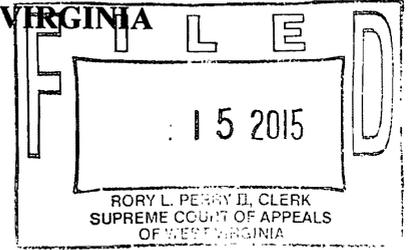


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0846



ARDEN J. CURRY, II,
Petitioner,

v.

(Kanawha County Circuit Court)
(Civil Action No.14-AA-28)

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD**
Respondent.

RESPONDENT'S RESPONSE BRIEF

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I. STATEMENT OF CASE

This is an appeal by Petitioner Arden Curry, II of a decision by the Respondent West Virginia Consolidated Public Retirement Board (hereinafter "Board") denying Mr. Curry's request to participate in the Public Employees Retirement System (hereinafter "PERS") in the capacity of his employment with the W.V. Department of Agriculture because he was not a full time employee as required by statute. The Respondent Board issued its *Final Order* denying Mr. Curry's request on March 5, 2014 and adopting the recommendations of Hearing Officer Jack W. DeBolt dated January 17, 2014. (A.R. 37-44). Mr. Curry appealed this decision to the Circuit Court of Kanawha County. On July 3, 2013, the honorable Tod Kaufman, Circuit Judge, entered an Order *Affirming* the Board's *Final Order*. (A.R. 377-380). Mr. Curry, by counsel, filed this appeal to this honorable Court.

The West Virginia Consolidated Public Retirement Board is a public body established pursuant to W. Va. Code §5-10D-1 to serve as the statutory administrator and fiduciary for the State's several pension plans, including the Public Employees Retirement System (hereinafter referred to as "PERS") as established in article ten [§§ 5-10-1 et seq.], chapter five of the code.

From 1984-2013, except for approximately four years between 1988-92, Petitioner, Arden Curry, II, was general counsel for the West Virginia Department of Agriculture (WVDA). (A.R. 123). He was placed on the payroll by former Commissioner Gus Douglass. He had a verbal agreement with WVDA that he would be eligible to participate in PERS and PEIA.

He did not have an office at WVDA. He had his own private law office. (AR 130-31). He used the telephones, computers and clerical staff from his office, and he was responsible for the cost which was not reimbursed or covered by WVDA. He was not required to and did not keep a record of his time spent working for WVDA. He estimated that he spent approximately 200-300 hours per year working for WVDA. (AR 131). He testified that the work he performed for WVDA accounted

for approximately one sixth of his law practice. (AR 131).

For approximately twenty one (21) years, WVDA submitted employer and employee contributions on his behalf to the Public Employees Retirement System. WVDA's employer reports submitted to the Consolidated Public Retirement Board (CPRB) reflected that Mr. Curry was a full time eligible employee. (A.R. 337). There is no record of Mr. Curry or WVDA contacting Respondent Board to determine Mr. Curry's eligibility for participation in PERS. Respondent Board relied upon the employer reporting form and was unaware of Mr. Curry's limited employment until Respondent received a letter from the Legislative Auditor's Office.

By letter dated May 15, 2013, Londa Sabatino, Audit Manager, WV Legislature *Joint Committee on Government and Finance*, notified Board's Executive Director, Jeffrey E. Fleck, of her office's belief that Mr. Curry was not eligible for participation in PERS. (A.R. 339-40). She also attached a copy of a legal opinion dated May 8, 2013 and drafted by Emma Case, counsel to *Joint Committee*, to support the Committee's position. (A.R. 341-44).

By letter dated June 17, 2013, Respondent Board notified Mr. Curry that he was not eligible to participate in PERS because he is not a full time employee as required by statute. (A.R. 170). By letter dated August 8, 2013, Mr. Curry, by counsel, David Schwirian, requested an administrative appeal. An administrative hearing was held on October 15, 2013.

On January 17, 2014, Hearing Officer, Jack DeBolt, issued an *Amended Recommended Decision* which recommended that Petitioner's request to participate in PERS should be denied because pursuant to West Virginia Code §5-10-17(a), §5-10-2(11) and §162-5-2.3 of the Code of State Rules, Petitioner's limited employment does not meet the definition of "full time employment". (A.R. 38-44).

By *Final Order* dated March 5, 2014, the Respondent Board adopted the *Amended Recommended Decision* of Hearing Officer DeBolt and denied Petitioner's request to participate in the Public Employees Retirement System (PERS). (A.R. 37). On July 3, 2014, the honorable Tod Kaufman of Kanawha County Circuit Court entered an Order affirming the Board's decision. (A.R. 377-380).

Petitioner, by counsel, filed an appeal to this honorable Court.

II. SUMMARY OF ARGUMENT

This honorable Court recently issued an opinion in a case which is virtually identical to this case. In *West Virginia Consolidated Public Retirement Board v. Jones*, No. 13-0937, filed June 11, 2014, the employer sought the services of what they deemed to be a "full time" attorney eligible for participation in PERS. (A.R. 347-363). On January 1, 2002, Mr. Jones accepted the position. He was on-call twenty four hours a day, seven days per week. He maintained a separate law practice, and the work he did for the public employer comprised 10-15 percent of his practice (approximately 200 hours/year). He billed the public employer at a reduced rate due in part to their representation that he would receive retirement benefits. (A.R. 347-48).

In November of 2010, after Mr. Jones and his employer had made timely payments into PERS for almost nine years and he had vested, Respondent Board notified him that they intended to refund those contributions because he was ineligible to participate in PERS because he was not a full time employee as set forth in W. Va. Code §5-10-2(11) and W.Va. C.S.R. § 162-5-2.3. (A.R. 349). The Circuit Court held that the Respondent Board was equitably estopped from denying Mr. Jones' participation in PERS due to his reliance on his employer's representations regarding his eligibility. (A.R. 362-3).

In *Reversing and Remanding* the Circuit Court's Order, the Supreme Court held that the Respondent Board was not estopped from denying Petitioner's participation in PERS due to his employer's misrepresentations regarding his eligibility, and further that an employer's error cannot "modify or amend the statutory requirements for PERS eligibility." (A.R. 359). With respect to the *Hudkins* decision relied upon by opposing counsel in his brief, the Court stated "this Court's ruling in *Hudkins* is limited to instances where the Retirement Board itself makes a false representation regarding a public employee's eligibility to receive retirement benefits." **"We deem it neither legally sound nor prudent to expand our holding in *Hudkins* to apply in circumstances regarding a public employer's false representation to an employee that he or she is eligible to participate in PERS."** (A.R. 359).

Membership in the Public Employees Retirement System is governed by West Virginia Code §5-10-17(a) and (d) which state, in pertinent part, as follows:

"(a) All employees, **as defined in section two [§ 5-10-2]** of this article, who are in the employ of a political subdivision shall become members of the Retirement System"

"(d) If question arises regarding the membership status of any employee, the Board of Trustees has the final power to decide the question."

West Virginia Code §5-10-2(11) defines "employee", in pertinent part, as follows:

"(11) **"Employee"** means any person who serves regularly as an officer or employee, **full time** 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, or an officer or employee whose compensation is calculated on a daily basis and paid monthly or on completion of assignment,"

West Virginia Code of State Rules §162-5-2.3 defines full time employment as follows:
"2.3. **Full time employment** - Employment of an employee by a participating public employer in a position which normally requires twelve (12) months per year service **and** requires at least one thousand forty (1,040) **hours per year** service in that position."

In May 2005, the rule was amended by deleting the “or” from “and/or”. Petitioner asserts that he met the definition of full time when the rule stated “and/or” because he worked twelve months per year, and further that this amendment cannot be retroactively applied to him to his detriment.

The facts of this case are primarily undisputed; however, Petitioner’s brief neglected to mention the most critical fact. The issue in this case is whether the Petitioner was eligible to participate in PERS which requires that he be a “full time” employee. The most critical fact in this case is the fact that the most the Petitioner ever worked in any given year in question is approximately three hundred hours. (A.R. 131). It strains credulity to argue that 300 hours per year could ever even under the most liberal interpretation qualify as full time employment.

Petitioner relies on the language “12 months and/or 1040 hours”; yet, the most Petitioner ever worked in any year in question is approximately three hundred hours. Petitioner ignores the term “month”. He never worked a full month. There are on average twenty two business days per month. Most full time employees work 160 hours per month. If you add all of Petitioner’s hours in any given year, it would add up to a little more than two months, not twelve months.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If the Court determines that oral argument is necessary, then this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

IV. ARGUMENT

A. STANDARD OF REVIEW

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented

de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996).

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

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." McDaniel v. WV Division of Labor, Syllabus Point 4, 214 W.Va. 719; 519 S.E.2d 277 (2003).

The Board is without any power to supplant its views of fairness and equity in place of the will and intent of the Legislature. Appalachian Regional Healthcare, Inc. v. WV Human Rights Commission, 180 W.Va. 303, 376 S.E.2d 317 (1988) (an administrative agency's power is solely a creature of statute and thus it must arrive any authority claimed from legislative enactment. It has no common law power but only that power conferred by law, expressly or by implication); State Human Rights Commission v. Pauley, 158 W.Va. 459, 212 S.E.2d 77 (1975) (an administrative agency can exert only such powers as those granted by the legislature and if it exceeds its statutory power its actions may be nullified by a court); 2 Am.Jur. 2d *Administrative Law* §77 (an agency cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power).

Administrative agencies are generally clothed with the power to construe the law as a necessary precedent to administrative action. Even so, it is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable. An agency cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the

statutes expressly grant it that power. And, while agencies are entitled to a certain amount of hegemony over the statutes they are entrusted to administer, agencies may not go to far afield of the letter of the law even if they perceive they are furthering the spirit of the law. Although an administrative agency has the authority and duty to determine its own limits of statutory authority, it is the function of the judiciary to finally decide the limits of the authority of the agency. See 2 Am Jur2d, *Administrative Law* §77 .

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.*

B. The liberality rule does not operate to confer a benefit where none was intended.

Opposing counsel appears to concede that the Respondent Board was correct in holding that the statute and the legislative rule must be read *in pari materia*; however, he asserts that the rule of liberality would permit the legislative rule to be read in a manner which would be inconsistent with the statutory mandate of full time service for eligibility for PERS participation.

The rule, West Virginia Code of State Rules §162-5-2.3, defines full time employment as follows:

“2.3. Full time employment - Employment of an employee by a participating public employer in a position which normally requires twelve (12) months per year service and requires at least one thousand forty (1,040) hours per year service in that position.”

In May 2005, the rule was amended by deleting the “or” from the “and/or”. Petitioner asserts that he qualifies because the and/or version should apply to him, and that he worked some hours in every calendar month of the years in question.

Such a strained interpretation of the rule would be illogical, and would render the legislative rule void. It would mean that anyone who worked one hour per month for twelve months would qualify as a full time employee for participation in PERS. If this were the case, then a Court should declare the rule void during this period of time because it conflicts with the statute, and when there is such a conflict the statute governs. *Maikotter v. University WV Bd. Of Trustees*, 527 S.E.2d 802 (1999).

Additionally, the burden is on Mr. Curry to prove that he meets the eligibility requirements for participation in PERS. *Wood v. WV PERS*, 446 S.E.2d 706, 191 W.Va. 484 (1994). In this case, Mr. Curry's limited employment cannot plausibly be considered full time. He testified that he only worked between 200 - 300 hours per year, and he had no accounting for which days or how many days per month he worked those hours. (A.R. 127).

Petitioner's interpretation of the rule ignores the term "month." The rule states that full time employment is "a position which normally requires twelve (12) months per year service..." See C.S.R. §162-5-2.3. West Virginia Code §5-10-14-(a)(1) requires a minimum of ten (10) days in any calendar month to receive a month of service credit, and §162-5-4.1.a requires the member to work four (4) or more hours per day to receive service credit for that day. Working a few hours each calendar month does not equate to working twelve (12) months per year.

Furthermore, it is questionable as to whether Mr. Curry is an "employee" or an independent contractor. Black's Law Dictionary defines "employee" as "a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." It defines "independent contractor" as one who "in the exercise of an independent employment,

contracts to do a piece of work according to his own methods and is subject to his employer's control only as to the end product or final result of his work.”

During the period in question, Mr. Curry practiced law from his office. He did not have an office at the Department of Agriculture. (A.R. 124). He used his telephone, his computer, and his staff to perform the work. (A.R. 124-25). He had other clients and testified that the work he performed for the Department only accounted for approximately one sixth of his practice. (A.R. 131). He clearly appears to be an independent contractor rather than an employee.

Regardless of the classification, a legal finding that someone who works less than three hundred (300) hours per year is “full time” would be a subversion of legislative intent. Pursuant to West Virginia Code §5-10-17(a) and §5-10-2(11), Mr. Curry's limited employment simply does not qualify as “full time” employment under the most liberal of standards.

The 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.*

C. Petitioner cannot detrimentally rely upon a right that never existed. Although the legislative rule was amended, the statute has always required full time employment.

The primary flaw with opposing counsel's theory is that he assumes Petitioner had a right to participate in PERS until 2005 when the legislative rule was amended from “and/or” to “and”. The Respondent Board's position is that Petitioner has always been statutorily prohibited from participating based upon his limited public employment. Regardless of the legislative rule's language and amendments, the statute has always been clear since its enactment in 1961. West

Virginia Code §5-10-2(11) has always defined “employee” as any person who serves regularly as an officer or employee, **full time** on a salary basis, whose tenure is not restricted as to temporary or provisional appointment”. *W.Va. Code §5-10-2(11)*.

Prior to 2005, the legislative rule defined “full time employment” as a position “which normally requires twelve (12) months per year service **and/or** requires at least one thousand forty (1,040) hours per year service.” In 2005, the rule was amended to remove the word “or”. Opposing counsel argues that this was a substantive change, that Mr. Curry qualified as full time until the 2005 change to the administrative rule, and that the Board is therefore estopped from denying his participation on the basis of detrimental reliance and/or promissory estoppel for the years after 2005.

Opposing counsel’s theory is flawed because it fails to address the fact that the statute, W.Va. Code §5-10-2, has always required full time employment for participation in PERS, and that W.Va. Code §5-10-17(d) grants the Board the final power to decide membership issues. In *Judicial Review of CPRB re: Cain for PERS Benefits*, 476 S.E.2d 185, 197 W.Va. 514 (1996), the Court struck down a similar argument. Counsel for Cain argued that pursuant to the legislative rule which stated “and/or”, Cain qualified as a “full time” employee because he had worked more than 1040 hours even though he did not work twelve months per year. The Court held that even though he may have satisfied the requirements of the legislative rule he was still required to satisfy the mandates of the statute, and that his classification as a “temporary” made him ineligible for participation in PERS regardless of the number of hours he had worked. *Id at 201*.

Petitioner Curry cannot detrimentally rely upon a right which never existed. In analyzing a detrimental reliance argument, the Court in Summers v. WV Consolidated Public Retirement Board, 618 S.E.2d 408 (2005) affirmed Respondent Board’s Hearing Officer’s interpretation of Booth v.

Sims, 456 S.E.2d 167 (W.Va. 1994) and held as follows:

“Booth principally stands for the proposition that government cannot take away contractual promise of pension benefits after an employee has relied thereon to his detriment, such detrimental reliance being presumed after ten years of service..... **That which is lacking in the present circumstance, at least, is the contractual promise as enunciated by the statutes...** There just has never been such a promise upon which these applicants could have relied. (*Court quoting the Hearing Examiner*).

Booth concerned substantive amendments to existing provisions governing the state troopers’ pension system.... In other words promises of future benefits were actually altered. In contrast, in the instant case the Teachers’ Retirement System pension plan never contained [such] a provision. Thus, unlike in *Booth*, the Teachers’ Retirement System had not made a promise on which the teachers relied. Therefore, the detrimental reliance principle set forth in *Booth* is not applicable to the present facts.” Id. at p. 413.

Booth does not confer constitutionally protected property rights where none statutorily existed. The issue in Booth was whether the legislature could amend an active employee’s pension plan without unconstitutionally impairing the obligations of contract. Id. at 177. The Court’s analysis centered on the concept that when a legislature creates a pension system and an employee for a number of years relies upon that “promise” of deferred payment, a contract is formed and the employee acquires a constitutionally protected property interest.

With respect to pension benefits, the statute in essence becomes the contract between the state and the potential employee. Legislative rules are merely the agency’s expression of its interpretation of the statute and how it intends to apply it. In this case, the legislature never promised Mr. Curry anything. To the contrary, the statute has always unequivocally required full time employment, and opposing counsel’s misconstruction of the legislative rule in effect for that period of time conflicts with the statute and legislative intent. Since its inception in 1961, W.Va. Code §5-

10-2(11) has always required full time employment. Petitioner's 200 hours per year cannot conceivably be considered full time as articulated in the statute or the legislative rule even when the rule stated that full time employment "normally requires twelve (12) months per year service **and/or** requires at least one thousand forty (1,040) hours per year service in that position." *C.S.R. 162-5-2.3*.

Mr. Curry does not have a statutory right to his request. The Board cannot give him a statutory right that does not exist, and he cannot detrimentally rely upon a right that never existed.

Additionally, permitting Mr. Curry to participate in a retirement plan in which he is not statutorily eligible to participate in is contrary to the explicit mandate of the statute and violates the Board's fiduciary duty to all participants in the retirement plan. The Board does not have a fiduciary duty to an individual who is not eligible to be a member. Regardless of whether the Department of Agriculture promised Mr. Curry that he could participate in PERS, the only enforceable rights which exist are those contained within the PERS statutes.

Hearing Officer DeBolt correctly concluded as follows:

3. The Applicant contends that liberal construction required for remedial legislation such as the PERS statutes and rules require the "and/or" language must be interpreted as meaning "or". He then relies upon the principles established by Booth v. Sims, 456 S.E.2d 167 (W.Va. 1995). Under the principles established by Booth, the Legislature may not take away a promised pension benefit once a member has detrimentally relied upon the promise, such detrimental reliance being presumed after ten years of employment while the promise was made. The Applicant is entitled to the protection of Booth v. Sims if the Legislative Rule definition of full-time employment prior to 2005 were to be read as 12 months per year or 1,040 hours. (A.R.41-43).
4. If the Legislative Rule is considered by itself "and/or" probably should be considered to mean "or" under the

rule of liberal construction of remedial statutes. The language “and/or” is patently ambiguous. In a contractual context it has been held that the expression “and/or” is neither positively conjunctive nor positively disjunctive. Ralls v. Taylor Auto Co., 42 S.E.2d 446, 202 Ga. 107 (1947) The rule cannot be considered just by itself, however, and must be read in para materij with the language of § 5-10-2(11), which requires as a condition to PERS participation that an otherwise eligible employee be full-time. See Appalachian Power v. Tax Department, 195 W.Va. 573, 466 S.E.2d 424 (1995). If the rule language of “and/or” is construed to mean “or” it would then be in direct conflict with the statutory requirement that employment be full-time. It is inconceivable that the Legislature intended for a person, for example, that works one hour per month every month to be considered full time. While there may be some wiggle room as to what constitutes full-time employment as that phrase would be ordinarily understood, the Applicant’s experience, even at the upper end of his 200 to 300 hours-per-year estimate, would put him at only about 14 percent of a normal full-time forty-hour work week. In order to avoid a direct conflict between the rule and the statute, “and/or” must be construed to mean the conjunctive “and”. Liberal construction does not require the conferring of a benefit when none is intended. Booth v. Sims, supra, accordingly, has no application here as the asserted statutory “promise” was never made in the first place. Consequently, because the Applicant does not meet the hours requirement of the rule it must be concluded that he was ineligible for participation in PERS throughout his employment by the Department of Agriculture. (A.R. 41-43).

Along the same line of reasoning, the Circuit Court also correctly concluded as follows:

“Petitioner asserts that the Board’s 2005 amendment to its regulation defining full-time employment cannot be used to deprive him of his constitutionally-protected pension. In taking this position, Petitioner assumes he had the right to participate in PERS until 2005, when the legislative rule was amended from the “and/or”

requirement to the “and” requirement. Regardless of this ambiguous language, the statute has always required full-time participation in PERS and that W.Va. Code §5-10-17(d) grants the Board the authority to decide membership issues.” (A.R 379).

“If the rule language of “and/or” would be construed to mean “or,” as Petitioner asserts in the previously addressed position, it would still be in conflict with the direct statutory requirements. As “an agency cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power” and, “while agencies are entitled to a certain amount of hegemony over the statutes they are entrusted to administer, agencies may not go to far afield of the letter of the law even if they perceive they are furthering the spirit of the law,” the legislative rule cannot be the sole basis for deciding eligibility as it would be in direct conflict with the statutory provisions requiring full-time employment. As to what constitutes full-time employment as that phrase would be ordinarily understood, Petitioner’s experience, even in the upper end of his 200-300 hours per year estimate, would put him at only about 14 percent a normal, full-time forty-hour work week, not full-time as a matter of law.” (A.R. 380).

VII. CONCLUSION

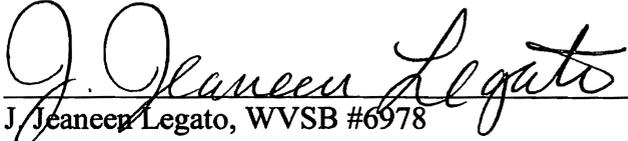
This honorable Court’s recent decision in *Jones* is indistinguishable from the facts and issues in this case. *West Virginia Consolidated Public Retirement Board v. Jones*, No. 13-0937 (filed June 11, 2014). The Petitioner is not statutorily eligible to participate in PERS, and he and his former employer should be refunded the contributions made on his behalf. His limited employment of approximately 300 hours per year cannot plausibly constitute full time employment pursuant to the statute and/or rule under the most liberal interpretation. There is simply no statutory or common law theory to support his request.

Petitioner’s remedy lies with the Legislature to amend the statute by creating an exception for general counsel to state agencies who do not work full time to purchase retroactive service; or, the Petitioner could seek redress from his employer either through additional compensation or the establishment of a different retirement plan for Petitioner which could be partially/totally funded by

a roll-over of his contributions.

Wherefore, Petitioner prays that this honorable Court will affirm the Circuit Court's *Final Order* affirming the Board's *Final Order*.

RESPECTFULLY SUBMITTED,
Counsel for Respondent,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0846

ARDEN J. CURRY, II,
Petitioner,

v.

(Kanawha County Circuit Court)
(Civil Action No.14-AA-28)

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD
Respondent.

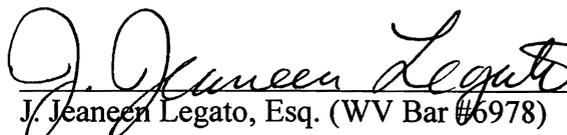
CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, counsel to the West Virginia Consolidated Public Retirement Board, do hereby certify that *Respondent's Response Brief*, filed herein on this 15th day of January 2015, was delivered to counsel for Petitioner via hand delivery to the following address:

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Respectfully Submitted,
WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD

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