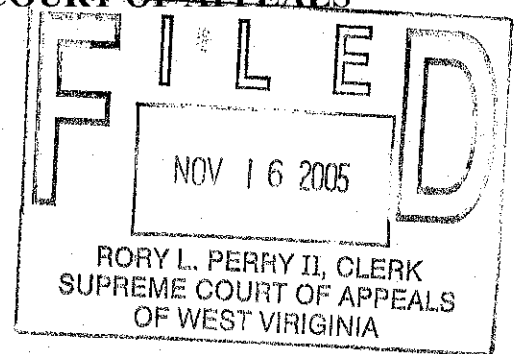


**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**PEGGY ANN MAYHORN,**  
Appellant,



v.

**APPEAL No. 32850**  
**Civil Action No. 04-AA-71**  
**(Circuit Court of Kanawha County)**

**WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,**  
Appellee.

**BRIEF FILED TO THE WEST VIRGINIA SUPREME COURT OF APPEALS**  
**ON BEHALF OF THE WEST VIRGINIA**  
**CONSOLIDATED PUBLIC RETIREMENT BOARD**

**Anne Werum Lambright**  
**Counsel for Appellee**  
**WEST VIRGINIA**  
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**Charleston WV 25305**  
**Telephone 304.558.3570, ext. 409**  
**State Bar No. 2131**

**I. Statement of Relevant Facts and Summary of Administrative and Judicial Decisions Below**

This matter is before the Court on the Petition for Appeal previously filed herein by the Appellant, Peggy Ann Mayhorn. In her Petition of Appeal to the West Virginia Supreme Court of Appeals, Ms. Mayhorn seeks reversal of a January 5, 2005, Order of the Circuit Court of Kanawha County, Judge Tod J. Kaufman, that affirmed the final administrative decision of Appellee West Virginia Consolidated Public Retirement Board ("Board") dated May 19, 2004, denying Ms. Mayhorn disability pension benefits from the Teachers Retirement System ("TRS").

Appellee Board is a public body created pursuant to West Virginia Code §5-10D-1 to serve as the statutory administrator and fiduciary for the State's pension plans, including the Teachers Retirement System. The members of the Board include the Treasurer, Auditor, Governor and other members of the executive branch of state government. It is required of the Board to ensure the the TRS plan, as well as its other retirement plans, is administered according to its terms, for the exclusive benefit of all plan participants and beneficiaries, in order to protect and preserve the plan's qualified tax status. See IRC 401(a); West Virginia Code §18-7A-3a. When individual plan participants seek to manipulate plan provisions for his or her individual benefit in a manner which is contrary to clearly expressed legislative intent, the Board has a responsibility to take all appropriate steps to ensure that the TRS trust is protected

Contrary to the Board's longstanding interpretation of controlling TRS plan provisions, Appellant Mayhorn seeks to compel the Board to grant her a disability pension. Appellant Mayhorn was employed as a cook with the Board of Education of the County of Logan and a member of Teachers Retirement System (TRS). She has approximately twelve years of contributory service. In 2003, Appellant Mayhorn applied for disability benefits from the Board and her application was denied by letter dated August 20, 2003, based upon evaluations by two Board-approved physicians who did not find her disabled. Appellant Mayhorn appealed this decision and Hearing Officer Jack W. DeBolt conducted a hearing on this appeal on March 19, 2004. Appellant Mayhorn was afforded the right to participate in the hearing, to present evidence and argument in support of the appeal and to cross-examine witnesses.

Thereafter, on April 13, 2004, Hearing Officer DeBolt issued a Recommended Decision that concluded that Appellant Mayhorn's application for disability retirement benefits should be denied as both the Board-approved physicians did not find her incapacity so severe that she was totally and permanently unable to perform the duties of the position she occupied immediately prior to the disabling illness or injury. Because the applicable law clearly and unambiguously provides that eligibility for a disability annuity from TRS requires that an examination by a physician selected by the Board must show that the member is incapacitated for service as a teacher (or in this case cook) and that this disability is total and likely to be permanent, Hearing Officer DeBolt found that she did not meet the statutory qualifications and therefore recommended that her application for disability retirement benefits be denied.

The Board reviewed the Recommended Decision and record in this matter and issued a Decision dated May 19, 2004, adopting Hearing Officer DeBolt's Recommended Decision. Appellant Mayhorn filed an appeal to Circuit Court pursuant to West Virginia Code §29A-5-4 on June 22, 2004.

On January 5, 2005, the Circuit Court of Kanawha County entered an Order affirming the administrative decision of the Board. In denying the relief sought by the Appellant, Judge Kaufman reviewed, *de novo*, the statutory and regulatory provisions applicable to this matter, and concluded that the Board's administrative decision was not affected by error of law. Moreover, Judge Kaufman determined that the Board's administrative decision was not clearly wrong based upon the substantial, reliable and probative evidence of record, and was neither arbitrary or capricious, nor characterized by an abuse of discretion.

## **II. Issue Presented**

A. Whether the circuit court below was correct in determining that the Appellee Board's decision to deny disability retirement benefits was based upon the substantial, reliable and probative evidence of record, and was neither arbitrary or capricious, nor characterized by an abuse of discretion.

### III. Citation of Authority

- A. West Virginia Code §18-7A-3a.
- B. West Virginia Code §18-7A-25
- C. West Virginia Code §29A-5-4
- D. West Virginia Code of State Rules §162-2-2-3.2.

### IV. Argument

**A. The standard for judicial review of administrative agency decisions is, in the absence of error of law, deferential to the decision of the agency.**

This matter is before the Court pursuant to West Virginia Code §29A-5-4 of the West Virginia Administrative Procedures Act. Section §29A-5-4(g) governs the review of contested administrative decisions and issues and specifically provides that:

(g) The Court may affirm the ...decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the...decision of the agency if the substantial rights of the Appellant...have been prejudiced because the administrative...decisions are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court has consistently held that, in the absence of an error of law, factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or “arbitrary and capricious.” See, e.g. Healy v. West Virginia Bd. of Medicine, 506 S.E. 2d 89, 92 (W.Va. 1998). Moreover, this Court has cautioned that, under the arbitrary and capricious standard, a circuit court which is reviewing the factual findings of an administrative agency must “not substitute its judgment for that of the hearing examiner.” See Woo v. Putnam County Board of Education, 504 S.E. 2d 644, 646 (W.Va. 1998).

With respect to judicial review of an administrative agency’s interpretations of the statutes and regulations which it administers, and notwithstanding the general rule of *de novo* review of issues of law, the Court has held that “absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of [a] statute by [an administrative agency]” having policy making authority relating to the statute. See, e.g., Sniffen v. Cline, 193 W. Va. 370, 456 S. E. 2d 451 (1995).

In addition, this Court has held that interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight and that such an agency’s construction of these statutes must be given substantial deference. *Sniffen*, citing *WV Department*

*of Health v. Blankenship*, 189 W. Va. 342, 431 S. E. 2d 681 (1993); *WV Non-Intoxicating Beer Commr' v. A&H Tavern*, 181 W.Va. 364, 382 S. E. 2d 558 (1989); *Dillon v. Board of Educ.*, 171 W.Va. 631, 301 S. E. 2d 588 (1983); *Smith v. State Workmen's Comp. Comm'r.*, 159 W.Va. 108, 219 S. E. 2d 361 (1975).

**B. West Virginia Code §18-7A-25 requires a physician selected by the Board to be of the opinion that a member is totally and likely permanently incapacitated for service in their job position.**

Because neither Board- selected physician was of the requisite opinion, Appellant Mayhorn did not meet the statutory standard for an award of TRS disability retirement benefits. Appellant. Mayhorn's arguments that she was not properly evaluated by the physicians selected by the Board were refuted by the evidence. Her argument that her Social Security Disability Award was not considered by the physicians fails to note that the Social Security Disability rule was not made effective by the Legislature until after her physician examinations and after the Hearing Officer's recommended decision was submitted to Appellee Board. It also fails to reflect the provisions of CSR § 162-2-3.2 that state that the award of Social Security Disability benefits simply creates a presumption of incapacity that can be rebutted by contrary medical opinion. The opinions of both Dr. Jeffrey and Dr. Walden were that Appellant. Mayhorn did not meet the statutory disability standard so any presumption of incapacity was rebutted by their respective contrary medical opinion.

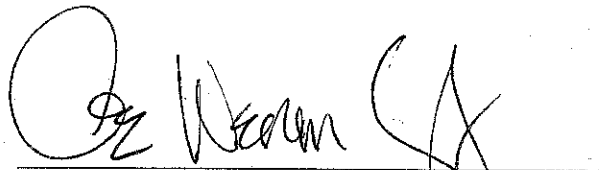
## V. Conclusion

The Board's denial of Appellant Mayhorn's request for disability benefits was not affected by error of law. To the contrary, the Board's decision, affirmed by the Circuit Court of Kanawha County, is entirely consistent with the clear and unambiguous provisions of West Virginia Code §18-7A-25.

ACCORDINGLY, and for all the foregoing reasons, the undersigned respectfully submits that the Board's Final Order of May 19, 2004, adopting Hearing Officer DeBolt's Recommended Decision in its entirety, is not affected by error of law, and that the Board's factual findings set forth therein are supported by the substantial, reliable and probative evidence of record. Consequently, and pursuant to the provisions of West Virginia Code §29A-5-4, this Court should reject the Appellant Mayhorn's request for a reversal of the Circuit Court's Order affirming the Board's administrative denial of Appellant's request for relief, on the basis that the Circuit Court's Order affirming the Board's administrative denial of Appellant's request for relief was, and is, plainly right.

Respectfully submitted,

The West Virginia Consolidated Public Retirement Board,  
By Counsel



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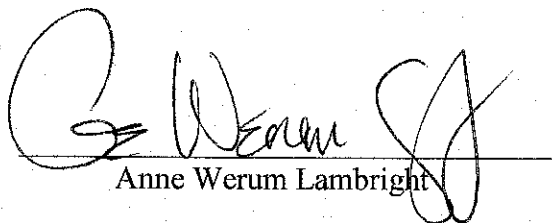
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Board Counsel

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**CERTIFICATE OF SERVICE**

I, Anne Werum Lambright, counsel for the respondent, do hereby certify that a copy of the foregoing Response in Opposition to Petition to Appeal was served upon the following, this the 15th day of November, 2005, by regular mail, postage prepaid, addressed as follows:

John Everett Roush, Esq.  
WV School Service Personnel Association  
1591 Washington St. East  
Charleston WV 25311



A handwritten signature in cursive script, appearing to read 'Anne Werum Lambright', is written over a horizontal line.

Anne Werum Lambright, Bar No. 2131  
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