BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14-0846

ARDEN J. CURRY, II,

Petitioner, Petitioner Below,

v.

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Respondent, Respondent Below.

Appeal from the Circuit Court of Kanawha County, West Virginia

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.
The Board's Argument that this Case is Virtually Identical to the Case of *West Virginia Consolidated Public Retirement Board v. Jones* is Incorrect

On multiple occasions in its brief the Board asserts that this Court's recently issued opinion in the case of *West Virginia Consolidated Public Retirement Board v. Jones*, 233 W.Va. 681, 760, S.E.2d 495 (2014), is "virtually identical" or "indistinguishable" from the facts and issues in this case. That assertion by the Board is untrue. As Curry noted in Section 16 to the Notice of Appeal filed in this matter (JA at 387) as well as in Footnote 2 on page 5 of Petitioner's Appeal Brief, for purposes of this appeal Curry concedes that his original estoppel argument for participation in the Public Employees Retirement Act (hereinafter "PERS") has been rendered moot by the *Jones* decision. Nonetheless, Curry asserts that the Circuit Court of Kanawha County committed error, as a matter of law, in concluding that Curry did not meet the statutory and regulatory eligibility requirements of "fulltime" employment for participation in PERS, which is

an argument that was never made, addressed, or ruled upon as part of the *Jones* decision. The issue that Curry raises in this appeal is completely distinct and independent from the issues ruled upon in the *Jones* decision and presents a question of law that this Court has never previously ruled upon. Very simply, the issue involved in this case which is whether Curry met the statutory and regulatory definition of "fulltime" employment was never raised in the *Jones* case.

II.
In Ruling in this Matter, this Court Must Construe the Provisions of the Public Employees Retirement Act and the Regulations Implementing its Provisions Liberally in Favor of its Intended Beneficiaries

The Board seems to suggest in its brief that this Court is not required to and should not construe the provisions of PERS and the regulations implementing it liberally in favor of finding that potential participants like Curry are eligible for participation. That suggestion by the Board is in direct conflict with both the statutory provisions of PERS itself as well as multiple decisions issued by this Court.[1]

First, in West Virginia Code §5-10-3a, the West Virginia Legislature provided specific guidance as to how the provisions of PERS and the regulations implementing its provisions must be interpreted. The West Virginia Legislature specifically declared that:

> The provisions of this Article shall be liberally construed so as to provide a general retirement system for the employees of the State herein made eligible for such retirement...

[1] The Board further seems to suggest in its brief that this Court is required to give complete deference to the Board's interpretation of the relevant statutes and regulations which are the subject matter of this case. Nonetheless, this Court should remain cognizant of its pronouncement in *West Virginia Consolidated Public Retirement Board v. Wood*, 233 W.Va. 222, 228, 757 S.E.2d 752, 758 (2014), where this Court held that "While this Court agrees with the proposition that the Board's interpretation is entitled to deference, it is imperative that a reviewing Court also consider the possibility, as the Circuit Court did in the present case, that the Board's interpretation is erroneous" along with what Justice Scalia stated in his concurring opinion in *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 260, 111 S.Ct. 127, 113 L.Ed.2d 274 (1991), where he noted that "Deference is not abdication and it requires us to accept only those agency interpretations that are reasonable and right of the principles of construction Courts normally employ."

Acknowledging the legislative mandate found in West Virginia Code §5-10-3a, this Court in *Flanigan v. West Virginia Public Employees Retirement System*, 342 S.E.2d 414 (W.Va. 1986), confirmed that the provisions of PERS must be construed liberally in favor of its intended beneficiaries when this Court declared:

> When approaching a resolution of this matter, it is noted that under West Virginia Code §5-10-3a (1979 Replacement Volume) we are directed to give substantial weight to the remedial nature of the PERS Act by the legislative ordination to construe its provisions liberally in favor of its intended beneficiary (id. at p. 419).

Finally in the case of *City of Wheeling Retirees Association Inc. v. City of Wheeling*, 185 W.Va. 380, 407 S.E.2d 384 (1991), this Court reemphasized that the provisions of PERS must be liberally construed in favor of its intended beneficiaries. This Court declared that:

> In another context, the "West Virginia Public Employees Retirement Act" West Virginia Code §5-10-1 to 5-10-54, as amended, is a remedial statutory enactment, and is "liberally construed so as to provide a general retirement system for the employees of the State." (Id. at pg. 387)

In this case, as will be discussed in Section III, the Circuit Court of Kanawha County, West Virginia found as a matter of law that the Board's definition of "fulltime" employment was ambiguous. In endeavoring to construe an ambiguous statute, this Court has declared that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." (Syl. pt. 1, *Smith v. State Workers Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)). The intent of the Legislature has already been established by the provisions of West Virginia Code §5-10-3a and this Court's decisions in *Flanigan* and *City of Wheeling Retirees Association Inc.* That intent is that the provisions of PERS must be construed liberally in favor of finding that intended beneficiaries, such as Curry, qualify for participation. When the provisions of PERS and the regulations implementing its provisions are construed in the manner mandated by both our Legislature and this Court, particularly in light of the fact that the definitional language

was found ambiguous by the Circuit Court, it is clear that Curry is entitled to participation in PERS.

III.
The Uncontested Facts Show that Curry was Employed by a Participating Employer in a Position that Normally Required Twelve (12) Months per Year of Service, and Therefore Qualifies for Participation in PERS

The issue in this case is not whether the Board is estopped from denying Curry participation in PERS as was the issue in the *Jones* case. Instead, the sole and singular issue in this case is whether the Circuit Court of Kanawha County, West Virginia erred, as a matter of law, in finding that Curry did not meet the statutory and regulatory definition of "fulltime" employment so as to be eligible to participate in PERS.

As Curry suggested in his initial brief, the ultimate issue in this appeal is not overly complicated and the Board does not dispute or contest any of the following facts. In West Virginia Code §5-10-17, our Legislature provided that all "employees" of appropriate participating public employers are entitled to participate in the PERS system. The Department of Agriculture, where Curry began his employment in 1987, was a participating employer. Our Legislature then defined an employee as "any person who serves regularly as an employee, fulltime, on a salary basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of, and whose compensation is payable, in whole or in part, by any political subdivision." The Board does not contest that Curry (a) was employed by the Department of Agriculture beginning in 1987, (b) was a salaried employee, (c) his tenure was not restricted as to temporary or provisional appointment, and (d) his compensation was payable in whole by the Department of Agriculture. The only issue the Board contests is whether Curry was a "fulltime" employee.

When it enacted PERS, the West Virginia Legislature elected not to define the term "fulltime" employment when it adopted West Virginia Code §5-10-2(11) but instead delegated to the Board the responsibility for making effective the provisions of the Act, including granting to the Board the authority "to make all rules and regulations" necessary to effectuate the Act, which would include defining "fulltime" employment. West Virginia Code §5-10-5. In compliance with the authority granted it under West Virginia Code §5-10-5, the Board on December 20, 1982, five years before Curry began his employment with the Department of Agriculture, filed with the West Virginia Secretary of State its first set of rules and regulations which included a definition of "fulltime" employment. (JA at 171). Those rules and regulations, filed in December 1982, defined "fulltime" employment as follows:

> Employment of an employee by a participating public employer in a position which normally requires twelve (12) months per year of service **and/or** one thousand forty hours (1,040) per year of service in that position shall be considered as fulltime employment. (Emphasis added.)

When the Board initially drafted its definition of "fulltime" employment in 1982, it was free to draft a definition that was as liberal or conservative as it deemed appropriate. In other words, instead of using the "and/or" language providing two separate mechanisms to meet the definition of "fulltime" employment, the Board could have adopted a definition that solely provided for a minimum number of hours per year of service in order to be eligible for participation in PERS and it was free to have set the number of hours per year at a level significantly higher or lower than that which the original definition contained. The reality is that when it drafted its definition, the Board provided for two separate scenarios under which an individual could qualify as being a "fulltime" employee. If the individual was employed in a job that "normally requires twelve (12) months per year of service" then under the Board's definition they were to be considered a "fulltime" employee or alternatively if they were employed by a

participating public employer for a minimum of "one thousand forty (1,040) hours per year of service in that position" they were also to be considered a "fulltime" employee. The bottom line is that under the Board's original definition of "fulltime" employment, either would suffice for qualification for participation in PERS.

The evidence that was presented to the hearing examiner and the Circuit Court was uncontested on the issue of whether Curry met the first alternative for being considered a "fulltime" employee under the Board's regulation that was in effect at the time he first became employed. The only testimony that was presented on this issue came from Curry, Brenda Mobley, who was the personnel manager for the West Virginia Department of Agriculture, and Gus R. Douglass, who was the duly elected Commissioner of the West Virginia Department of Agriculture during the time periods Curry was employed by that agency. That uncontested and uncontradicted testimony was as follows:[2]

1. Curry was carried during his tenure with the West Virginia Department of Agriculture as a fulltime exempt salaried employee of the West Virginia Department of Agriculture on its books and records. (JA at 247-252)

2. As a fulltime exempt salaried employee of the West Virginia Department of Agriculture, Curry was required to perform any and all legal services the West Virginia Department of Agriculture requested of him, regardless of the amount of time he was required to spend handling matters on behalf of the West Virginia Department of Agriculture in any given year. (JA at 247-252, JA at 236-241, JA 242-246, and JA at 125-126)

3. As a fulltime exempt salaried employee of the West Virginia Department of Agriculture, Curry was required to available and on-call with the West Virginia Department of Agriculture 365 days a year, 24 hours a day. (JA at 247-252, JA at 236-241, JA at 126)

4. Commissioner Douglass, who was responsible for employing Curry, and Brenda Mobley, the personnel manager for the West Virginia Department of Agriculture each testified that "Because of the unique nature of the legal

[2] At the hearing before the Hearing Examiner in this matter, the parties stipulated that the affidavits of Curry, Brenda Mobley, and Commissioner Douglass would be accepted into evidence and would be considered in the same manner as if the drafters of the affidavits had been present and testified in person. (JA 116-119)

services provided by Mr. Curry, the scope of the areas of expertise he was required to address on behalf of the West Virginia Department of Agriculture, the unknown timing of when issues may arise within the Department of Agriculture, and because of the volume of services he was required to provide, Mr. Curry was employed in a position that not only normally but actually required 12 months of service per year." (JA at 247-252, JA at 236-241)

5. Brenda Mobley, the personnel manager for the West Virginia Department of Agriculture, testified that "As Personnel Manager of the West Virginia Department of Agriculture, and based upon my familiarity with the records kept by the West Virginia Department of Agriculture, along with my personal contact with Mr. Curry, I believe Mr. Curry did provide services as an employee to the West Virginia Department of Agriculture in each and every month he was employed by the West Virginia Department of Agriculture and that it was reasonably necessary that he be employed in the position that required employment 12 months per year. The nature of the services provided by Mr. Curry and the areas he was called upon by the West Virginia Department of Agriculture to provide advice and recommendations on required Curry to provide, and he did actually provide, services to the West Virginia Department of Agriculture 12 months per year... The employment position of Mr. Curry with the West Virginia Department of Agriculture was a position that the West Virginia Department of Agriculture believed required his services 12 months per year." (JA at 247-252)

6. Gus R. Douglass, the former commissioner of the West Virginia Department of Agriculture, testified that "Because of the unique nature of the legal services provided by Mr. Curry, the scope of the areas of expertise he was required to address on behalf of the West Virginia Department of Agriculture, the unknown timing of when issues may arise with the Department of Agriculture, and because of the volume of services he was required to provide, Mr. Curry was employed in a position that not only normally but actually required 12 months of service per year. As the former commissioner of the West Virginia Department of Agriculture, it was my belief and continues to be my belief that the position of General Counsel that Mr. Curry was hired for as a fulltime exempt salaried employee necessitated and required that he be retained in a position that not only normally but actually required 12 months per year of service. During his employment as a fulltime exempt salaried employee of the West Virginia Department of Agriculture, acting as its General Counsel, I believe that Mr. Curry did provide services as an employee to the West Virginia Department of Agriculture in each and every month he was employed by the West Virginia Department of Agriculture and that it was reasonably necessary that he be employed in a position that required employment 12 months per year... When Mr. Curry was hired as a fulltime exempt salaried

> employee of the West Virginia Department of Agriculture, acting as its General Counsel, the West Virginia Department of Agriculture retained him as a fulltime exempt employee in a position which both normally and actually required 12 months of service per year. (JA at 236-241)

When Curry first became employed by the Department of Agriculture in 1987, the above-quoted rule defining "fulltime" employment was in effect and remained in effect until May 13, 2005, when the Board changed the definition of "fulltime" employment by amending its rules and regulations. (J.A. at 228). Instead of defining "fulltime" employment as being employed in a position which normally requires twelve (12) months per year of service **and/or** requires at least one thousand forty (1,040) hours per year, it abolished the "or" language previously found in the regulations and for the first time required that "fulltime" employment include both (a) being employed in a position that normally requires twelve (12) months per year of service **and** (b) requiring at least one thousand forty (1,040) hours per year of service in that position. The question in this appeal is whether the Board's election to make participation in PERS more restrictive by amending its definition of "fulltime" employment in the year 2005, 18 years after Curry became employed, can be used to deprive Curry of his constitutionally and contractually vested rights. The Board concedes, as Curry has asserted in this motion for appeal that if Curry did meet the definition of "fulltime" employment that was in effect from the time he first became employed by the Department of Agriculture in 1987 until May 13, 2005 when the definition was amended, then under the decision of *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988) and *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1965), Curry is entitled to his constitutionally and contractually vested right to participate in PERS.

The Circuit Court of Kanawha County held that the "and/or" language found in the Board's definition of "fulltime" employment was "ambiguous." (JA at 395). The Circuit Court then concluded that because the Board has final power to decide issues regarding membership status

under West Virginia Code §5-10-17(d), it was appropriate for the Board to construe this ambiguous language in a manner depriving Curry participation in PERS, even if the actions of the Board were completely arbitrary and even if it failed to construe the language under the liberality provisions of West Virginia Code §5-10-3a.

Even if the Circuit Court was correct that the regulation's "and/or" language was actually ambiguous, it would result in no salvation to the Board.[3] This Court has held that "a statute that is ambiguous must be construed before it can be applied." (Syl. pt. 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992)). In endeavoring to construe an ambiguous statute, this Court has also declared that it is cognizant that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the legislature." (Syl. pt. 1, *Smith v. State Workers Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)).

Sometimes it is difficult for a court to try and determine what the "intent" of the Legislature or an agency was when trying to figure out how to construe a statute or regulation. However, in the case of PERS, that is an easy endeavor. When establishing the entire PERS system, our Legislature in West Virginia Code §5-10-3(a) mandated how all of the provisions of the Act and the regulations that were to ultimately be adopted to implement it must be construed. Our Legislature stated that "The provisions of this Article shall be liberally construed so as to provide a general retirement system for the employees of the state herein made eligible for such retirement."

[3] As was noted beginning on Page 11 of Petitioner's appeal brief, Curry asserts that the "and/or" language was not ambiguous but instead clearly set up two separate and distinct criteria for which an individual could qualify for participation in PERS. *Michael v. Marion County Board of Education*, 198 W.Va. 523, 482 S.E.2d 140 (1996); *Duckworth v. Stalnaker*, 68 W.Va. 197, 69 S.E.2d 850 (1910). A cardinal rule of statutory construction in West Virginia is that significance in effect must, if possible, be given to every section, clause, word, or part of a statute. (Syl. pt. 3, *Meadows v. Walmart Stores Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999); *State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 251 S.E.2d 505 (2009). The word "or" that was included within the original definition of "fulltime" employment that Curry was hired under cannot be considered just superfluous. The word "or" was drafted into the original definition because it was meant to provide for two different options for an individual to qualify as having "fulltime" employment. This reading of the original definition is supported by the fact if "or" really did not mean anything in the original definition, then why was it removed in 2005? The answer is simple. The Board wanted to make the definition of "fulltime" employment more restrictive, and the only way it could do so was to remove the "or" language.

This proposition of law has been repeatedly confirmed by this Court. *Flanigan v. West Virginia Public Employees Retirement System*, 176 W.Va. 330, 335, 342 S.E.2d 414, 419 (1986) and *City of Wheeling Retirees Association Inc. v. City of Wheeling*, 185 W.Va. 380, 407 S.E.2d 384 (1991). Thus, when construing the statute and regulations in the manner mandated by our Legislature, it is clear that Curry is entitled to participation in PERS.

The only decision that the Board has cited in favor of its position is the case of *In Judicial Review of CPRB re Cain for PERS Benefits*, 197 W.Va. 514, 476 S.E.2d 185 (1996). What the Board failed to point out to the Court its brief is that the facts in *Cain* were significantly different from the current litigation and thus the Board's reasoning is fundamentally flawed. In *Cain*, an individual sought an additional year of service credit from his employment with the West Virginia Department of Highways during the years 1962 and 1963. Everyone, including the Board, the hearing examiner, and even the Circuit Court who heard the initial appeal were in unanimous agreement that under the Board's definition of fulltime employment (WVCSR §162-5-2.3), Cain, just like Curry in this instance, was entitled to pension benefits. Nonetheless, the Board argued that because the Department of Highways in its official documentation "classified" Cain "at all times during his employment as a temporary employee," Cain did not meet the definition of fulltime employee under West Virginia Code §5-10-2, and therefore benefits had to be denied.

West Virginia Code §5-10-2, which the Board relied upon in *Cain* to deny benefits and attempts to use to deny Curry benefits in this matter, defines the term "employee" as follows:

> "Employee" means any person who serves regularly as an officer or employee, fulltime, on a salaried basis, **whose tenure is not restricted as to temporary or provisional appointment**, in the service of, and whose compensation is payable, in whole or in part, by any political subdivision, or an officer or employee whose compensation is calculated on a daily basis and paid monthly on completion of assignment... (Emphasis added.)

In *Cain*, this Court held that under West Virginia Code §5-10-2, "An individual is an employee for membership in the Public Employees Retirement System if such individual is employed fulltime and his or her tenure is not restricted as to temporary or provisional appointment." This Court went out to find that Cain was not entitled to benefits, even though he met the Board's definition of fulltime employment, because the uncontested fact was that the Department of Highways "at all times, classified [Cain] as a temporary" and thus under West Virginia Code §5-10-2 he did not meet the definition of fulltime employment because his "tenure" was "restricted as to temporary or provisional appointment." As this Court will have noted, the *Cain* decision is inapposite from the undisputed facts in this litigation for one key and important reason. The sole reason this Court did not grant Cain the additional time he requested was because he had been classified by the Department of Highways as a "temporary employee." That scenario does not exist in the current litigation because at all times during his employment with the West Virginia Department of Agriculture, Curry was classified by the Department as a "fulltime exempt salaried employee."[4] (JA at 236-241 and JA 247-252). Very simply, during his entire time as a fulltime employee of the West Virginia Department of Agriculture, Curry served as its

[4] Without citing any legal authority, the Board in one random paragraph makes the unsupported argument that maybe Curry was not an employee but instead was an independent contractor. As the Court will note, by correspondence dated June 17, 2013, the sole and singular reason the Board denied Curry pension benefits was its position that he was not employed for the requisite number of hours (1,040 hours per year) as was required in the Board's definition of fulltime employment found in WVCSR §162-5-2.3 which became effective in the year 2005. (JA at 170) Applicable West Virginia law makes it clear that the Board is not permitted, for purposes of this appeal, to rely upon any other reasons for denial. A basic element of fairness mandates that issues which have not been raised below should not be made on appeal. *Whitlow v. Board of Education of Kanawha County*, 190 W.Va. 223, 438 S.E.2d 15 (1993); *State v. Jessie*, 225 W.Va. 21, 689 S.E.2d 21 (2009). Moreover, the assertion that Curry may have been an independent contractor versus a fulltime exempt salaried employee of the Department of Agriculture is not factually supported and instead is directly contradicted by the affidavits of Commissioner Douglass, Curry, and Brenda Mobley. At all times, Curry worked under the direct control and supervision of the Department of Agriculture. The Department of Agriculture directed what work Curry performed and when his work product was required, and compelled Curry pursuant to the terms of its contractual agreement to be available to provide services to the Department of Agriculture 24 hours a day, seven days a week. The Department of Agriculture retained ultimate control over whether it agreed or disagreed with the legal advice provided by Curry.

General Counsel each and every month and thus met the definition of a fulltime employee as that term was defined when he first became employed.

IV.
Conclusion

For the reasons set forth herein, Curry moves the Court for an Order overturning the decision of the Circuit Court of Kanawha County, West Virginia by finding that Curry in entitled to participate in PERS.

ARDEN J. CURRY, II, Petitioner,

–By Counsel–

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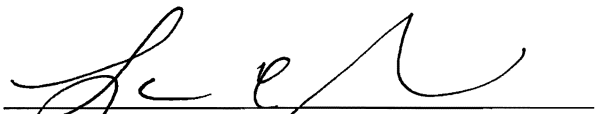
CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that on the 4th day of February, 2015, filed the foregoing **PETITIONER'S REPLY BRIEF** with the Clerk of the Court and served the same upon counsel for Respondent via U.S. mail, postage prepaid, a true copy thereof to the following:

J. Jeaneen Legato
4101 MacCorkle Avenue, SE
Charleston, West Virginia 25304



Lonnie C. Simmons (W.Va. I.D. No. 3406)