11. DROs "must contain specific instructions and directives to the plan administrator" in order to be correct and enforceable. *Chenault v. Chenault*, 224 W. Va. 141, 146, 680 S.E.2d 386, 391 (2009); *see also McPhee v. Maine State Ret. Sys.*, 980 A.2d 1257, 1264 (Me. 2009) (observing a requirement that a QDRO be sufficiently specific).

12. The June 2009 DRO was internally inconsistent on its face with regard to the form of benefit to be chosen by the Participant in PERS, Mr. Akers (compare Ex. 1, ¶¶ (7)(b), (7)(d), and (8) to ¶¶ (7)(b) and (8)); therefore, as a matter of law, the Board had authority to reject the DRO because it did not contain sufficiently specific instructions and directives to the plan administrator.

13. The Final Divorce Order's direction to require Mr. Akers to appoint Ms. Jones as the beneficiary for a joint and survivor annuity does not entitle Ms. Jones to relief because the QDRO is the exclusive method authorized by statute for the division of PERS benefits. *King v. King*, No. 35696, at pp. 7-8 (W. Va. May 16, 2011) (Mem. Decision) (applying

the terms of a QDRO rather than a divorce Settlement Agreement when determining whether the Participant had the right to elect any form of benefit of his choosing, because "[i]n West Virginia, it is the QDRO which determines the allocation of retirement benefits," and which "must control.") (citations omitted); *see also Brown v. City of Fairmont, W. Va.*, 221 W. Va. 541, 547, 655 S.E.2d 563, 569 (2007) (per curiam) (holding that "it is not necessary for the plan to look beneath the surface of the QDRO to inquire into its propriety under state law."); *Metro. Life v. Pettit*, 164 F.3d 857, 863-4 (4th Cir. 1998) (in considering proper beneficiary for life insurance policy, refusing to hold plan administrator liable for failing to make payments based on contract external to beneficiary designation held by the plan, because to do so would impact plan relationships based on "outside agreements of which the administrator will likely be unaware."); *McPhee,* 980 A.2d at 1264 (holding that the director of a governmental retirement plan was neither permitted nor required by statute to consider the intent of the parties expressed in a settlement agreement or divorce judgment separate from a QDRO when reviewing the enforceability of the QDRO).

14. PERS provisions give its members the right and ability to choose, at the time of their retirement, the form of benefit they wish to receive, even when a QDRO is in place. *See, e.g.*, W. Va. Code §§ 5-10-22 (providing for a default form of benefit of a straight life annuity) and 5-10-24 (permitting the participant to elect, in lieu of a straight life annuity, a 100% joint and survivor annuity or a modified 50% joint and survivor annuity); *see also*, W. Va. Code R. § 162-1-6.2.3 (wherein the Legislative Rules governing PERS QDROs provide that all QDROs shall adopt the "shared payment approach," pursuant to which the Alternate Payee receives his or her portion of the marital property "at the same time and in the same form as the benefit <u>elected by and paid to the member</u> once he or she enters pay status." (emphasis added)).

15. A PERS QDRO "may not require the plan to provide the alternate payee with any type or form of benefit, or any option, not otherwise provided under the plan." W. Va. Code R. § 162-1-6.2.6 (effective June 1, 2008 - June 30, 2009).[2]

16. Thus, the Board also had authority to refuse to Qualify the June 2009 DRO because it sought to require the Board to enforce a restriction on the participant's benefit election options that the Board had no statutory authority to enforce. Ex. 1, ¶¶ (7)(b) and (7)(f); Ex. 3, ¶ 10.

17. The Legislature has chosen to limit what portion of a PERS benefit can be considered "marital property" and therefore be divisible by a QDRO. W. Va. Code § 29A-1-2(d) (defining "Legislative rules" as rules which have "the force of law.").

18. Specifically, it has provided that:

> 6.2 In cases of divorce or legal separation, the annuity, refund of accumulated contributions, or other provisions available to a member, retirant or beneficiary of any Retirement System may only be divisible as provided in this rule. ...
>
> 6.2.1. In cases of divorce or legal separation where the member's or retirant's interest in his or her retirement account is subject to division as marital property pursuant to state domestic relation law, <u>that portion of the member's or retirant's retirement account which is subject to division by a [QDRO] shall be determined by the Board by using the following formula ... the marital property portion of a member's or retirant's retirement benefit which is subject to division shall be computed by the Board by multiplying the Vested Accrued Retirement Benefit, less all benefits due to Exempt Service, by a fraction, the numerator being the number of years of contributing service incurred during the marriage, and the denominator being the total number of years of contributing</u>

[2] This legislative rule has been revised since the time of the events at issue in this case. The Court has applied the version of the rule in effect at the time of entry of the June 2009 DRO, but notes that rule remains substantially the same. *See* W. Va. Code R. § 162-1-7 (2014).

> service toward the pension at the date of separation or the date of divorce. In determining the member's or retirant's benefit, the numerator used by the Board in the fraction shall not include the member's previously withdrawn service credit which was not repaid in full...

W. Va. Code R. § 162-6-2 (Effective June 1, 2008 - July 1, 2009) (emphasis added).

19. The effect of this rule is to exclude some of a PERS member's benefit from being treated as marital property: years of contributing service incurred before or after the marriage, exempt service, and previously withdrawn service credit which was not repaid in full during the marriage, are not considered marital property and therefore cannot be divided by a QDRO. W. Va. Code R. § 162-6-2 (Effective June 1, 2008 - July 1, 2009).

20. The order sought by Ms. Jones would have allowed her to receive 100% of Mr. Akers' entire PERS benefit upon his death, including amounts attributable to the more than three years he participated in PERS after the end of his marriage to Ms. Jones, including periods of service accrued during his marriage to Mrs. Akers. Ex. 1, ¶¶ (7)(b) and (7)(f); Ex. 3, ¶ 10.

21. Thus, the Board also had authority to refuse to Qualify the June 2009 DRO because it sought to award more than the marital property portion of Mr. Akers' PERS benefits as defined by W. Va. Code R. § 162-2-6 (Effective June 1, 2008 - July 1, 2009).

22. While the Petitioner correctly notes that State law contemplates that a QDRO may operate to prohibit a member from changing the type of annuity he or she is receiving upon divorce or from naming a new spouse as an annuitant, the restrictions apply only to individuals who have actually retired at the time of divorce and any subsequent remarriage. W. Va. Code § 5-10-24 (2009); and W. Va. Code § 5-10-2(23) (defining "Retirant" as "any member who commences an annuity payable by the retirement system.").

23. Thus, there was no statutory authority for the Board to accept as a QDRO an order which sought to impose these restrictions with respect to a divorce occurring prior to the PERS member's retirement.

24. The Court declines to apply Internal Revenue Code (the Code) Section 414(p)(5) to the Board's review of the June 2009 DRO as Code Section 414(p)(5) does not apply because PERS is a governmental plan. Code Section 414(p)(9) (providing that paragraph (p) does not apply to those plans to which Code Section 401(a)(13) does not apply); Code Section 401(a) (providing that paragraph (13) of Section 401(a) shall apply only to plans to which Code Section 411 (relating to minimum vesting standards) applies); and Code Section 411(e)(1) (providing that Code Section 411 does not apply to governmental plans); *see, also,* Treas. Reg. § 1.401(a)-13(a) ("This section applies only to plans to which section 411 applies without regard to section 411(e)(2)).

The Board is Entitled to Summary Judgment Against Ms. Jones For All Claims Based on the December 2010 DRO Because the Board Correctly Determined that the Order Could Not Be Considered a QDRO Under Applicable Law.

25. With regard to the December 2010 DRO, Ms. Jones again asserts entitlement to relief based on claims for a writ of mandamus, declaratory judgment, injunction and damages.

26. As the Court noted with respect to the June 2009 DRO, each of these claims likewise requires the Petitioner/Plaintiff to establish that the Board should have accepted the December 2010 DRO as a QDRO.

27. Therefore, the Board is entitled to summary judgment on each of these claims as well because it had two legitimate bases for rejecting the December 2010 DRO on

which Ms. Jones' first four claims rest: first, because the DRO was submitted after the death of the participant and after surviving spouse annuity benefits became payable, and second, because the DRO conflicted with applicable law.

28. The retirement of a member in PERS makes the beneficiary designation and, if applicable, joint and survivor annuity election irrevocable, except in certain limited circumstances.[3] W. Va. Code § 5-10-24 (providing, for each joint and survivor annuity option, that upon the death of a retirant who elected such an option, his or her annuity "shall" be continued and paid to the beneficiary nominated by the retirant).

29. The Board properly rejected the December 2010 DRO issued after the death of Mr. Akers because a surviving spouse annuity became payable to Mrs. Akers effective January 1, 2010 at which point the Board had no authority to hold or segregate the benefits, and such benefits became irrevocable and could not be altered by a QDRO. *See* W. Va. Code § 5-10-24.

30. The December 2010 DRO was also properly rejected because, like the June 2009 DRO, it sought to award more than the marital property portion of Mr. Akers' PERS benefits as defined by W. Va. Code R. § 162-1-6.2.a. (2010)[4], by attempting to require Ms. Jones to be named as the sole survivor beneficiary for Mr. Akers' PERS benefits. Ex. 3.H., ¶ (7)(b).

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[3] A retired PERS member is permitted to revoke a joint and survivor annuity option and replace it prospectively with a straight life annuity if the spouse dies or the member becomes divorced, and similarly is permitted to prospectively elect a joint survivor annuity option if the member subsequently remarries, pursuant to W. Va. Code § 5-10-24. Mr. Akers' divorce of Ms. Jones and remarriage to Mrs. Akers occurred prior to his retirement, so these limited exceptions did not apply. *See* Exs. 1, 3.A., 12, 14.

[4] As the Court previously noted, this rule has been revised over the years, but the definition of the marital property portion of the benefit remains materially the same. *See* W. Va. Code R. § 162-1-7 (2014).

31. The Court declines to apply the reasoning adopted by the Federal District Court in *Nat'l City Corp. v. Ferrell*, 2005 WL 2143984 (N.D.W.Va. 2005), because the outcome depended on the application of an ERISA statute and Department of Labor guidance which does not apply to governmental plans like PERS. *See* 26 U.S.C. §§ 1003(b)(1) and 1056.

32. The Court again notes that Code Section 414(p)(5) did not apply to the Board in considering whether the December 2010 DRO could be deemed a QDRO.

The Board is entitled to summary judgment against Plaintiff for all claims based on both DROs pursuant to laches

33. "[L]aches is an equitable doctrine based on the maxim that equity aids the vigilant, not those who slumber on their rights." *Province v. Province*, 196 W. Va. 473, 473 S.E.2d 894 (1996) (citation omitted).

34. "The elements of laches consist of (1) unreasonable delay and (2) prejudice." *Province v. Province*, 196 W. Va. 473, 473 S.E.2d 894 (1996) (citation omitted).

35. Laches has been applied in favor of government agencies before, on public policy grounds. *See Maynard v. Bd. of Educ. of Wayne Cnty.*, 178 W. Va. 53, 61, 357 S.E.2d 246, 255 (1987).

36. Ms. Jones' failure to pursue her request for a QDRO for more than seven months after submitting it to the Board constitutes unreasonable delay in these circumstances.

37. Thus, in addition to the foregoing grounds, the Board is entitled to summary judgment against Ms. Jones as a matter of law because to hold otherwise would be to prejudice the Board on the basis of Ms. Jones' unreasonable delay.

38. The Court notes that whether delay in pursuing a request for a QDRO will be dependent on the particular facts of each case, in that a delay will not always result in prejudice to the Board, or more specifically, the PERS trust; in this case, however, the intervening remarriage, retirement and death of Mr. Akers, coupled with the lack of a valid QDRO, required the Board to commence monthly annuity payments to Mrs. Akers.

39. Moreover, with respect to retroactive amounts sought by Ms. Jones, the Board would be prejudiced if payment to her were required because such funds are no longer possessed by the Board.

The Board is also entitled to Summary Judgment Against Ms. Jones on Her Mandamus Petitions Because the Board's Duty in Reviewing the DROs was Discretionary

40. "A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." *State ex rel. Maple Creative LLC v. Tincher*, 226 W. Va. 118, 120, 697 S.E.2d 154, 156 (2010) (quoting Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

41. Mandamus relief can be sought to "compel performance of a nondiscretionary duty, though another remedy may exist, and where the Board acted under a misapprehension of law." *Jones v. W. Va. Consol. Pub. Ret. Bd.*, No. 101327, p. 3 (Sept. 23, 2011) (Mem. D.) (citing *State ex rel. DHHR v. W. Va. Pub. Empl. Ret. Sys.*, 183 W. Va. 39, 393 S.E.2d 677 (1990)).

42. With respect to discretionary duties, mandamus may be "a proper remedy to compel ... officers exercising discretionary and judicial powers to act, when they refuse to do so, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made." *Nobles v. Duncil*, 202 W. Va. 523, 505 S.E.2d 442 (1998) (quoting syl. pt. 1, *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924)) (internal quotation marks omitted).

43. "Since mandamus is an 'extraordinary' remedy, it should be invoked sparingly," and only "in extraordinary circumstances." *State ex rel. Crist v. Cline*, 219 W. Va. 202, 208, 632 S.E.2d 358, 364 (2006) (citations omitted).

44. The Court has concluded that the Board did not have a nondiscretionary duty to approve the June 2009 and December 2010 DROs, as discussed previously in this Order; however, Ms. Jones' Petitions for Writ of Mandamus should also be denied in this case because even if the duties of the Board with respect to QDROs are considered discretionary, this is not a case in which the Board failed to act (*i.e.*, to respond to Ms. Jones' requests for approval of a QDRO), but rather a case in which the Petitioner is attempting, through mandamus, to prescribe the manner in which the Board should act (*i.e.*, to actually approve Ms. Jones requests for a QDRO).

The Board is also entitled to Summary Judgment Against Mrs. Akers Because It Properly Paid the benefit as a Posthumous Disability

45. W. Va. Code § 5-10-25 requires the Board to grant a disability retirement request "upon application," retroactive to the later of the first day of the month following the date of application or the first day of the month following the last day the member appears on the employer's payroll. W. Va. Code § 5-10-25 and W. Va. Code R. § 162-5-19.2.

46. Mrs. Akers does not dispute that Mr. Akers applied for disability retirement benefits on September 15, 2009, and that the Board ultimately determined that he was entitled to such benefits, retroactive to January 1, 2010, since he was on his employer's payroll until his death in December 2009.

47. The Board's procedures with regard to death of a PERS member awaiting a final determination on his or her disability retirement application are reasonable - they take into account the mandatory language of W. Va. Code § 5-10-25 and W. Va. Code R. § 162-5-19.2, the length of time needed to adequately review and rule on such an application, and the goal of protecting those beneficiaries of PERS members who may die while a disability application is pending where the denial of the application would result in a surviving spouse receiving nothing due to the member's insufficient service credit in the plan to receive a pre-retirement death benefit.

48. Thus, the Board properly awarded Mrs. Akers' benefits as a 100% joint and survivor benefit based on a disability retirement.

Based on all of the foregoing, the Court hereby GRANTS the Board's Motion for Summary Judgment against Petitioner/Plaintiff Patricia Jones and Respondent/Defendant Judy Vannoy Akers, and denies the Motions and declines to adopt the proposed orders submitted on behalf of Petitioner/Plaintiff Patricia Jones and Respondent/Defendant Judy Vannoy Akers. The objections and exceptions of the Petitioner/Plaintiff Patricia Jones and Respondent/Defendant Judy Vannoy Akers herein are noted.

The Clerk is ORDERED to mail certified copies of this Order to counsel of record upon its entry with the Court.

IT IS SO ORDERED.

ENTERED this 8th day of July, 2014.

Honorable Tod J. Kaufman, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10th DAY OF July 2014
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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