

SUPREME COURT OF APPEALS OF WEST VIRGINIA

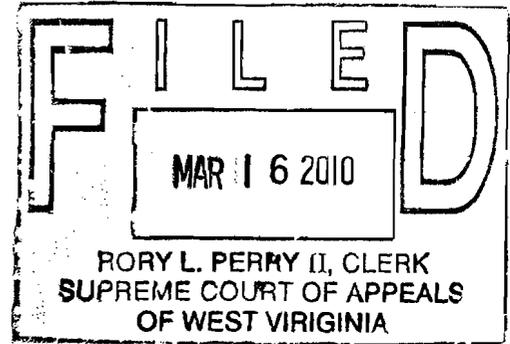
Supreme Court Docket No. : 35471

**Civil Action No. 07-AA-89 (Circuit Court of Kanawha County)
(The Honorable Jennifer F. Bailey)**

**DONNA MCKNEELY,
Appellant,**

v.

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



**BRIEF OF THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT
BOARD IN OPPOSITION TO PETITION FOR APPEAL**

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**I. KIND OF PROCEEDING AND
NATURE OF RULING IN LOWER TRIBUNAL**

A. INTRODUCTION

This is an appeal by Donna McKneely, Appellant, a disability annuitant from the West Virginia Death, Disability and Retirement Fund (State Police Plan A), of a decision by the West Virginia Consolidated Public Retirement Board (hereinafter the "Board") denying her request to change her disability status from non-duty related to duty related disability retirement benefits.

In 1999, Appellant suffered an injury when she slipped and fell at the State Police Academy where she was taking a promotional examination. This was a voluntary and non-compensated examination. At the time of injury, Appellant was on a maternity leave of absence. In January 2001, the Board awarded Appellant non-duty related disability retirement benefits. She did not contest this award until September 9, 2005.

The Board issued its *Final Order* denying Ms. McKneely's request to change her disability status from non-duty related to duty related on May 23, 2007 and adopting the recommendation of Hearing Officer Jack W. DeBolt dated April 10, 2007. Ms. McKneely, by counsel, appealed this decision to the Circuit Court of Kanawha County.

By Order entered on July 31, 2009, the Circuit Court affirmed the Board's Order, holding that after a thorough examination of the record, the Board had made correct and appropriate findings under the circumstances and that the Board's decision was not contrary to law, clearly wrong, or otherwise in violation of applicable law. The court specifically found that Appellant failed to satisfy the requirements for duty related disability retirement benefits as contained in West Virginia Code § 15-2-29(a) because Appellant's injury did not occur while she was performing her duties as a State Trooper.

B. PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellant is a disability annuitant from the West Virginia Death, Disability and Retirement Fund (Plan A). She was an active member of the State Police for eight years, two months and fourteen days.

On June 28, 1999, Appellant slipped and fell at the State Police Academy where she was taking an examination for promotion to the rank of sergeant. At that time, she was on a maternity leave of absence and had given birth via caesarian section three weeks prior to the date of the examination. She fell during a break in the examination while going to the restroom.

Appellant's participation in the promotional examination was voluntary. Her participation was not mandatory and she was not compensated in any manner for her time or other expenses related to the examination. It was not a duty of her employment.

In October 2000, Appellant applied for duty-related disability benefits and was denied this request based upon the opinions of the examining physicians. Instead, the Board awarded Appellant non-duty-related disability benefits on January 24, 2001. At that time, Appellant received a letter from the Board informing her that she could appeal the disability decision or see a second Board selected physician. She chose neither option. Between October 1999 and her retirement on January 24, 2001, she worked periodically on and off duty.

Following the Board's award of non-duty disability benefits, Appellant took no steps to perfect an administrative appeal until September 9, 2005, when her lay representative, Norman Henry, requested that her status be changed from a non-duty related annuity to a duty-related annuity.

Appellant's request was denied by letter dated September 22, 2005, wherein the request was incorrectly treated as a new matter and the Appellant was advised that she had 90 days to request an

appeal. The appeal was requested within the 90 day time period, although said appeal was requested years after the initial decision.

On August 18, 2006, an administrative hearing was held. On April 10, 2007, hearing examiner, Jack DeBolt, issued a *Recommended Decision* in which he recommended that since the present Legislative Rules imposing time limitations for appeal were not in effect in 2001, Appellant's appeal was timely; however, he recommended that her request to change her partial non-duty related disability award from the West Virginia Death, Disability and Retirement Fund to a duty related award should be denied. By *Final Order* entered on May 23, 2007, the Appellee, the Board, adopted the hearing examiner's *Recommended Decision*, thereby denying the Appellant's request.

By Order entered on July 31, 2009, the Circuit Court affirmed the Board's Order, holding that Appellant does not qualify for duty-related benefits under West Virginia Code §15-2-29(a) because her injury did not result from "an occupational risk or hazard peculiar to the services required of members of the Department and incurred pursuant to or while the member was engaged in the performance of her duties as a member of the Department." Appellant is appealing this decision.

II. ISSUE

Whether pursuant to §15-2-29 of the West Virginia Code, the Appellant suffers from an "injury, illness or disease resulting from any occupational risk or hazard inherent in or peculiar to the services required of members" of the State Police and "incurred pursuant to or while the member was engaged in the performance of his or her duties"; and,

Whether the Circuit Court's Order is clearly wrong in view of the reliable, probative, and substantial evidence of record.

III. DISCUSSION OF LAW

The West Virginia Administrative Procedures Act governs the review of contested administrative decisions and issues by a circuit court 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.

West Virginia Code §29A-5-4.

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). 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.” Woo v. Putnam County Board of Education, 504 S.E. 2d 644, 646 (W.Va. 1998).

Legal issues, such as statutory and regulatory interpretation, are legal matters which are subject to *de novo* review. Id.

As 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).

Interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight, and 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).

This Court may not confer retirement benefits for employment where the legislature has not so authorized. See *Cain v. PERS*, 197 W. Va. 514, 476 S.E.2d 185 (1996). The rule of statutory construction to liberally construe a remedial statute to the benefit of the beneficiaries of the statute does not operate to confer a benefit where none is intended. *Id.*

Duty related disability retirement benefits from the West Virginia Death, Disability and Retirement Fund (State Police Plan A) are governed by §15-2-29(a) of the West Virginia Code, which states:

(a) Any member of the Department who has not yet entered retirement status on the basis of age and service and who becomes partially disabled by injury, illness or disease **resulting from any occupational risk or hazard inherent in or peculiar to the services required of members of the Department and incurred pursuant to or while the member was engaged in the performance of his or her duties as a member of the Department** shall, if, in the opinion of the Retirement Board, he or she is by reason of that cause probably permanently unable to perform adequately the duties required of him or her as a member of the Department, but is able to engage in any other gainful employment in a field other than law enforcement, be retired from active service by the Retirement Board.”

In 2000, at the time Appellant initially requested disability retirement, §15-2-29(a) of the West Virginia Code stated:

Any member of the division who has been or shall become physically or mentally permanently disabled by injury, illness or disease **resulting from any occupational risk or hazard inherent in or peculiar to the services required of members of the division and incurred pursuant to or while such member was or shall be engaged in the performance of his or her duties as a member of the division** shall, if, in the opinion of the retirement board, he or she is by reason of such cause unable to perform adequately the duties required of him or her as a member of the division, but is able to engage in any other gainful employment, be retired from active service by the retirement board.

Non-duty disability retirement benefits from the West Virginia Death, Disability and Retirement Fund (State Police Plan A) are governed by §15-2-30 of the West Virginia Code, which states:

(a) If any employee who has served less than twenty years and who remains in the active service of the agency has, in the opinion of the board, become permanently partially or totally disabled to the extent that the employee cannot adequately perform the duties required of an employee of the agency from any cause other than those set forth in the preceding section and not due to vicious habits, intemperance or willful misconduct on his or her part, the employee shall be retired by the board. The employee is entitled to receive annually and shall be paid from the fund in equal monthly installments during a period equal to one-half the time he or she served as an employee of the agency or until the disability eligibility sooner terminates, a sum equal to five and one-half percent of the total salary which would have been earned during twenty-five years of service. At the end of the one-half time period of service, the benefit payable for the remainder of the retirant's life is an annual sum paid in monthly installments equal to one-half the base salary received by the retirant from the agency in the preceding twelve-month period immediately prior to the disability award: *Provided*, That if the retirant was not employed with the agency for twelve months immediately prior to the disability award, the amount of monthly salary shall be annualized for the purpose of determining the benefit.

IV. ARGUMENT

West Virginia Code §15-2-29 and §15-2-30 clearly distinguish between duty related

disability retirement benefits from non-duty related disability retirement benefits for members of the state police. Counsel for Appellant's analysis fails to recognize this distinction and in essence proffers a theory which would enable any injury suffered by a member to qualify for duty related disability retirement benefits.

Opposing counsel also fails to recognize that although members of the State Police are not eligible for Social Security Disability benefits for their service as troopers, they (like Appellant) are eligible to collect non-duty related disability retirement benefits, and they are not prohibited from engaging in other gainful employment covered by Social Security in addition to receiving those benefits. Additionally, opposing counsels' argument that this case is analogous to the Worker's Compensation statute is flawed for several reasons. Primarily, as the Circuit Court appropriately recognized, workers' compensability standards contained in the Workers' Compensation Act are not the same as the standards set forth in West Virginia Code § 15-2-29(a).¹

Pursuant to the current and 2000 version of §15-2-29(a) of the West Virginia Code, to qualify for duty related disability retirement benefits a member's injury must result from an **“occupational risk or hazard inherent in or peculiar to the services required of members of the Department and incurred pursuant to or while the member was engaged in the performance of her duties as a member of the Department”**. This statute establishes a two prong requirement for an individual to be eligible to receive duty related disability retirement benefits. In this case, Appellant cannot establish either prong. Appellant's injury did not result from an occupational risk or hazard inherent in or peculiar to that of a State Trooper and the injury was not incurred pursuant to or while she was engaged in the performance of her duties.

¹See Circuit Court Order, *McKneely v. WV CPRB*, 07-AA-89, p.7.

A. Appellant's injury did not occur "pursuant to or while she was engaged in the performance of her duties as a member of the Department".

On June 28, 1999, the Appellant, while on maternity leave, voluntarily attended (without pay) a non-required examination at the State Police Academy to participate in an opportunity to be promoted to sergeant. While walking to the restroom, she slipped on a slick spot on the floor and fell injuring her back.

In 2000, when Appellant was awarded non-duty disability retirement she was made aware of her opportunity to appeal the decision or to see another Board physician. She chose neither option. Several years later, in 2005, the Board received the Appellant's request from her counsel which is the subject of this appeal. **She was given the opportunity to present additional evidence in this matter only because she claimed to have new evidence to present; however, no new evidence has been presented.**²

The only evidence ever before this Board, the Circuit Court, and now this honorable Court clearly indicates that the Appellant's participation in the examination for promotion was voluntary, not compensated and occurred while she was not on duty. As required by §15-2-29(a) of the West Virginia Code, her injury was not incurred "pursuant to or while she was engaged in the performance of her duties".

In a letter addressed to Appellant dated February 26, 1999 regarding her attendance at the examination, Captain Charles R. Bedwell stated the following:

² Appellant claims that a written special order exists requiring her attendance. During the administrative hearing, her representative promised to fax the order to counsel for the Board and the Hearing Examiner. As of this date, no such order has been received and counsel for Appellant now claims that the "Department failed to produce it".

“All members are reminded that participation in a promotional cycle is **voluntary** and is **not compensable time**. The time spent preparing for, traveling to and participating in examinations and evaluation boards and other candidate activities **will not be considered as or reported as hours worked**. Also, expense accounts will not be allowed.”³

P.D. Clemens, Captain Troop 5 Commander, in a letter dated March 7, 2000 stated the following:

“...it is my opinion that Senior Trooper McKneely’s original injury was not department related. This injury occurred on Department Property, but she was not on Department Time while interviewing as part of our agency’s promotional procedure.”⁴

In response to an inquiry on the Board’s *Employer’s Report Form*, Colonel Gary L. Edgell, Superintendent, opined that the Appellant’s injury was not the result of “an occupational risk or hazard inherent in or peculiar to the services required of a State Trooper”.⁵ In a letter dated October 24, 2000, Colonel Edgell further opined that her injury was not work related and in support of his position stated the following reasons:

- “1) When this question arose shortly after the incident occurred, the Department ruled the injury was not work related.
- 2) Since June 28, 1999, when this incident occurred, the Appellant has been either on Sick Leave, Annual Leave or working in Light Duty status for the vast majority of the time. She has, in fact, exhausted all available leave and was placed on Medical Leave Without Pay effective October 2, 2000. During this entire period, she has never been granted Disability Leave, which would be the statutory remedy if indeed the incident in question were work related.
- 3) While the Appellant has reportedly undergone extensive medical treatment and testing during the intervening period, no costs associated with this testing or treatment have been defrayed by the Department (again, the statutory remedy for

³See attached Exhibit A.

⁴See attached Exhibit B.

⁵See attached Exhibit C.

a duty related injury).

4) All of the above listed actions on the part of the Department were subject to the filing of an employee grievance, if indeed the employee perceived the Department to be wrong in the position it had taken. To date, no grievance has been filed.

5) Attachment #1 is correspondence dated February 26, 1999, which was originated by the Department's Promotional Standards Officer. In it you may note the clear statement that, ".....*participation in a promotional cycle is voluntary and is not compensable time.*"

6) The above position was not arbitrary on the part of the Department. On the contrary, it is based upon the Department's interpretation of relevant statutes and regulations, and upon consultation with the U.S. Department of Labor. Attachment #2 (*Selected FLSA Regulations*) details a case which is directly applicable to the issue at hand.

7) Since the Appellant was off duty, participating in promotional cycle activities when she slipped and fell on June 28, 1999, it has been, and remains the Department's position that the reported injury is not duty related or service connected, consistent with §15-2-29(a) which states in part, [...*quotation of statute omitted*].⁶

Additionally, counsel for Appellant's analogy involving West Virginia Workers' Compensation Act and the opinion delivered in *Dodson v. Workers' Compensation Division*, 210 W.Va. 636, 558 S.E.2d 635 (2001) is not applicable to this case. The standard for a duty related disability retirement case is substantially different than the standard for a workers' compensation case. The issue in *Dodson* was whether an injury sustained during a mandatory preemployment agility test constituted a sufficient employment relationship as to qualify the individual as an "employee" entitling him to coverage by workers' compensation.

The Court in *Dodson* held that "where an offer of employment is conditioned upon an applicant successfully completing a course of safety instruction at his own expense and thereafter submitting to a physical agility test.... involving exposure of the applicant to immediate harm, participation in the physical agility test constitutes an acceptance of employment, entitling the

⁶See attached Exhibit D.

applicant to workers' compensation coverage". *Id. syllabus point three.*

The facts of the present case differ significantly from *Dodson*. In this case, Appellant was not required to participate in the promotional examination. It was not a condition of her employment. She voluntarily, without pay and while off duty attended the examination, and by doing so she was not put at *significant risk of immediate physical harm*.

Furthermore, Hearing Officer Jack W. DeBolt found that counsel for Appellant's reliance upon the opinion in *Dodson* was "ill-founded for the reason that the injured worker in Dodson, although injured during an uncompensated training session and physical agility test prior to beginning employment, was required to attend as a condition of employment, not here the case." "Further, Workers' Compensation compensability standards are not the same as the standard set forth in §15-2-29."⁷ He further found that because the Appellant's participation in the examination for promotion was "purely voluntary, it cannot be concluded that the Applicant's injury was incurred pursuant to or while she was engaged in the performance of her duties as a State Trooper as required by such §15-2-29." *Id.* p.7.

In affirming the Board's decision, the Circuit Court found that Appellant's reliance on *Dodson* was misplaced and not persuasive because of the differing standards and the evidence in the record. The Court found that although Appellant "claims that a written special order exists which required her attendance, the Appellant failed to produce a copy of such an order despite her promise to do so". Additionally, the Court held that the evidence in the record indicated that the promotional exam was voluntary, not compensated and occurred while Appellant was not on duty; that her failure to sit for the exam would only result in her foregoing a promotional cycle; and, that her missing the

⁷See *Recommended Decision* attached as Exhibit E.

exam would have no adverse consequences on her present working conditions or the continuance of her employment as a State Trooper.⁸

As mandated by West Virginia Code § 15-2-29(a), Appellant has failed to establish that her injury occurred ‘pursuant to or while she was engaged in the performance of her duties as a member of the Department’.

B. Appellant’s injury did not result from an ‘occupational risk or hazard inherent in or peculiar to the services required of members of the Department’.

West Virginia Code § 15-2-29(a) also requires Appellant to prove that her injury resulted from an “occupational risk or hazard inherent in or peculiar to the services required of members of the Department”. The hearing examiner never addressed this particular issue because there was no need to once he found that her attendance was voluntary and that she was not on duty ordered to attend the examination. Likewise, the Circuit Court did not address this issue, finding it to be inconsequential since the injury did not occur while the Appellant was performing her duties as a State Trooper.⁹

Although not addressed by the hearing examiner or the Circuit Court, Appellant cannot establish this statutory requirement either. Slipping and falling on a slick floor is not an occupational risk or hazard inherent in or peculiar to the services of a State Trooper. Being injured while trying to apprehend a suspect or being shot in the line of duty are examples of risks inherent to being a State Trooper. Using counsel for Appellant’s “but for” analysis, a slip and fall injury is common and happens to several average citizens (non-troopers) on a daily basis. Even if Appellant had not been

⁸See Circuit Court Order, *McKneely v. WV CPRB*, 07-AA-89, p.6-7.

⁹See Circuit Court Order, *McKneely v. WV CPRB*, 07-AA-89, p.6.

a trooper but merely a visitor to the Academy, she would have probably still slipped and fell on the slick floor.

V. CONCLUSION

Appellant proffers a misleading legal theory which is premised upon this honorable Court rejecting the findings of fact made by the Board's Hearing Officer and affirmed by the Circuit Court. As previously discussed, the Circuit Court found based upon the overwhelming weight of the evidence below that Appellant's participation in the promotional examination was voluntary, not mandated by her superiors, and not compensated in any manner.¹⁰ Such findings of fact should be given great deference and not disturbed on appeal unless clearly wrong or arbitrary and capricious. *Healy v. West Virginia Bd. of Medicine*, 506 S.E. 2d 89, 92 (W.Va. 1998). The only evidence presented below to the contrary consists of the self-serving uncorroborated testimony of the Appellant.

A substantial portion of Appellant's brief attempts to draw an analogy between the "work-related" statutory requirement of the Workers' Compensation statute and the "pursuant to the performance of her duties" as a state trooper statutory requirement of the West Virginia Death, Disability and Retirement Fund (State Police Plan A, *W.Va. §15-2-29*). Appellant uses this analogy to theorize that the lower court's ruling would result in the fund being "one of the most exclusionary state compensatory schemes in the country."

Appellant's analysis fails to recognize that perhaps "work-related" is so liberally construed under the Workers' Compensation statute because a finding otherwise would preclude the employee from receiving any compensation for her injury; whereas, the West Virginia Death, Disability and

¹⁰See p. 2 of Circuit Court Order, *McKneely v. WV CPRB*, 07-AA-89.

Retirement Fund (State Police Plan A) provides compensation for an injured trooper even when her injury is **not** duty related and did **not** occur pursuant to the performance of her duties as a state trooper.

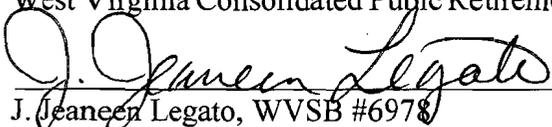
Wherefore, West Virginia Code §15-2-29(a) mandates that to be eligible for duty related disability retirement benefits a member's injury must result from an **“occupational risk or hazard inherent in or peculiar to the services required of members of the Department and incurred pursuant to or while the member was engaged in the performance of her duties as a member of the Department”**. In this case, the Appellant has failed to meet either prong.

The Board respectfully submits that its final administrative order dated May 23, 2007 and the Circuit Court's Order entered on July 31, 2009 affirming the Board's Order should be affirmed by this Honorable Court because the Board correctly applied the law and its administrative decision was not:

- (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.¹¹

RESPECTFULLY SUBMITTED,
West Virginia Consolidated Public Retirement Board,

BY :



J. Jeaneen Legato, WWSB #6978

West Virginia Consolidated Public Retirement Board
4101 MacCorkle Ave. S.E.
Charleston, West Virginia 25304

¹¹West Virginia Code §29A-5-4.

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EXHIBIT A



RECEIVED BY
OCT 28 2000
WVCPRB

West Virginia State Police
725 Jefferson Road
South Charleston, West Virginia 25309-1698
Executive Office

February 26, 1999

Cecil H. Underwood
Governor

Colonel Gary L. Edgell
Superintendent

SrTpr Donna M McKneely
WEST VIRGINIA STATE POLICE
Box 30
Winfield WV 25213-0030

Dear SrTpr McKneely:

The Selection and Review Board convened on the 26th day of February 1999 at Department Headquarters for the purpose of determining the initial eligibility of candidates for promotion to the permanent rank of Sergeant. In considering your initial eligibility, the Board determined that you have met the requirements for participation in this promotional cycle.

As required by the provisions of the Career Progression System, the Board did not consider any pending disciplinary action or current internal investigations in determining candidate eligibility. Should the final disposition of any pending case be the issuance of disciplinary action against any candidate or should any current investigation result in the issuance of any disciplinary action that would have precluded any candidates' participation in this cycle, the affected candidate(s) will be removed from the promotional cycle at the time this office receives notification of such action.

The study guide and source document list for the promotional examinations are being drafted and will be forwarded to the Superintendent for approval. Upon receiving approval, the study guide will be mailed to each eligible candidate.

Dates for the promotional examinations and evaluation boards have not been determined as of this date. Location and the day of the week on which any particular examination or evaluation board will be conducted will be at least in part dependent upon availability of classroom space.

All members are reminded that participation in a promotional cycle is voluntary and is not compensable time. The time spent preparing for, traveling to and participating in examinations and evaluation boards and other candidate activities will not be considered as or reported as hours worked. Also, expense accounts will not be allowed.

Congratulations on your successful completion of this phase of the promotional process. If you have any questions or comments, please contact me directly.

Sincerely,

BY DIRECTION OF THE SUPERINTENDENT

CAPTAIN CHARLES R. BEDWELL
PROMOTIONAL STANDARDS OFFICER

CRB:lmr

cc: Member's Permanent Rank File

EXHIBIT B

MP
JR



WEST VIRGINIA STATE POLICE
TROOP 5 HEADQUARTERS
735 RIVERVIEW AVENUE
LOGAN, WEST VIRGINIA 25601-3434

SEARCHED
SERIALIZED
INDEXED
FILED

Cecil H. Underwood
Governor

Colonel Gary L. Edgell
Superintendent

March 7, 2000

Superintendent
West Virginia State Police
725 Jefferson Road
South Charleston, WV 25309-1698

(THROUGH CHANNELS)

RE: INJURY OF SENIOR TROOPER D. M. MCKNEELY

Dear Sir,

I have reviewed all of the attached Report of Injury or Illness to Member Reports concerning Senior Trooper D. M. McKneely and the injury to her back and the illness concerning a viral infection. I have also reviewed all attached correspondences reference the injury and illness of Senior Trooper McKneely explaining same and attached cover letters from Sergeant E. B. Starcher and F/Sergeant J. A. Parsons.

After reviewing same, it is my opinion that Senior Trooper McKneely's original injury was not department related. This injury occurred on Department Property, but she was not on Department Time while interviewing as part of our agency's promotional procedure.

I would suggest that our agency's legal division give a written opinion to Senior Trooper McKneely concerning our stance reference her back injury, so that her insurance may start paying her medical bills and she can schedule the necessary surgery to relieve her pain.

Respectfully,

P. D. Clemens, Captain
Troop 5 Commander

PDC/pdd

Attachments

EXHIBIT C

**State of West Virginia
Consolidated Public Retirement Board**

Capitol Complex, Building 5, Room 1000, Charleston, West Virginia 25305-0720
Telephone: 304-558-3570 or 800-654-4406 (within WV) Fax: 304-558-6337

**CONSOLIDATED PUBLIC RETIREMENT BOARD
EMPLOYER'S REPORT FORM
DEPARTMENT OF PUBLIC SAFETY RETIREMENT SYSTEM**

OCT 16 AM 11:30
STATE POLICE

Information to be completed by the Employee:

Employee's Name Donna Mae (Ashcraft) McKneely	Date of Birth 02-22-69	Social Security Number 235-25-1062
Reason for requesting disability retirement: As a result of an injury sustained during a fall on June 28, 1999, my condition (back, neck and spine) has worsened to the extent that I am no longer able to perform the duties required of a West Virginia State Trooper. My physicians inform me that this condition is permanent and that I am not a candidate for surgery.		
<i>Donna M McKneely</i>		10/13/2000
Member's Signature		Date

Information to be completed by Employer:

- Do you know of any reason that would prevent this individual from working for you?
TFC McKneely's medical file contains documentation reflecting a reported low back injury which she attributes to the above referenced fall. The most recent letter from her physician (see attached medical file) indicates that this condition will preclude her being able to fulfill the duties of a State Trooper. It should be noted that TFC McKneely has not been examined/evaluated by a physician of the State's choosing, nor does her file reflect any influence or effect which her other medical conditions may or may not have had on her back problem.
- Work duties: See attached Job Description for Entry-Level State Police Road Trooper.
- Date of last full day of work: July 25, 2000 4. Last day of paid sick or annual leave: October 2, 2000
- In your opinion is this accident/sickness of this individual the result of an occupational risk or hazard inherent in or peculiar to the services required of a State Trooper? Yes No

Reporting Employer's Name and Address: WEST VIRGINIA STATE POLICE 725 JEFFERSON ROAD SO. CHARLESTON, WV 25309-1698	Telephone Number 304-746-2100	Date 10/25/00
	Signature <i>Gary L. Edgell</i>	
	Title COLONEL GARY L. EDGELL SUPERINTENDENT	

Upon Completion by Physician mail directly to: Sharon Waggy, Consolidated Public Retirement Board, 1900 Kanawha Boulevard East, Building 5, Room 1000, Capitol Complex, Charleston, West Virginia 25305-0720.

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EXHIBIT D



West Virginia State Police
725 Jefferson Road
South Charleston, West Virginia 25309-1698
Executive Office

Cecil H. Underwood
Governor

October 24, 2000

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Colonel Gary L. Edgell
Superintendent

Ms. Sharon Waggy, Retirement Advisor
Consolidated Public Retirement Board
Building 5, Room 1000
State Capitol Complex
Charleston, West Virginia 25305-0720

RE: Trooper First Class Donna M. McKneely

Dear Ms. Waggy:

This correspondence is intended to set forth the position of the West Virginia State Police in regard to a petition for service connected disability retirement submitted by Trooper First Class Donna M. McKneely. Specifically, TFC McKneely's request is predicated upon a reported low back injury which she attributes to duty as a member of the West Virginia State Police.

With respect to the nature and severity of the reported injury and resulting medical condition, it is the position of the Department that a thorough, independent evaluation of this matter be undertaken by a physician of the Board's choosing.

With respect to whether or not the incident which is reported to have caused the back injury is work related (i.e. the fall on June 28, 1999), it is the position of the Department that this incident is not work related. In support of this position, I offer the following:

- 1) When this question arose shortly after the incident occurred, the Department ruled the reported injury not work related.
- 2) Since June 28, 1999, when this incident occurred, the petitioner has been either on Sick Leave, Annual Leave or working in Light Duty status for the vast majority of the time. She has, in fact, exhausted all available leave and was placed on Medical Leave Without Pay effective October 2, 2000. During this entire period, she has never been granted Disability Leave, which would be the statutory remedy if indeed the incident in question were work related.
- 3) While the petitioner has reportedly undergone extensive medical treatment and testing during the intervening period, no costs associated with this testing or treatment have been defrayed by the Department (again, the statutory remedy for a duty related injury).

Correspondence
TFC Donna M. McKneely
October 24, 2000

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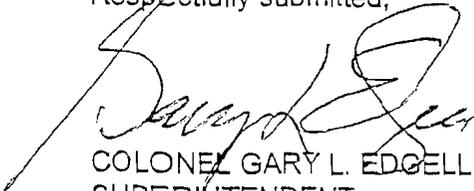
- 4) All of the above listed actions on the part of the Department were subject to the filing of an employee grievance, if indeed the employee perceived the Department to be wrong in the position it had taken. To date, no grievance has been filed.
- 5) Attachment # 1 is correspondence dated February 26, 1999, which was originated by the Department's Promotional Standards Officer. In it you may note the clear statement that, *".....participation in a promotional cycle is voluntary and is not compensable time."*
- 6) The above position was not arbitrary on the part of the Department. On the contrary, it is based upon the Department's interpretation of relevant statutes and regulations, and upon consultation with the U.S. Department of Labor. Attachment # 2 (*Selected FLSA Regulations*) details a case which is directly applicable to the issue at hand.
- 7) Since the petitioner was off duty, participating in promotional cycle activities when she slipped and fell on June 28, 1999, it has been, and remains the Department's position that the reported injury is not duty related or service connected, consistent with §15-2-29(a) which states in part,

"Any member of the division who has been or shall become physically or mentally permanently disabled by injury, illness or disease resulting from any occupational risk or hazard inherent in or peculiar to the services required of members of the division and incurred pursuant to or while such member was or shall be engaged in the performance of his or her duties as a member of the division shall, if, in the opinion of the retirement board....."

Given all the above, it is my recommendation that TFC McKneely's petition for service connected disability be denied. If, however, the Board's physician is in concurrence with the petitioner's physician, I would support the award of a non-service connected disability award by the Board.

If I may be of further assistance, please contact myself or my staff at your first convenience.

Respectfully submitted,



COLONEL GARY L. EDGELL
SUPERINTENDENT
WEST VIRGINIA STATE POLICE

Letter Ruling: March 1, 1993 (cont.)

during the sleeping period, the entire sleep period must be counted as hours worked.

We conclude that the draft agreement you submitted conforms with the sleep time principles discussed in §553.222. We trust that the above is responsive to your inquiry.

/s/ Daniel F. Sweeney
Deputy Assistant
Administrator

* * * * *

Letter Ruling: March 19, 1993

This is in reply to your inquiry concerning whether time spent by a police officer during off-duty hours attending an interview for a potential career development reassignment is compensable under the Fair Labor Standards Act (FLSA).

As you were previously advised, attendance at lectures, meetings, training programs and similar activities are not compensable under the FLSA if all four of the conditions described in 29 CFR 785.27 are met. Under the facts described in your letter of February 26, 1993, clearly (a) and (d) are met. Further, the program is voluntary in nature and there is nothing in your submission which indicates that the officer's failure to participate would adversely affect his present working conditions or the continuance of his employment by the City. Thus, we conclude that condition (b) is met. See 29 CFR 785.28. Since the purpose of the program is career development in another skill (i.e., traffic control and motorcycle training) rather than to enhance the officer's performance in his present job, we conclude that the condition (c) is also met. See the last sentence of 29 CFR 785.29. Consequently, we conclude that the time spent in attending the career development interview by the officer during off-duty hours is noncompensable under the FLSA.

We trust that the above is responsive to your inquiry.

/s/ Daniel F. Sweeney
Deputy Assistant
Administrator

* * * * *

Letter Ruling: March 18, 1993

This is in reply to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to _____ firefighters when they are "on-call," and whether the on-call hours are compensable under the FLSA.

Both the Wage and Hour Regional Office in Kansas City and this office advised, in response to prior inquiries from the Fire Chief and the City Attorney, that the time spent by firefighters on-call, under the facts made available, is not compensable under the FLSA, provided that the calls are not so frequent that the employees cannot use the time effectively for their own purposes. The compensability of on-call time for the firefighters may well turn on the frequency of such emergency calls. If calls to duty are so frequent that employees cannot use their off-duty time effectively for their own benefit, the entire on-call period would be

compensable. However, you have not provided any new factual information in this regard.

Whether a particular factual situation will be considered to constitute hours of work under the FLSA is not always easy to predict. In Renfro v. Emporia, 948 F.2d 1529, 30 WH Cases 1017 (10th Cir. 1991) cert. dismissed 112 S.Ct. 1310 (1992), the court found on-call time spent by firefighters compensable where they responded to an average of three to five calls in a 24-hour on-call period, and as many as 13 calls on occasion. The court stressed the "fact based nature of these cases" in distinguishing Renfro from its holdings in Norion v. Worthen Van Service Inc., 839 F.2d 653 (10th Cir. 1988) and Boehm v. Kansas City Power & Light Co., 868 F.2d 1182 (10th Cir. 1989).

You may wish to review the frequency of calls received by on-call _____ firefighters in light of this case law. As indicated in §785.2 of 29 CFR Part 785, the ultimate decisions on interpretations of the FLSA are made by the courts.

We trust that the above is responsive to your inquiry.

/s/ Charles E. Pugh
Acting Administrator

* * * * *

Letter Ruling: March 19, 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain seasonal employees of the _____ Department of Natural Resources _____ who also work as "volunteers" performing the same tasks for _____ during the "off-season."

You state that _____ employs certain employees at its park facilities on a seasonal basis. They work as full-time employees for 6 to 8 months per year. After the seasonal period is over, the employees are terminated. Many of these employees are then rehired during the next seasonal period. During the off-season, some of these employees volunteer to work (presumably without compensation) and perform the same tasks as volunteers as they had performed while employed as seasonal employees by _____. You ask whether such volunteer work is inconsistent with the FLSA.

We conclude that such work without compensation for those hours is prohibited by §3(e)(4) of the FLSA. An individual is not permitted to "volunteer" to perform services for a public agency if such services are the same type of services which the individual is employed to perform for the public agency. See 29 CFR 553.102.

To allow _____ employees to "volunteer" during the off-season the same services for which they are paid during the season raises the potential for abuse which Congress had in mind in enacting §3(e)(4). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'"). We do not believe it would be untoward for individuals to conclude, under the circumstances, that their chances of reemployment the next season may depend on their volunteering services to _____ during the off-season.

We trust that the above is responsive to your inquiry.

/s/ Charles E. Pugh
Acting Administrator

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* * * * *

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:

(1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee. Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

§785.25 Illustrative U.S. Supreme Court decisions.

These principles have guided the Administrator in the enforcement of the Act. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. (*Steiner v. Mitchell*, 350 U.S. 247 (1956)). In another case, knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday (*Mitchell v. King Packing Co.*, 350 U.S. 260 (1956)). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities.

§785.26 Section 3(o) of the Fair Labor Standards Act.

Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of clothes or washing was a preliminary or postliminary activity compensable by contract, custom, or practice as provided by section 4 of the Portal-to-Portal Act, and as discussed in §785.9 and part 790 of this chapter.

LECTURES, MEETINGS AND TRAINING PROGRAMS

§785.27 General.

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

- (a) Attendance is outside of the employee's regular working hours;
- (b) Attendance is in fact voluntary;
- (c) The course, lecture, or meeting is not directly related to the employee's job; and
- (d) The employee does not perform any productive work during such attendance.

§785.28 Involuntary attendance.

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

§785.29 Training directly related to employee's job.

The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

§785.30 Independent training.

Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

§785.31 Special situations.

There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

§785.32 Apprenticeship training.

As an enforcement policy, time spent in an organized program

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of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

(a) The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and

(b) Such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

TRAVEL TIME

§785.33 General.

The principles which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved. The subject is discussed in §§785.35 to 785.41, which are preceded by a brief discussion in §785.34 of the Portal-to-Portal Act as it applies to travel time.

§785.34 Effect of section 4 of the Portal-to-Portal Act.

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus travel time at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such travel time must be counted in computing hours worked. However, ordinary travel from home to work (see §785.35) need not be counted as hours worked even if the employer agrees to pay for it. (See *Tennessee Coal, Iron & RR. Co. v. Muscoda Local*, 321 U.S. 590 (1944); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 690 (1946); *Walling v. Anaconda Copper Mining Co.*, 66 F. Supp. 913 (D. Mont. (1946).)

§785.35 Home to work; ordinary situation.

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

§785.36 Home to work in emergency situations.

There may be instances when travel from home to work is overtime. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers all time spent on such travel is working time. The Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

§785.37 Home to work on special one-day assignment in another city.

A problem arises when an employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city. For example, an employee who works in Washington, DC, with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in §785.36), or like travel that is all in the day's work (see §785.38). All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible.

§785.38 Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (*Walling v. Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. A. 10, 1944))

§785.39 Travel away from home community.

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is

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IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

DONNA MCKNEELY,

Appellant,

v.

Supreme Court Docket No.: 35741

STATE OF WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

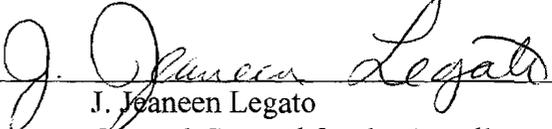
Appellee.

CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, Counsel for the Appellee, do hereby certify that a copy of the foregoing Appellee's Brief in Opposition to Petition for Appeal was served upon Counsel for the Appellant, Marvin Masters, by hand delivering said copy to his address of:

Marvin W. Masters, Esquire
The Masters Law Firm
181 Summers Street
Charleston, West Virginia 25301

on this 16th day of March 2010.


J. Jeaneen Legato
General Counsel for the Appellee