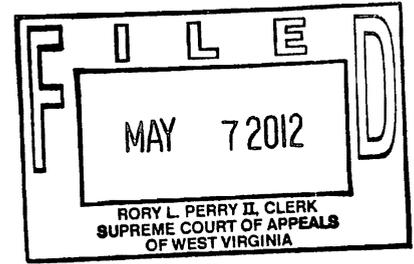


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0156

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Respondent below, Petitioner



v.

Appeal from a final order
of the Circuit Court of
Kanawha County (11-AA-47)

RONALD McKOWN,
Petitioner below, Respondent

PETITIONER'S BRIEF

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	iii
Assignments of Error.....	1
Statement of the Case	1
Summary of Argument.....	7
Statement Regarding Oral Argument and Decision	10
Argument.....	11
I. The Circuit Court erred by simultaneously awarding Mr. McKown administrative and mandamus remedies, because mandamus relief is available only where there is an absence of another adequate remedy, and because mandamus is an inappropriate remedy for contested appeals including benefit determination questions.....	11
II. The Circuit Court erred by awarding Mr. McKown service credit for periods of inactive military service occurring when no “draft” was in effect, because the only reasonable construction of W. VA. CODE § 18-7A-17(b) is that only active military service occurring while both a national emergency and the federal Selective Service Act’s induction authority were in effect entitles a member to military service credit in TRS.....	15
A. “Service in the armed forces” refers to active duty service.....	17
B. Service “in a period of national emergency within which a federal selective service act was in effect” refers to service occurring during both a period of national emergency and a period in which a draft is in effect.....	23
III. The Circuit Court erred by failing to give deference to the Board’s longstanding and reasonable interpretation of W. VA. CODE § 18-7A-17(b), even though this Court has repeatedly held that an administrative agency’s reasonable and permissible construction of a statute it administers should be afforded substantial deference, absent clear legislative intent to the contrary.	25
IV. The Circuit Court erred by applying the doctrine of estoppel to the Board’s correction of an error contained within a retirement estimate where TRS statute require the Board to correct errors	

without exception for equitable reasons, the Circuit Court failed to defer to factual findings by the Hearing Officer, and failed to appropriately weigh the various factors this Court looks to when determining whether estoppel should apply to a government agency.....	28
A. W. VA. CODE § 18-7A-14(f) required the Board to correct the error made in calculating Mr. McKown’s estimated military service credit.....	29
B. The Hearing Officer’s factual finding that Mr. McKown did not detrimentally rely is substantially supported by evidence in the record and should not have been reversed.....	30
C. The Circuit Court failed to apply various factors this Court has held are relevant when determining whether estoppel should lie against the State, which weigh decidedly against applying estoppel in this case.....	31
Conclusion.....	35

TABLE OF AUTHORITIES

Federal Statutes

50 U.S.C. § 1601-1651	24
50 U.S.C. App. § 467(c)	24
Act of May 18, 1917, 40 Stat. 76.....	24
Selective Training and Service Act of 1940, Section 3(a), Pub. L. 76-783, 54 Stat. 885, enacted Sept. 16, 1940.....	23

State Statutes

W. VA. CODE § 18-7A-2(30)	5
W. VA. CODE § 18-7A-14	15
W. VA. CODE § 18-7A-14(f).....	10, 29
W. VA. CODE § 18-7A-17(b)	passim
W. VA. CODE § 18-7A-17(c)	18
W. VA. CODE § 18-7A-17(e)	18
W. VA. CODE § 18-7A-17(f).....	18
W. VA. CODE § 18-7A-18.....	15
W. VA. CODE § 18-7A-25(a)	5
W. VA. CODE § 18-7A-25(b)	5
W. VA. CODE § 18-7A-25(c)	5
W. VA. CODE § 18-7A-26.....	15
W. VA. CODE § 29A-5-1, et seq.....	passim
W. VA. CODE § 29A-5-4(d)	7
W. VA. CODE § 53-1-3.....	14
W. VA. CODE § 53-1-5.....	14

State Regulations

W. VA. CODE R. § 162-2-7.37

State Case Law

Bank of Wheeling v. Morris Plan Bank & Trust Co., 155 W. Va. 245, 183 S.E.2d 692 (1971).....13

Cowie v. Roberts, 173 W. Va. 64, 312 S.E.2d 35 (1984).....10

Densley v. Dept. of Ret. Sys., 173 P.3d 885 (Wash. 2007).....20, 21

Evans v. Hutchinson, 158 W. Va. 359, 214 S.E.2d 453 (1975)26

Ewing v. Bd. of Educ. Of County of Summers, 202 W. Va. 228, 503 S.E.2d 541 (1998).....12, 13

Haines v. Workers' Comp. Comm'r, 151 W. Va. 152, 150 S.E.2d 883 (1966).....27, 28

Hudkins v. W. Va. Consol. Pub. Ret. Bd., 220 W. Va. 275, 647 S.E.2d 711 (2007).....9, 32, 33, 34

Lanham v. Consol. Pub. Ret. Bd., No. 11-0778 (W. Va. Supreme Court March 9, 2012).....10, 29

McDaniel v. W. Va. Div. of Lab., 214 W. Va. 719, 591 S.E.2d 277 (2003).....27

McGrady v. Callaghan, 161 W. Va. 180, 244 S.E.2d 793 (1978)12

McMellon v. Adkins, 171 W. Va. 475, 300 S.E.2d 116 (1983)12

Mounts v. Chafin, 186 W. Va. 156, 411 S.E.2d 481 (1991).....12, 13

Myers v. Consol. Pub. Ret. Bd., 226 W. Va. 738, 704 S.E.2d 738 (2010)10, 29

Samsell v. State Line Dev. Co., 154 W. Va. 48, 174 S.E.2d 318 (1970).....31

Sniffin v. Cline, 193 W. Va. 370, 456 S.E.2d 451 (1995).....9, 26, 27

State ex rel. Canterbury v. County Court of Wayne County, W. Va., 151 W. Va. 1013, 158 S.E.2d 151 (1967).....13

State ex rel. Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (1969).....11

State ex rel. McKenzie v. Smith, 212 W. Va. 288, 569 S.E. 809 (2002).....15

State ex rel. Richey v. Hill, 216 W. Va. 155, 603 S.E.2d 177 (2004).....12

State ex rel. Young v. Sims, 192 W. Va. 3, 449 S.E.2d 64 (1994).....10, 12, 13

<i>W. Va. Health Care Cost Review Auth. v. Boone Mem. Hosp.</i> , 196 W. Va. 326, 472 S.E.2d 411 (1996).....	28
<i>Wooddell v. Daily</i> , 160 W. Va. 65, 230 S.E.2d 466 (1976)	23
Other	
52 Am. Jr. 2d <i>Mandamus</i> § 3 (2000).....	12
<i>Basehore v. Pa. Pub. School Employees' Ret. Bd.</i> , 318 A.2d 392 (Pa. Commw. Ct. 1973).....	21
Black's Law Dictionary (9th ed. 2009)	18
Bruce Ackerman, <i>The Emergency Constitution</i> , 113 Yale L. J. 1029 (2004).....	24
L. Dow Davis, <i>Reserve Callup Authorities: Time for Recall?</i> , 1990-APR Army Law. 4 (1990)	25
<i>Lieb v. Judges Ret. Sys. Of Ill.</i> , 731 N.E.2d 809 (Ill. App. Ct. 2000).....	9, 19
<i>Reinelt v. Michigan Pub. School Employees' Ret. Bd.</i> , 276 N.W.2d 858 (Mich. Ct. App. 1979).....	20, 21

ASSIGNMENTS OF ERROR

- I. The Circuit Court erred by simultaneously awarding Mr. McKown administrative and mandamus remedies, because mandamus relief is available only where there is an absence of another adequate remedy, and because mandamus is an inappropriate remedy for contested appeals including benefit determination questions.
- II. The Circuit Court erred by awarding Mr. McKown service credit for periods of inactive military service occurring when no "draft" was in effect, because the only reasonable construction of W. VA. CODE § 18-7A-17(b) is that only active military service occurring while both a national emergency and the federal Selective Service Act's induction authority were in effect entitles a member to military service credit in TRS.
- III. The Circuit Court erred by failing to give deference to the Board's longstanding and reasonable interpretation of W. VA. CODE § 18-7A-17(b), even though this Court has repeatedly held that an administrative agency's reasonable and permissible construction of a statute it administers should be afforded substantial deference, absent clear legislative intent to the contrary.
- IV. The Circuit Court erred by applying the doctrine of estoppel to the Board's correction of an error contained within a retirement estimate where TRS statute require the Board to correct errors without exception for equitable reasons, the Circuit Court failed to defer to factual findings by the Hearing Officer, and failed to appropriately weigh the various factors this Court looks to when determining whether estoppel should apply to a government agency.

STATEMENT OF THE CASE

Mr. McKown joined the West Virginia Teachers' Retirement System (TRS) in 1982, after being hired by the Lincoln County Board of Education. (A.R. 2-3).¹ After joining TRS, Mr. McKown submitted a copy of a DD 214, a form issued by military authorities upon an individual's completion of certain types of military service, to the Consolidated Public Retirement Board (CPRB or the Board), the statutory agency responsible for administering TRS. (A.R. 7, 38-39, 43-45). The DD 214 showed that Mr. McKown had active duty service in the United States Navy from October 2, 1973 to October 1, 1977, for a total of four years. (A.R. 40, 144). Mr. McKown had enlisted in the Navy on April 13, 1973, but did not perform any active

¹ References to the Appendix Record - the contents of which were agreed to by the parties - are set forth as "A.R. ___."

duty until October of that year. (A.R. 14, 34, 140-144). Between April and October, he finished his university studies and got married. (A.R. 34). During this time period he was considered to be in an “inactive” status; although he was on “stand by” and could be called to active duty, he was not actually ever so called. (A.R. 40-41, 76-77, 144²). After being discharged from active service, Mr. McKown had additional inactive service in the Naval Reserves, from October 1, 1977, through April 12, 1979. (A.R. 144). During that time period, Mr. McKown worked for C&P Telephone, and then attended Marshall University. (A.R. 41-42). In 1981, after graduating from Marshall University, and following a short period of time during which he worked for a bank, Mr. McKown became employed as a teacher and began participating in TRS. (A.R. 3, 23-24, 42).

Mr. McKown continuously participated in TRS for more than twenty years. (A.R. 3). On February 22, 2008, Mr. McKown was considering an early retirement, and submitted a Benefit Estimate Request to the Board, in order to obtain an estimate of his retirement benefits. (A.R. 42-5, 149). On the form’s “Comments” section, in response to a question asking him to enclose a copy of his DD-214 form in the event he was requesting military service credit, Mr. McKown wrote: “You should have a copy of my DD-214 - If not I can get one from the Navy Dept. My active duty dates were 10-1-73 to 10-1-77. In June of 2008 I will be finishing my 27th year of teaching.” (A.R. 149). The Benefit Estimate Request states at the top: “Important Notice: An estimate is merely advisory in nature and is not binding upon either the Retirement Board or the Member.” (A.R. 149).

² See Box 18(d) showing 5 months, 19 days of Prior Inactive Service.

Board staff's response, dated February 27, 2008, set forth estimates of the various figures used in calculating Mr. McKown's estimated monthly benefits. (A.R. 11). The response was based in part on "Estimated military service" of 4.000 years. (A.R. 11). Throughout the document there were notifications that this was merely an estimate. (A.R. 11). For example, the response began with "The estimate you requested is shown on this page. This estimate is merely advisory in nature and is not binding upon the Retirement Board or the member," and concluded with: "* IMPORTANT: This is an estimate only. (see next page also) Experience tells us that in all likelihood, service and salary figures will change when we do your actual retirement calculations." (A.R. 11) (emphasis in original). The estimate was based on an assumed retirement date of July 1, 2009. (A.R. 11).

Additional retirement estimates were prepared for Mr. McKown on or about August 11, 2008, after he submitted another Benefit Estimate Request, in which he again asserted that he had four years of military service. (A.R. 9-10, 145-148). The differences among these estimates accounted for the impact on the benefit that would occur as a result of two different retirement dates and the use of different amounts of sick leave. (A.R. 9-10, 145-148). Each estimate listed Mr. McKown's "Estimated military service" as 4.000 years. (A.R. 9-10, 145-148). Like the estimate provided to Mr. McKown in February 2008, the estimates contained several warnings that the figures reported therein were estimates only, and not binding upon the CPRB. (A.R. 9-10, 145-148). Mr. McKown ultimately applied for retirement, but before his effective retirement date, rescinded his application and decided to continue working. (A.R. 43).

On September 1, 2009, Mr. McKown submitted another Benefit Estimate Request to the Board, indicating an anticipated last day of work of June 10, 2010. (A.R. 7). Board staff provided him with two estimates on that date, each containing the above-quoted language

indicating that the contents of the response were estimates only. (A.R. 150-151). Although Mr. McKown had not submitted any request for additional credit or documentation of additional military service, both estimates listed his “Estimated military service” as 4.474 years, an increase of almost six months from the estimates provided to him previously. (A.R. 150-151). Mr. McKown later testified that he noticed this unexplained increase, but did not question it because it worked to his benefit. (A.R. 82). On October 8, 2009, after receiving a similar estimate the day before (*see* A.R. 152), Mr. McKown again applied for retirement and informed his employer, the Lincoln County Board of Education, that his last day would be June 10, 2010. (A.R. 62-63, 153).

The Board is authorized by statute to credit a TRS member with prior military service credit for “service in the Armed Forces of the United States in any period of national emergency within which a federal Selective Service Act was in effect.” W. VA. CODE § 18-7A-17(b). The Board interprets this language to permit the award of prior military service credit to a TRS member for active duty in the Armed Forces of the United States commencing on or before July 1, 1973, the date on which the federal government’s authority to “draft” individuals into active military duty pursuant to the Selective Service Act of 1940 ended. (A.R. 88, 99, 114, 122-127, 157). Mr. McKown’s active duty did not fall within the dates required by the Board, and therefore each of the estimates Mr. McKown received were incorrect. (A.R. 98-99, 114). In general, this type of error would result in the amount of the estimated retirement annuity being incorrect,³ but in Mr. McKown’s case, this also meant that he was not yet eligible to retire because he did not have sufficient years of service relative to his age.⁴ (A.R. 154).

³ Upon retiring, a TRS member’s monthly annuity payment is calculated using a formula that takes into account the member’s “average salary” and “total service credit.” W. VA. CODE § 18-7A-26. “Total service” means

In June 2010, after auditing his file in preparation for his upcoming retirement, and identifying the error, Board staff informed Mr. McKown he was not eligible for any prior service credit for military service. (A.R. 64-65, 154). As a June 15, 2010 letter from TRS Senior Retirement Advisor explained, Mr. McKown's active military service had not begun within the time frame required by W. VA. CODE § 18-7A-17(b). (A.R. 154). Thus, without the required thirty years of total service (Mr. McKown had twenty-nine years of service credit), he was not yet eligible to retire. (A.R. 154).

By letter dated June 21, 2010, Mr. McKown appealed the Board's denial of his request for military service credit. (A.R. 1-2). Pursuant to the Board's Benefit Determination and Appeal Rules, the matter was referred to an independent Hearing Examiner, before whom an administrative hearing was held. (*See* Tr. beginning at A.R. 13). In addition to appealing the Board's decision, Mr. McKown obtained part-time employment as a coach for the Lincoln County Board of Education. (A.R. 71-72). As of September 7, 2010,⁵ he was waiting for final approval from the Lincoln County Board of Education for a full-time position which would pay him the same salary he received prior to terminating his employment in 2010, and enable him to accrue the additional required year of service credit in order to be eligible to retire prior to age sixty. (A.R. 73, 87-88). At the administrative hearing, Mr. McKown stated that his employment

"all service as a teacher while a member of the TRS, as well as credit for "prior service." *Id.* at § 18-7A-2(30). TRS members can earn "prior service" credit through, among other things, certain types of military service, as outlined in W. VA. CODE § 18-7A-17(b) and at issue in this appeal.

⁴ TRS members may become eligible to retire with full benefits in one of several ways: (1) by attaining the age of sixty years and having at least five years of service credit; (2) by accruing 35 years of total service as a teacher in West Virginia, regardless of age; (3) by attaining age fifty-five and having thirty years of service as a teacher. W. VA. CODE § 18-7A-25(a), (b). A TRS member who has at least thirty but less than thirty five years of service as a teacher, and who is less than fifty-five years of age, is eligible for an annuity that is actuarially adjusted to account for the earlier retirement. *Id.* at § 18-7A-25(c). Thus, a TRS member who attains age fifty-five but is not yet sixty, as Mr. McKown had at the time he submitted his request for an estimate, must have thirty years of combined teaching and military service credit in order to be eligible to retire.

⁵ The date of the administrative hearing at which Mr. McKown testified. *See* A.R. 13.

in this position was a “done deal,” and was expected to be approved that very evening. (A.R. 87-88). In addition, because of his part-time employment as a coach, Mr. McKown acknowledged that he would actually be making more money than he had in recent years. (A.R. 87).

After considering the testimony and evidence developed during the hearing, as well as Mr. McKown’s proposed order and a response on behalf of the Board, Hearing Officer DeBolt recommended that the Board of Trustees of the CPRB deny Mr. McKown’s request for military service credit in TRS. (A.R. 203). On the question of the interpretation of W. VA. CODE § 18-7A-17(b), the Hearing Officer concluded that CPRB’s active duty service requirement was entitled to deference. (A.R. 208-209). The Hearing Officer also concluded that “under the clear language of the statute the period of a member’s service must coincide with the Selective Service Act being in effect as well as the period of national emergency.” (A.R. 209). Finally, because Mr. McKown was being reemployed, which would permit him to earn the service credit he needed to become eligible to retire at the same rate of pay, the Hearing Officer concluded that CPRB was not estopped from applying the statute to Mr. McKown, because he failed to establish detriment as a consequence of reliance upon any misrepresentation of Board staff. (A.R. 207-208, 209-210). The Hearing Officer also concluded that even if Mr. McKown had established detrimental reliance, the strong public interest against the commencement of an annuity prior to meeting eligibility requirements would overcome its application in this case. (A.R. 210).

The Board of Trustees adopted the Hearing Officer’s Recommended Decision at its March 2, 2011 meeting.⁶ (A.R. 228-236). On March 31, 2011, Mr. McKown filed a Petition

⁶ The Recommended Decision was initially presented to and voted upon by the Board of Trustees at its January 19, 2011 meeting; however, because Mr. McKown and his counsel were not properly notified of the meeting, Mr. McKown requested and the Board agreed to consider that action null and place the matter on the docket at the subsequent meeting. (A.R. 214-226). While the Board is required to provide notice of the presentation

for Appeal and for Writ of Mandamus with the Circuit Court of Kanawha County. (A.R. 249). As required by W. VA. CODE § 29A-5-4(d), the Board filed an Administrative Record on April 15, 2011. (A.R. 448). On that date, CPRB also moved to dismiss Mr. McKown's Petition for Writ of Mandamus on several grounds, including his failure to exhaust administrative remedies under the Administrative Procedures Act. (A.R. 250-265). The parties submitted briefs and proposed orders to the Court, and presented oral argument on August 15, 2011. (A.R. 448). On January 6, 2012, the Court entered the proposed order submitted by the Petitioner, which reversed the Final Order of the Board of Trustees, and issued a Writ of Mandamus against the Board, directing it to credit Mr. McKown with six years of military service credit in TRS. (A.R. 430-447). The Board now appeals from that order.

SUMMARY OF ARGUMENT

The law governing TRS requires the Board to grant free service credit to members for "service in the armed forces of the United States during a period of national emergency within which a federal selective service act was in effect." W. VA. CODE § 18-7A-17(b). The Board interprets this language as authorizing credit for periods of active duty in the armed forces of the United States commencing on or before July 1, 1973, the last date on which the federal government had the authority to draft individuals into active military service. Ronald McKown, the respondent in this case, is a TRS member who enlisted in the Navy in April of 1973, served on active duty for four years beginning in October of 1973, and then became a member of the Naval Reserves for eighteen months. While evaluating his ability to take an early retirement, Mr. McKown was erroneously informed, through the Board's calculations of his estimated

of an appeal at these meetings, no additional testimony or argument from either Board staff or the applicant is permitted. W. VA. CODE R. §§ 162-2-7.3.

retirement benefit, that he would receive four, or possibly four and one half years of TRS military service credit, even though his active duty service did not begin until after July 1, 1973.

In October of 2009, Mr. McKown filled out an application for retirement, indicating that he intended to retire effective July 1, 2010. Board staff identified the error in June of 2010, while auditing Mr. McKown's file in preparation for his upcoming retirement. Board staff notified Mr. McKown that he would not actually be eligible for military service credit, and that as a result, he was not yet eligible for an early retirement, because he did not have sufficient years of service in TRS.

Mr. McKown appealed the Board's decision. The Board of Trustees of the CPRB ruled that he was not eligible for military service credit. Mr. McKown then appealed to the Circuit Court of Kanawha County, which overruled the Board's decision, and ordered the Board to grant him six years of military service credit. The Circuit Court held that the Board was required to grant TRS service credit both for periods of active duty and for periods of membership in the armed forces, even when the member was not performing any actual duties for the military. The Circuit Court also held that the Board was required to grant credit for any service performed during a period of national emergency, regardless of whether the draft was in effect, as long as at some other point during the national emergency, the draft had previously been, or later was in effect. The Circuit Court also held that the Board was required to give Mr. McKown six years of credit because of the errors it made when calculating the estimates provided to Mr. McKown.

The Board appealed the Circuit Court's decision to this Court, and argues that the requirement that a member receive service credit only for active duty should be upheld because it

is clear that the word “service” means something above and beyond mere membership, and because it is clear that the intent of the statute was to provide service credit to TRS members whose careers were delayed or interrupted by reason of active military service - not to individuals for time periods they worked in the private sector or pursued educational opportunities, like Mr. McKown did when not on active duty, or even doing nothing at all. Although the West Virginia Supreme Court of Appeals has not addressed this question, at least one other court has acknowledged that the word “service” in this context refers to active duty. *Lieb v. Judges Ret. Sys. Of Ill.*, 731 N.E.2d 809 (Ill. App. Ct. 2000). The Board also argues that the requirement that a member’s active service commence on or before July 1, 1973 should be upheld because by referencing both a period of national emergency and a period in which the federal Selective Service Act was in effect, the statute makes clear that the presence of both periods are key factors in receiving TRS military service credit. In addition, the Circuit Court failed to provide the appropriate level of deference to the Board’s interpretation of the statute on both questions, such deference being due to administrative agencies’ interpretations of statutes they are charged with administering. *See e.g. Sniffin v. Cline*, 193 W. Va. 370, 456 S.E.2d 451 (1995).

The Board further argues that Mr. McKown was not entitled to the credit simply because the Board made a mistake when preparing the estimates provided to him. Mr. McKown was ultimately able to continue working at the same rate of pay and accruing service credit in the plan, and therefore did not suffer the type of injury the law requires in order to be compensated on the basis of this kind of mistake. *Cf. Hudkins v. W. Va. Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) (per curiam). In addition, giving Mr. McKown the credit would be contrary to a TRS statute requiring the Board to correct these kinds of errors, which does not

include an exception for equitable considerations. W. VA. CODE § 18-7A-14(f); *see also Myers v. Consol. Pub. Ret. Bd.*, 226 W. Va. 738, 704 S.E.2d 738 (2010) (per curiam) and *Lanham v. Consol. Pub. Ret. Bd.*, No. 11-0778 (W. Va. Supreme Court March 9, 2012) (memorandum decision).

Finally, the Board appeals because of the Circuit Court not only reversed the administrative decision of the Board, but also issued a writ of mandamus against the Board. The writ of mandamus is an extraordinary remedy that should not have been granted in this case, because Mr. McKown could have received (and actually was granted) full relief through the administrative appeals process, and because the writ of mandamus is not to be used to direct an administrative agency how to rule substantively on a claim like the one made by Mr. McKown. *Cowie v. Roberts*, 173 W. Va. 64, 312 S.E.2d 35 (1984); *State ex rel. Young v. Sims*, 192 W. Va. 3, 449 S.E.2d 64 (1994).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that this matter is appropriate for oral argument pursuant to Rule 19. The case involves assignments of error in the application of settled law and narrow issues of law, and the Petitioner contends that oral argument could significantly aid the Court's decisional process due to the important public policy issues underlying the errors raised in this appeal. Petitioner contends that while the case is appropriate for a memorandum decision in that it involves the application of settled law and narrow issues of law, a full opinion would be welcome because such a decision would help guide the Board, its participants, and the lower courts in dealing with three issues impacting participants in all of the plans administered by the Board: specifically, the construction and interpretation of military service credit statutes, the

correction of errors, and the appropriateness of requests for and awards of mandamus relief in benefit determination cases.

ARGUMENT

I. The Circuit Court erred by simultaneously awarding Mr. McKown administrative and mandamus remedies, because mandamus relief is available only where there is an absence of another adequate remedy, and because mandamus is an inappropriate remedy for contested appeals including benefit determination questions.

The Circuit Court's January 6, 2012 Final Order and Writ of Mandamus (the January 6, 2012 Order) awarded Mr. McKown two types of relief: the Court reversed the Board's March 2, 2011 Final Administrative Order, and the Court issued a writ of mandamus directing the Board to award Mr. McKown six years of TRS military service credit. (A.R. 447). The Board appeals this decision because Mr. McKown was not entitled to mandamus relief where he had another available remedy: an administrative appeal. Moreover, the Board submits that it was improper for the circuit court to use a writ of mandamus to control how the Board ruled on Mr. McKown's claim.⁷

The traditional standard for the issuance of mandamus relief was described in *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969):

A writ of mandamus will not issue unless three elements coexist- (1) a clear legal right to the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

⁷ The Board also submits that Mr. McKown was not entitled to mandamus relief because he did not establish a clear legal right to the service credit. (See A.R. 260-264). The Board's arguments in this regard are set forth below.

Syl. Pt. 2. The burden of proof of establishing each of these elements is on the party seeking the writ, and the absence of any one of these required criteria is a sufficient basis to deny the writ. *State ex rel. Richey v. Hill*, 216 W. Va. 155, 160, 603 S.E.2d 177, 182 (2004) (citing 52 Am. Jr. 2d *Mandamus* § 3 at 271 (2000)). On an appeal of a circuit court's order granting mandamus relief, the Court's review of whether the legal prerequisites for mandamus relief are present is *de novo*. *Ewing v. Bd. of Educ. Of County of Summers*, 202 W. Va. 228, 234, 503 S.E.2d 541, 547 (1998) (citations omitted).

The mandamus remedy is not appropriate where another adequate remedy is available. *See e.g. McMellon v. Adkins*, 171 W. Va. 475, 478, 300 S.E.2d 116, 119-20 (1983) (denying mandamus because case involved issues that could be dealt with in routine civil litigation or declaratory judgment action); *McGrady v. Callaghan*, 161 W. Va. 180, 187, 244 S.E.2d 793, 796-7 (1978) (denying mandamus because statutory appeal procedures afforded an adequate remedy). In particular, this Court has specifically held that mandamus is not the appropriate method to challenge a denial of benefits by the Board because the State Administrative Procedures Act (APA) affords claimants an alternative remedy. *State ex rel. Young v. Sims*, 192 W. Va. 3, 9, 449 S.E.2d 64, 70 (1994). Instead, this Court held that Board claimants must follow the procedures of the APA, and once the Board rules on the claim through its administrative process, file an appeal to a circuit court, rather than seek a writ of mandamus. *Id.* The decision in *Young* was consistent with the way this Court has treated challenges to actions by other administrative agencies also subject to the APA. *See e.g. Mounts v. Chafin*, 186 W. Va. 156, 160-1, 411 S.E.2d 481, 485-6 (1991) (denying writ of mandamus where the APA's procedures for contesting administrative decisions and obtaining judicial review of such decisions were available; *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245,

251-2, 183 S.E.2d 692, 695-6 (1971) (affirming dismissal of complaint for injunctive relief where complainant had not exhausted administrative remedies available under the APA). In *Mounts*, the Court explained that the designation of the APA in statute as the proper method of contesting decisions of an agency “represents a clear legislative determination that these procedures are to be the exclusive means of contesting the actions of” the agency. 186 W. Va. at 160-161. The Court further explained that this legislative determination is based on the agency’s responsibility for and expertise in applying the statutes governing the agency. *Id.*

The reasoning expressed by the Court in *Mounts* is consistent with other holdings by the Court that mandamus is a proper remedy to compel tribunals exercising judicial powers to act when they refuse to do so in violation of their duty, but that the remedy should not be employed to prescribe in what manner tribunals are to act. *See e.g. State ex rel. Canterbury v. County Court of Wayne County, W. Va.*, 151 W. Va. 1013, 1024-5, 158 S.E.2d 151, 158-9 (1967) (reversing a lower court’s grant of writ of mandamus based in part on principle that mandamus is inappropriate method for compelling inferior tribunal’s manner of action or result of decision); *Ewing v. Bd. of Educ. Of County of Summers*, 202 W. Va. 228, 238, 503 S.E.2d 541, 551 (1998) (holding that once a school board employee initiated a grievance, he or she could seek relief via mandamus “only for the limited purpose of curing procedural defects in the grievance process.”) In *Young*, involving the Board specifically, the Court observed that a writ of mandamus would be awarded in cases involving the denial of benefits only for purposes of ensuring that the administrative procedures would be followed. 192 W. Va. at 17.

Mr. McKown initiated his challenge of the Board’s determination of his eligibility for military service credit and retirement in the appropriate manner: he requested an appeal of Board staff’s decision to the Board’s Hearing Officer, and participated in the

administrative hearing and proceeding. (A.R. 1). After receiving an adverse final administrative decision, however, Mr. McKown filed both an appeal pursuant to the APA and a petition for writ of mandamus. (A.R. 237-248). At no point in the administrative or circuit court proceedings did he allege that the Board failed to rule or act on his request, or make a claim that the administrative remedy would somehow be inadequate. Thus, the Circuit Court should have granted the Board's motion to dismiss Mr. McKown's petition for writ of mandamus, which pointed out, among other things, that Mr. McKown could not meet the requirement that no other adequate remedy exist.⁸ (*see* A.R. 250-265). Instead, even though Mr. McKown himself never responded to the arguments brought in that Motion to Dismiss, and without any discussion of how Mr. McKown met the essential elements of mandamus relief, the Circuit Court granted the petition for writ of mandamus and directed the Board to award Mr. McKown six years of TRS military service credit. (A.R. 447). Moreover, it did so in the very same order which awarded Mr. McKown relief under the APA. (A.R. 447). Because, by Mr. McKown's and the Circuit Court's own admissions, another adequate remedy was available to Mr. McKown - an administrative appeal - the Circuit Court committed error when it simultaneously awarded these two types of relief.

The Circuit Court also committed error by using the writ of mandamus to direct the Board how to rule on Mr. McKown's benefit claim. There is no dispute that the Board afforded Mr. McKown an administrative hearing, at which he was represented by counsel. (*See generally*, A.R.). In fact, in moving to dismiss the petition for writ of mandamus, the Board specifically stipulated that it did not contest Mr. McKown's right to pursue his appeal under the

⁸ In addition, the Board's Motion to Dismiss argued that the Petition for Writ of Mandamus should be dismissed because it was not verified in accordance with W. VA. CODE § 53-1-3, because no rule to show cause was issued in accordance with W. VA. CODE §§ 53-1-3 and 53-1-5, and because the Petitioner did not have a clear legal entitlement to relief. (A.R. 250-265). The circuit court never specifically ruled on any of these arguments.

APA to the Circuit Court or to this Court, if necessary. (A.R. 264). The Circuit Court's ruling makes clear that the writ granted against the Board directs the Board to rule in a particular way - namely, to change the way it interprets a substantive statute. (A.R. 447).

Mandamus is an extraordinary remedy that should be invoked sparingly. *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 296, 569 S.E. 809, 817 (2002) (citation omitted). The Board submits that this was not an appropriate case for the use of this extraordinary relief, and accordingly requests the Court to reverse and vacate the Circuit Court's January 6, 2012 Order granting such relief to Mr. McKown.

II. The Circuit Court erred by awarding Mr. McKown service credit for periods of inactive military service occurring when no "draft" was in effect, because the only reasonable construction of W. VA. CODE § 18-7A-17(b) is that only active military service occurring while both a national emergency and the federal Selective Service Act's induction authority were in effect entitles a member to military service credit in TRS.

In 1941, the West Virginia Legislature created TRS, a defined benefit retirement system through which participants earn a retirement annuity calculated on the basis of years of service credit and salary. *See W. VA. CODE § 18-7A-1, et seq.* In general, TRS members accrue service credit by working in TRS-covered employment and making mandatory contributions to the plan for such service. W. VA. CODE § 18-7A-14. These contributions, together with contributions of the participating TRS employers for such service, and interest accruing on the contributions as a result of investment, make up the fund from which TRS benefits are paid. W. VA. CODE § 18-7A-18. The amount of TRS benefits paid to a retiree is based on a formula which takes into account the member's total service credit, as well as his or her average salary. W. VA. CODE § 18-7A-26.

In addition to earning years of service to count towards the computation of a retirement benefit by working for a participating employer while a member of TRS, since 1943, state law has provided that a TRS member can receive “free”⁹ military service credit for certain “service in any of the armed forces of the United States in any period of national emergency within which a federal Selective Service Act was in effect.” W. VA. CODE § 18-7A-17(b).¹⁰ The Board has always interpreted this provision as authorizing the award of service credit only for active duty service commencing on or before July 1, 1973, the date on which the federal government’s authority to draft individuals ended. (A.R. 98-102, 113, 122-123, 125, 127, 157). Applying this interpretation, the Hearing Officer recommended, and the Board agreed, to deny Mr. McKown’s request for service credit in TRS, because his active duty service commenced in October of 1973, more than three months after the end of the “draft.” (A.R. 235). The Circuit Court reversed the Board’s denial, and held that Mr. McKown was entitled to military service credit. (A.R. 430-447).

First, the Circuit Court held that there is no requirement that a member perform active duty in order to receive credit under this provision, because the word “active” does not appear in the statute. (A.R. 440-1). Instead, the Circuit Court held that “service” under the

⁹ “Free” is a means of distinguishing this type of service credit from that afforded under federal USERRA laws and its predecessor statutes, which is obtained only when a member makes up the contributions he or she missed as a result of an absence from employment covered by the plan due to service in the uniformed services - i.e., “purchases” the service credit for periods of interruptive military service.

¹⁰ TRS was created in 1941, and did not initially provide for the award of military service credit. In 1943, TRS was amended to provide military service credit to members with “service in any of the armed or auxiliary forces of the United States in any period of national emergency within which a federal selective service act was in effect, if such service ... interrupted service as a teacher.” H.B. 257, 1943 Regular Session. In 1945 the requirement that military service interrupt an existing TRS member’s employment was removed, thereby allowing members to obtain service credit for “service in any of the armed forces of the United States in any period of national emergency within which a federal selective service act was in effect,” even if it predated membership in TRS. S.B. 142, 1945 Regular Session. A subsequent amendment limited the years of military service credit a member could receive to a maximum of ten years, or 25% of the member’s total service at the time of retirement. Com. Sub. For H.B. 273, 1953 Regular Session.

statute referred to the entire period of Mr. McKown's membership in the armed forces - including four years of active duty, as well as his time as a member of the Naval Reserves. (A.R. 441-2). The Circuit Court relied on a statement in the statute that the definition of "armed forces" included the Women's Reserves. (A.R. 441-2). On the basis of these conclusions, the Circuit Court determined that all six years of Mr. McKown's membership in the Navy could qualify him for service credit in TRS. The Circuit Court then held that the Board had incorrectly determined the time period during which service (whether defined as active or otherwise) must have occurred in order to make a member eligible for military service credit. (A.R. 442-5). According to the Circuit Court's reasoning, any military service occurring during a period of national emergency will qualify a member for service credit, as long as at some point during that national emergency, the draft was in effect. (A.R. 443). The Circuit Court relied in part on provisions governing military service credit in the Public Employees Retirement System, including a general statement of purpose, and a definition of the Vietnam era found in statutes applicable to another CPRB-administered plan. (A.R. 442).

The Board believes that these holdings are in error and that the Circuit Court's January 6, 2012 Order should be reversed because the reasonable construction of this statute is that it awards credit only for active duty service during a period which is both a period of national emergency and a period in which the draft was in effect.

A. "Service in the armed forces" refers to active duty service.

The Board applies the plain and ordinary meaning of the phrase "service in the armed forces of the United States" by granting service credit under this statute only for active duty service, as opposed to periods of an individual's membership in the armed forces of the

United States in which he performed no duties or activities on behalf of the armed forces. To say that someone is “in the service” of an organization contemplates that the person is performing duties or actions on behalf of or to benefit the organization. *See e.g.* Black’s Law Dictionary (9th ed. 2009) (defining “service” as “[t]he act of doing something useful for a person or company...”). To be “in service” of an organization clearly means something beyond, and other than, mere membership, which is essentially what the Circuit Court held when it deemed all six years of Mr. McKown’s membership in the Navy as “service.” Thus, under the plain and ordinary meaning of the language used in the statute, the Board submits that only active duty in a branch of the armed forces of the United States is creditable in TRS under W. VA. CODE § 18-7A-17(b). In fact, several of Mr. McKown’s communications with the Board acknowledged that this is the plain and ordinary meaning of the provision, as he specifically requested and asserted an entitlement to four years of credit for his “military service,” which was the length of his active duty service, as opposed to six years, the length of his membership in the Navy. (A.R. 2, 149).

Moreover, that a member’s military service must be active duty service is implied in the statute. W. VA. CODE § 18-7A-17(b) provides that qualifying military service is “considered equivalent to public school teaching...” This subsection is found within a statute granting other forms of prior service credit as well, including, for example, for service as a teacher in the employment of the federal government or another state, service as a member or employee of the Legislature, of service as an officer with a statewide professional teaching system. W. VA. CODE §§ 18-7A-17(c), (e), (f). In each case, these provisions contemplate that a member can receive credit for work or employment for specific organizations. The word “service” in subsection (b) should be read in light of those provisions as well. Applying the Circuit Court’s reasoning, on the other hand, would award service credit equivalent to actual

employment under the plan to individuals for periods in which they worked in the private sector, attended school, or perhaps did nothing at all, as individuals may do while on an inactive status in the reserves, at no cost to the member. Mr. McKown himself testified that for the two years of his membership in the Navy that he was not on active duty, he did exactly that. These are not the types of experiences or time periods the Legislature intended to be “considered equivalent to public school teaching,” as provided under the statute, much less to be awarded to members on a non-contributory basis, at extreme cost to the other members and employers who contribute to the plan.

At least one other court has similarly concluded that “military service” in a retirement plan statute refers to active duty service. In *Lieb v. Judges Ret. Sys. Of Ill.*, 731 N.E.2d 809 (Ill. App. Ct. 2000), the public retirement plan at issue provided that its members could apply for creditable service for up to two years of “military service,” without specifying whether service was required to be “active duty.” The Board of Trustees of that plan, like the Board in this case, interpreted the statute as requiring active duty service. *Id.* at 90. A plan member who fulfilled a six-year enlistment, only six months of which was active duty, sought the maximum amount creditable under the statute, two years. *Id.* at 89. The court determined that the term “military service” was ambiguous because it was susceptible to two reasonable and conflicting interpretations; however, based on the statute as a whole, the court concluded that the Illinois Legislature intended “military service” to refer to active duty service, as opposed to inactive reserve duty. *Id.* at 93. Like W. VA. CODE § 18-7A-17(b), that plan’s statute treated the creditable period as equivalent to actual service in employment covered by the plan. *Id.* Thus, *Lieb* supports the Board’s position that W. VA. CODE § 18-7A-17(b) should be read as granting service credit only for active duty service.

In his reply brief filed with the Circuit Court, Mr. McKown claimed that several other court opinions were more analogous to his case, and supported his proposition that active duty is not required. (A.R. 319-331). The Board respectfully submits that none of those cases actually support Mr. McKown's position. *Reinelt v. Michigan Pub. School Employees' Ret. Bd.*, 276 N.W.2d 858 (Mich. Ct. App. 1979) is the closest to this case in terms of factual and legal issues from among those cited by Mr. McKown, in that it concluded that periods of time other than active duty could constitute "time spent in [the] armed service" for purposes of a retirement plan, but should not be considered persuasive for several reasons. First, the language of the statute at issue in *Reinelt* was very different: while one portion of the statute did reference "active duty" in the armed service, the portion of the statute describing the period of service credit to award a member did not, instead referring only to "time spent in such armed service." *Id.* at 860. Thus, the court in that case had to take into consideration that the legislative body that had drafted the statute must have meant different things by using different terms. *Id.* Second, because the interpretation being questioned was put forth by the state's attorney general, the Court of Appeals of Michigan did not, in that case, apply the more deferential standard of review applicable to administrative agency interpretations of statutes that must be applied here.¹¹ *Id.* at 860-1. Nonetheless, the court acknowledged that an interpretation of that statute requiring "service" to be read as "active duty" was reasonable. *Id.* at 861.

Densley v. Dept. of Ret. Sys., 173 P.3d 885 (Wash. 2007), also cited by Mr. McKown in his reply brief before the Circuit Court, actually supports the Board's position as well. In that case, the primary issue was whether only "active federal duty" qualified as "service

¹¹ As the Board argues in Section III, below, the Circuit Court was required to give deference to the Board's interpretation of this statute, as it is the administrative agency charged with applying it.

in the armed forces.” *Id.* at 889. The statute at issue, like that in *Reinelt*, contained references both to “active federal duty” and “service in the armed forces,” and therefore the court was required to presume that “[w]hen the legislature uses two different terms in the same statute, [...] the legislature intends the terms to have different meanings.” *Id.* Moreover, in that case, the member was not seeking service credit for periods during which he performed no duties for the military - instead, the dispute was over whether certain military training or drill sessions were creditable. *Id.* at 887. Thus, *Densley* does not support Mr. McKown’s contention that the type of duty he performed is routinely credited by state retirement plans.

None of the remaining cases cited by Mr. McKown in his reply brief even address the question of whether service means active duty, and actually support that only active duty is creditable in a retirement plan. For example, in *Basehore v. Pa. Pub. School Employees’ Ret. Bd.*, 318 A.2d 392 (Pa. Commw. Ct. 1973), there is no discussion whatsoever of how many years of active duty the member had in the armed forces. While the member was granted military service credit, the record showed that the member was in the Navy for more than 20 years and apparently made a career of his military service; therefore it is quite possible that he had more than five years of active duty service, which was the maximum awardable in that plan. *Id.* at 59.

As Mr. McKown pointed out in briefs filed with the circuit court, under W. VA. CODE § 18-7A-17(b), the term “armed forces” is deemed as including the “Women’s Army Corps, women’s appointed volunteers for emergency service, Army Nurse Corps, SPARS, Women’s Reserve, and other similar units officially parts of the military service of the United States.” The Circuit Court held that this provision was evidence of the “intended breadth of the statute.” (A.R. 441). The Board submits that this language does not support the conclusion that periods of inactive membership qualify as “service in the armed forces of the United States”

under W. VA. CODE § 18-7A-17(b), particularly when the member is engaged in other activities such as attending school or working in the private sector. The question is not whether Mr. McKown was a member of the armed forces of the United States, but rather whether active duty is required under the statute. Members of the Reserves, like members of the regular branches of the armed forces, can be called into active duty or can be in an inactive status. Thus, as the Board representative testified at the administrative hearing, members of the Women's Reserve, for example, would only be entitled to credit under the statute for periods in which they were actively serving in those units. (A.R. 122). This part of the statute is evidence that the Legislature intended the term "armed forces of the United States" to include the organizations listed therein, not of any intention of how the term "service" should be read, as the Circuit Court erroneously held.

As a result of the Circuit Court's erroneous holding, Mr. McKown received a total of six years of military service credit in TRS, even though it is undisputed that for two of those years, he was free to do as he chose, and spent that time in school, attending to personal affairs, and working in the private sector. Because the Board's position that W. VA. CODE § 18-7A-17(b) only active duty qualifies as "service in the armed forces of the United States" was based on the plain and ordinary meaning of that phrase, and particularly, the term "service," the Board respectfully requests that this Court reverse the January 6, 2012 Order of the Circuit Court holding that "service" referred to periods of membership in the armed forces, without regard to the actual performance of service or duties on behalf of the armed forces, and affirm the Board's requirement that TRS members may receive military service credit only for active duty service.

B. Service “in a period of national emergency within which a federal selective service act was in effect” refers to service occurring during both a period of national emergency and a period in which a draft is in effect.

The Board also appeals the Circuit Court’s January 6, 2012 Order because it concluded, in error, that W. VA. CODE § 18-7A-17(b) permits the award of service credit for military service commencing after July 1, 1973. (A.R. 440-444). The interpretation adopted by the circuit court renders the reference in the statute to the “federal Selective Service Act” essentially meaningless, and therefore is not a permissible interpretation of the provision. *See Wooddell v. Daily*, 160 W. Va. 65, 68, 230 S.E.2d 466, 469 (1976) (citations omitted).

In this regard, a historical background of the federal laws governing national emergency powers and the selective service system is informative. Pursuant to the selective service act in place at the time the TRS military service credit statute was first enacted,¹² male citizens could be drafted¹³ into active duty service in the military at any time, whether a time of war or peace. Selective Training and Service Act of 1940, Section 3(a), Pub. L. 76-783, 54 Stat. 885, enacted Sept. 16, 1940. Prior to 1940, drafts had been authorized by statute only in reference to specific wars. For example, a law passed in 1917, and canceled in 1918, authorized conscription for purposes of supporting the United States’ involvement in World War I. *See Act*

¹² *See* The Selective Training and Service Act of 1940, Pub. L. 76-783, 54 Stat. 885, enacted Sept. 16, 1940. That law was later repealed, and the Selective Service Act of 1948 enacted in its place. Pub. L. 80-759, 62 Stat. 604, enacted June 24, 1948. The Selective Service Act of 1948 remains in force today, but has been renamed and amended several times, and is now known as the Military Selective Service Act. Universal Military Training and Selective Service Act of 1951, Pub. L. 82-51, 65 Stat. 75, enacted June 19, 1951; Military Selective Service Act of 1967, Pub. L. 90-40, 81 Stat. 100, enacted June 30, 1967; and Military Selective Service Act, Pub. L. 92-129, 85 Stat. 348, enacted September 28, 1971.

¹³ In *In re Gregg*, a decision that was not challenged by either Mr. McKown or addressed by the circuit court, the CPRB accepted a recommendation of the hearing officer that for purposes of this TRS provision, the federal Selective Service Act was “in effect” until July 1, 1973. (A.R. 188-195). In particular, the hearing officer concluded that even though a selective service act was technically “on the books” after that date, and in fact even exists today, the “teeth of the Selective Service Act and its effect upon the citizenry is the draft, not any requirement to register ...” (A.R. 194). Thus, because the draft ended on July 1, 1973, the Hearing Officer ruled that military service must have begun before this date in order to make a member eligible for TRS military service credit. (A.R. 194).

of May 18, 1917, 40 Stat. 76. The ability of the federal government to induct individuals into active duty military service, whether it time of war or peace, continued until June 1, 1973, when amendments to the law took place, and prohibited conscription after that date. *See* 50 U.S.C. App. § 467(c).

In the 1940s, the President's ability to declare and use emergency powers was fairly broad. Bruce Ackerman, *The Emergency Constitution*, 113 Yale L. J. 1029, 1078 (2004). There were many purposes for which a national emergency could be declared, as hundreds of statutes contained references to the emergency powers of the executive, and federal law did not require the President to specify those powers he sought to invoke with a particular declaration of national emergency. *Id.* It was not until 1976 that federal law was amended to provide that when the President declared a national emergency, it would automatically terminate after two years, unless expressly extended, and that the President was required to identify the statutory authorities intended to be used under the declaration. *See* 50 U.S.C. § 1601-1651.

Thus, as W. VA. CODE § 18-7A-17(b) recognizes, there are periods of national emergency and periods in which individuals can be drafted, but it is only when these two periods overlap - *i.e.*, periods of national emergency within which the draft was in effect - that TRS military service credit should be awarded. Applying the Circuit Court's reasoning, which was proposed by Mr. McKown, unnecessarily diminishes the reference to the Selective Service Act, because it would mean that TRS members could receive military service credit for military service that occurred years before or after a draft was in effect. This is so because periods of national emergency can be declared for many reasons unrelated to military action or the use of the draft, and can and often are extended for many years.

Moreover, the Circuit Court's interpretation makes it unnecessarily unclear and difficult to administer TRS. Although throughout the time of his military service there were periods of national emergencies in effect, "there was no formal declaration of an emergency for military operations during the Vietnam War." L. Dow Davis, *Reserve Callup Authorities: Time for Recall?*, 1990-APR Army Law. 4, 10 (1990). At the time, national emergencies were then in effect for the Depression (declared in 1933), the Korean War (declared in 1950), the postal strike (declared in 1970) and other international economic matters (declared in 1971). *Id.* The Circuit Court did not specify which of these national emergencies the Board should refer to when determining when the period of national emergency during which Mr. McKown's service occurred had ended. Indeed, using, for example, the date the national emergency declared for the postal strike ended would be unreasonable, since that declaration was wholly unrelated to Mr. McKown's military service. An application of the Circuit Court's ruling in the context of the history of the use of the national emergency and draft powers shows that this is not a reasonable and permissible construction of W. VA. CODE § 18-7A-17(b). Accordingly, the Board respectfully requests that this Court reverse the Circuit Court's January 6, 2012 Order and affirm that the Board has correctly interpreted W. VA. CODE § 18-7A-17(b) as granting military service credit only for active duty service occurring during both a period of national emergency and a period in which a federal Selective Service Act was in effect.

III. The Circuit Court erred by failing to give deference to the Board's longstanding and reasonable interpretation of W. VA. CODE § 18-7A-17(b), even though this Court has repeatedly held that an administrative agency's reasonable and permissible construction of a statute it administers should be afforded substantial deference, absent clear legislative intent to the contrary.

The Board submits that the Circuit Court's ruling was in error because it failed to give the appropriate level of deference to the Board's longstanding interpretations of W. VA.

CODE § 18-7A-17(b). This Court has often recognized that while a review of a statutory interpretation question on appeal is *de novo*, an administrative agency's reasonable and permissible construction or interpretation of statutes and regulations which it administers should be afforded "great weight" and "substantial deference," absent clear legislative intent to the contrary. *See e.g. Sniffin v. Cline*, 193 W. Va. 370, 374, n.8, 456 S.E.2d 451-455, n.8 (1995) (citations omitted). This deference is afforded in part because of an understanding that an agency's historical interpretations of statutes are to be considered evidence of legislative intent. *See e.g. Syl. pt. 7, Evans v. Hutchinson*, 158 W. Va. 359, 214 S.E.2d 453 (1975) ("Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.")

The statute at issue is exclusive to the administration of TRS, and has no impact outside of the context; thus, the Board is the administrative agency charged with administering W. VA. CODE § 18-7A-17(b). It is undisputed that the interpretation applied by the Board is one that it has applied for "many years." (A.R. 122-3, 125, 129-130). Despite this, the Circuit Court's order failed to address the deference owed to the Board's interpretation, or identify any evidence of legislative intent to the contrary that would override the application of such deference. As the administrative agency charged with interpreting and applying this service credit provision, the Board has applied its expertise in the field of retirement plan laws and administration to determine that only active duty is creditable under the statute, and that such active duty must have commenced before July 1, 1973. While for the reasons discussed above the Board does not believe that the Circuit Court's interpretation is reasonable, even assuming *in arguendo* that it is, this does not justify reversing the historical practice of the Board, inasmuch

as the Board's interpretations were reasonable, permissible, and not inconsistent with legislative intent. *See Sniffin*, 193 W. Va. at 374.

The Circuit Court did not address the aforementioned authority, but did hold that the Board's interpretation was to be reviewed as an interpretive rule under the APA, and therefore was not entitled to deference. (A.R. 443-444). In particular, the Circuit Court based this determination of the fact that the Board's interpretation was not set forth in a published, legislative rule. (A.R. 443). Contrary to this conclusion, there is no authority in the APA or otherwise that an administrative agency's interpretation is entitled to no deference unless it has been first promulgated in a legislative rule. Literally every action or inaction taken by an administrative agency constitutes an interpretation of a statute, since such agencies are created by and can only act within statutes. *See e.g.* Syl. pt. 4, *McDaniel v. W. Va. Div. of Lab.*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citations omitted) (observing that the power of administrative agencies is dependent upon statutes, "so that they must find within the statute warrant for the exercise of any authority which they claim.") Thus, such a rule could bring the actions of administrative agencies to a standstill, requiring them to promulgate legislative rules addressing every possible scenario that could come before them which would require a statutory interpretation, in order that such rules receive any deference.

The Board does not believe such a rule exists. In *Haines v. Workers' Comp. Comm'r*, 151 W. Va. 152, 157, 150 S.E.2d 883, 886 (1966), for example, this Court upheld a longstanding policy of the Workers' Compensation Commissioner that an uncorrected visual loss of 20/20 is and should be considered industrial blindness, and that any claimant suffering such a loss should be compensated for the entire loss of the eye. Rejecting the employer's argument that the policy had to be filed in the office of the Secretary of the State pursuant to the APA, the

Court held that such a policy “is not such rule as is contemplated by the provisions of Code, 1931, 29A-1-1, as amended, and 29A-2-1, as amended.” *Id.* Rather, the question was only whether the policy conformed with the law. *Id.*

The Board has not argued that its interpretation is entitled to “controlling weight,” as would be afforded to an agency’s regulation or policy once duly enacted as a legislative rule. *See W. Va. Health Care Cost Review Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 335-6, 472 S.E.2d 411, 420-1 (1996) (citations omitted). Under the weight of authority issued by this court in other administrative cases, however, the Board’s interpretation is entitled to “substantial deference” and “great weight.” The court’s failure to recognize and apply this principle was in error; therefore, the Board respectfully requests that this Court reverse the Circuit Court’s January 6, 2012 Order.

IV. The Circuit Court erred by applying the doctrine of estoppel to the Board’s correction of an error contained within a retirement estimate where TRS statute require the Board to correct errors without exception for equitable reasons, the Circuit Court failed to defer to factual findings by the Hearing Officer, and failed to appropriately weigh the various factors this Court looks to when determining whether estoppel should apply to a government agency.

In addition to concluding that the Board misapplied the governing statute, the Circuit Court ruled that Mr. McKown would also be entitled to six years of military service credit on the basis of estoppel. (A.R. 445-447). This ruling was in error because it failed to consider the Board’s statutory duty to correct errors, failed to appropriately defer to factual findings made by the Hearing Officer, and failed to appropriately consider and weigh the broader implications of applying estoppel to this case.

A. W. VA. CODE § 18-7A-14(f) required the Board to correct the error made in calculating Mr. McKown's estimated military service credit.

W. VA. CODE § 18-7A-14(f) provides that the Board must take action to correct errors:

If any change or employer error in the records of any participating public employer or the retirement system results in any member receiving from the system more or less than he or she would have been entitled had the records been correct, the board shall correct the error ...

This Court recently held that similar statutes required the Board to correct a service credit errors despite arguments that the Board was estopped from making such corrections. *Myers v. Consol. Pub. Ret. Bd.*, 226 W. Va. 738, 704 S.E.2d 738 (2010) (per curiam) and *Lanham v. Consol. Pub. Ret. Bd.*, No. 11-0778 (W. Va. Supreme Court March 9, 2012) (memorandum decision). In *Myers*, the Court affirmed a Board decision which removed two months of service credit from a member of the Public Employees Retirement System (PERS) which had been erroneously credited and shown on the member's statements for many years. *Myers*, 226 W. Va. at 754. In denying the member's request for a reversal of the decision, the Court noted that the Board was required by statute to correct the error, citing to a PERS statute requiring the Board to correct errors upon discovery which is nearly identical to the TRS statute cited above. *Id.* at 754, n. 7. The Court reiterated this principle in *Lanham*, concluding that although the member had been permitted to withdraw and later reinstate contributions made when he was not actually eligible to participate, the circuit court's application of the Board's error correction statute in that case was consistent with the *Myers* decision. *Lanham*, at p. 3. Because the Circuit Court failed to consider or apply the statute requiring the Board to correct service credit errors, such as that which occurred in Mr. McKown's case when the Board's retirement estimates indicated he

would receive military service credit, the Board respectfully requests that the Court reverse the Circuit Court's January 6, 2012 Order.

B. The Hearing Officer's factual finding that Mr. McKown did not detrimentally rely is substantially supported by evidence in the record and should not have been reversed.

The Circuit Court also failed to give appropriate deference to the factual findings of the Hearing Officer with respect to Mr. McKown's claims of detrimental reliance. After receiving testimony from Mr. McKown and reviewing the record, the Board's Hearing Officer found that Mr. McKown failed to establish detrimental reliance, because he was to be re-hired by his employer, and would be able to continue working in order to reach eligibility for an early retirement. (A.R. 73, 87-88). Despite this testimony, the Circuit Court found that Mr. McKown "gave up his job and the job was eliminated." (A.R. 447). There was also no support in the record whatsoever for the Circuit Court's finding that Mr. McKown "has suffered medically as a result of the Board's actions" (*see* A.R. 447), as Mr. McKown did not present any testimony or documentation of such injuries.

The Circuit Court's order acknowledges that

A reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts.

(A.R. 431) (quoting *Donahue v. Cline*, 190 W. Va. 98, 102, 437 S.E.2d 262, 266 (1993) (*per curiam*)). By the very standards the circuit court cited to in its order, it was not free to substitute its own judgment in this case, where there was substantial support in the record for the Hearing

Officer's factual findings with respect to Mr. McKown's claim for estoppel. Accordingly, because the Circuit Court erroneously relied on its own finding that detrimental reliance occurred, when this was contrary to the supported findings of the Hearing Officer, the Board requests that the Circuit Court's order be reversed.

C. The Circuit Court failed to apply various factors this Court has held are relevant when determining whether estoppel should lie against the State, which weigh decidedly against applying estoppel in this case.

Finally, the Circuit Court's application of estoppel was in error because it failed to apply and weigh the various factors this Court has held are relevant in determining whether estoppel should apply against a government agency.

While unfortunate, that correction of the errors imposes some hardship on Mr. McKown is not dispositive of this question. *See Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 62-63, 174 S.E.2d 318, 327 (1970) (recognizing that refusal to apply estoppel against the State in that case would impose some hardship on the entity claiming estoppel, but concluding that harm to the public would result from applying estoppel outweighed this hardship). The Circuit Court, on the other hand, held that estoppel applied essentially because Mr. McKown suffered a hardship, without consideration of any other limitations on the doctrine, or factors this court considers. (A.R. 447).

In particular, this Court has held that the doctrine of estoppel is to be applied cautiously, and that this principle is applied with force when asserted against the State. *See Syl. pt. 7, Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970). The general rule is that an estoppel may not be invoked against a governmental unit when functioning in its governmental capacity. *Id.* at 59 (citations omitted). It is "well-settled" that the State is not

bound, on the basis of estoppel, by the *ultra vires* or legally unauthorized acts of its officers in the performance of governmental functions. *Id.* To the extent that any member of the Board's staff provided incorrect information to Mr. McKown regarding his service credit, such actions were clearly undertaken in a governmental capacity and in no way for the "special benefit or profit" of the Board or its administrative staff. Accordingly, estoppel should not be applied to the Board under these circumstances. The Circuit Court did not take these limitations into consideration when it ruled in favor of Mr. McKown on his estoppel claim.

The Circuit Court also failed to weigh the public policy harms that would occur as a result of applying estoppel in this case. As the Hearing Officer concluded, applying estoppel would cause a harm to the public that outweighs the hardship imposed on Mr. McKown by the correction of the service credit error, because it would have allowed him to commence an annuity when he was not yet statutorily eligible. (A.R. 222). The Board submits that the public harm goes even further, as applying estoppel in cases like these would effectively prohibit the Board from correcting any errors that inevitably occur in the administration of the retirement accounts of tens of thousands of public employees working for hundreds or thousands of employers.

Instead of considering these matters, the Circuit Court relied on a case in which this Court applied the estoppel doctrine to prohibit an action by the Board with respect to the use of sick leave. (A.R. 445-446 (citing *Hudkins v. W. Va. Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) (per curiam)). The Board submits that the circuit court's reliance on this case was in error, because it is legally and factually distinguishable from Mr. McKown's situation. In *Hudkins*, the member at issue was erroneously advised that she could "freeze" her unused sick leave until her retirement date four years later, and use it to increase her service

credit upon her retirement. *Hudkins*, 220 W. Va. at 276-7. While that advice was incorrect, it had been the practice of the Board for many years to permit employees to freeze unused sick leave until a later retirement date – this practice only changed once the Board became aware that the practice conflicted with an administrative rule of the Division of Personnel. *Id.* Unfortunately, after terminating her employment in reliance on the erroneous advice, and learning only years later of the error, the Board’s attempts to correct the error meant that she would have lost her unused sick leave forever. *Id.*

In contrast, there is no evidence that the errors corrected by the Board with respect to Mr. McKown involved practices which were permitted for years. Rather, Board staff testified that the dates of active service provided by Mr. McKown were outside of the dates the Board regularly looked to in evaluating military service credit eligibility in TRS. (A.R. 122-3, 125, 129-130). Thus, while this Court found in *Hudkins* that “Ms. Hudkins could not have been aware of the methodology used by the Board even if she had thoroughly examined the Board’s rules,” the same cannot be said of Mr. McKown. *See Hudkins*, 220 W. Va. at 281.

The *Hudkins* case is also distinguishable because it was clear in that case that the member actually relied to her detriment on the statements of Board staff and reasonably so. As discussed previously, Mr. McKown failed to actually establish reliance to his detriment, because as of the date of the administrative hearing, he indicated he had essentially been re-hired at a comparable or higher rate of pay. (A.R. 73, 87-88). Ms. Hudkins, on the other hand, lost her accrued sick leave forever, and it was years before she learned she could not freeze it and use it upon retirement. *Hudkins*, 220 W. Va. at 276-7. Moreover, Mr. McKown has not established that any reliance he placed on the Board’s actions was reasonable. In particular, the forms on which he relied, the Benefit Estimates provided to him in 2008 and 2009, clearly stated that they

were estimates, including the specific line referring to his years of military service credit, which read “estimated.” (See e.g. A.R. 11). These forms varied with respect to the years of military service credit, initially estimating he would be eligible for four years, and later estimating almost four and one-half years, and although Mr. McKown noticed this inconsistency, he said nothing because it worked to his benefit. (A.R. 82). He should not now be permitted to claim reasonable reliance on this information.

Finally, *Hudkins* is distinguishable because in that case, the Court’s decision was also based on the relatively small fiscal impact that applying estoppel would have. Whereas in *Hudkins*, the application of estoppel resulted in a \$51 per month impact to the plan, the impact of doing so for Mr. McKown would be much greater, because it would result in making him eligible to retire before meeting the statutory criteria for the same, and risk making every informal or estimated calculation offered by the Board staff binding, even though clearly designated as an estimate. The Board submits, therefore, that the Circuit Court’s reliance on *Hudkins* was in error, and that its conclusion that estoppel applies in this case should be reversed.

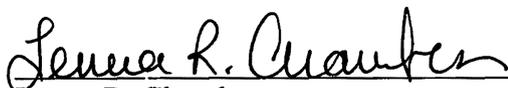
CONCLUSION

Petitioner, the West Virginia Consolidated Public Retirement Board, respectfully requests that this Court reverse the Circuit Court's January 6, 2012 Order with respect to Mr. McKown's administrative appeal, vacate the Circuit Court's January 6, 2012 Order with respect to the Writ of Mandamus granted against the Board, and affirm the Board's March 2, 2011 Final Order denying Mr. McKown's request for military service credit in TRS.

Respectfully Submitted,

West Virginia Consolidated Public
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CERTIFICATE OF SERVICE

I, Lenna R. Chambers, do hereby certify that I have caused a copy of the foregoing **Petitioner's Brief** to be served by regular United States Mail on this 7th day of May, 2012, upon:

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