

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 REPLY BRIEF

**Counsel for Petitioner, the West Virginia
Consolidated Public Retirement Board**
Lenna R. Chambers, Esquire (WVSB 10337)
Counsel of Record
BOWLES RICE McDAVID GRAFF & LOVE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Phone: (304) 347-1777
E-mail: lchambers@bowlesrice.com

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 1

ARGUMENT..... 1

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..... 1

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..... 3

A. “Service in the armed forces” refers to active duty service..... 3

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..... 7

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. 8

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 statutes 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 factors this Court looks to when determining whether estoppel should apply to a government agency..... 9

CONCLUSION 11

TABLE OF AUTHORITIES

West Virginia Code

W. VA. CODE § 18-7A-14(f).....	9, 10
W. VA. CODE § 18-7A-17(b)	passim
W. VA. CODE § 5-10-15	7

West Virginia Cases

<i>Harshbarger v. Gainer</i> , 184 W. Va. 656, 403 S.E.2d 399 (1991)	7
<i>Hudkins v. W. Va. Consol. Pub. Ret. Bd.</i> , 220 W. Va. 275, 647 S.E.2d 711 (2007).....	10
<i>In re Appeal or Judicial Review of Decision of the W. Va. Consol. Pub. Ret. Bd.</i> , 197 W. Va. 514, 476 S.E.2d 185 (1996)	6
<i>In re Dostert</i> , 174 W. Va. 258, 324 S.E.2d 402 (1984).....	7
<i>Lanham v. Consol. Pub. Ret. Bd.</i> , No. 11-0778 (W. Va. Supreme Court March 9, 2012).....	9
<i>Mounts v. Chafin</i> , 186 W. Va. 156, 411 S.E.2d 481 (1991).....	2
<i>Myers v. Consol. Pub. Ret. Bd.</i> , 226 W. Va. 738, 704 S.E.2d 738 (2010)	9
<i>State ex rel. Young v. Sims</i> , 192 W. Va. 3, 449 S.E.2d 64 (1994).....	2

Other

<i>City of Natchez, Miss. v. Sullivan</i> , 612 So.2d 1087 (Miss. 1992)	5
<i>Goodwin v. Employees Ret. Sys. of Georgia</i> , 275 S.E.2d 136 (1981)	5
<i>Lieb v. Judges Ret. Sys. of Ill.</i> , 731 N.E.2d 809 (Ill. App. Ct. 2000).....	3
<i>Reinelt v. Public School Employees Ret. Bd.</i> , 276 N.W.2d 858 (Mich. Ct. App. 1979).....	4, 5

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner, the West Virginia Consolidated Public Retirement Board (the Board) incorporates by reference its statement regarding oral argument and decision as set forth in the Petitioner's Brief.

ARGUMENT

The Board respectfully submits the foregoing reply to supplement its original brief and to respond to arguments set forth in Respondent Ronald C. McKown's (Respondent or Mr. McKown's) response brief which are not already addressed by its original brief.

- 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.**

Mr. McKown's appeal to the Circuit Court sought additional service credit in TRS on the basis of two arguments: first, that the Board was required to grant him such credit under W. VA. CODE § 18-7A-17(b) and second, that the Board was required to grant him such credit on the basis of estoppel. (A.R. 237-249). In his Response Brief, Respondent concedes that the administrative appeal provided him an adequate remedy as it related to these claims. Respondent argues, however, that he is entitled to simultaneously pursue and receive mandamus relief under the same theories, simply because the award of attorneys' fees and costs is "consistent with" the granting of mandamus relief. Response Brief, pp. 12-13.

If the remedies available in an administrative appeal were considered inadequate in every case in which an appellant wants or requests attorneys' fees and costs, administrative appeals would be never be considered adequate, and the mandamus remedy would always be available to an individual otherwise entitled to an administrative appeal. While the express question has not been decided, this Court has on several occasions held that an individual who could pursue an administrative appeal was not eligible to also pursue mandamus relief, without reference to the potential difference between the types of proceedings in terms of the availability of fees and costs. *See e.g. State ex rel. Young v. Sims*, 192 W. Va. 3, 449 S.E.2d 64 (1994) and *Mounts v. Chafin*, 186 W. Va. 156, 411 S.E.2d 481 (1991).

The Board respectfully requests that this Court reject the Respondent's only argument in support of his entitlement to mandamus relief, as the principle he asserts would eviscerate the intent of the APA by allowing all administrative appellants to pursue their claims in a mandamus action, a principle which has been rejected by this Court time and time again. The Board requests the Court to hold that it is the underlying claims that this Court must look to when determining whether there is another adequate remedy such that mandamus relief is not appropriate. In this case, the Respondent concedes that the administrative appeals process serves as an adequate remedy for his claim - he cannot escape the requirement that he exhaust administrative remedies simply by asserting an entitlement to attorneys' fees and costs.

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.

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

Mr. McKown maintains in his Response Brief that the language of W. VA. CODE § 18-7A-17(b) is clear and unambiguous and supports his request for service credit for inactive service. As the Petitioner noted in its initial brief to this Court, an Illinois court considering a very similar question disagreed, and held that the term “military service,” when used in a public retirement plan statute authorizing additional service credit for military service, referred to active duty service, not inactive service in the Reserves. *Lieb v. Judges Ret. Sys. of Ill.*, 731 N.E.2d 809 (Ill. App. Ct. 2000). Applying circular reasoning, Mr. McKown tries to distinguish *Lieb* by claiming that the intent of W. VA. CODE § 18-7A-17(b) is “plain on its face.” Actually, the very issue raised by the statute considered in *Lieb* - does “service” refer to active duty, or also inactive duty? - is raised by the statute at issue in this case. If it were as clear as Mr. McKown suggests that “service” in this context encompasses both active and inactive duty, the Illinois court would have had no basis to look to other parts of the statute or to the statute’s legislative history, as it did. In fact, the plaintiff in *Lieb* also argued that the statute was clear and unambiguous, but this argument was soundly rejected by the Court, which held that the term “military service” was “susceptible to two equally reasonable and conflicting interpretations.” *Lieb*, 731 N.E.2d at 813.

Like the Illinois statute, W. VA. CODE § 18-7A-17, as a whole, supports the Board’s interpretation. The intent is clear that additional service credit be available time periods spent actually performing services on behalf of various organizations: the military, as a teacher

for the federal government, while serving as an officer for a statewide professional teaching association, etc... See W. VA. CODE § 18-7A-17(b), (c), (f). The Board's interpretation, which assumes that the Legislature did not intent to reward individuals with up to 10 years of free service credit for time periods spent working in the private sector, attending school, or tending to personal affairs, all of which Mr. McKown fully admits he did while a member of the Reserves, simply because he could have been called into active duty service.

Mr. McKown continues to point to the list of organizations considered a part of the armed forces for purposes of W. VA. CODE § 18-7A-17(b), and in doing so, continues to misunderstand the issue. The question is not whether Mr. McKown was a member of an organization that was a part of the armed forces - as a member of the Navy, and then the Naval Reserves, Mr. McKown was indeed a member of the armed forces. That W. VA. CODE § 18-7A-17(b) requires the Women's Reserve, for example, to also be treated as a part of the armed forces for this statute does not indicate in any way the Legislature's intent with respect to the question of whether "service" includes inactive duty in addition to active duty. Mr. McKown also points to language found in the statutes governing the Public Employees Retirement System (PERS), which he claims shows the Legislature's intent to benefit both those were drafted as well as those who enlist. Again, this is not the issue before the Court in this appeal - the Board's interpretation of W. VA. CODE § 18-7A-17(b) does not distinguish between those who were drafted and those who enlisted. (A.R. 126). The distinction at issue is whether a member was performing active duty or not.

Mr. McKown then turns to the decision of the Court of Appeals of Michigan in *Reinelt v. Public School Employees Ret. Bd.*, 276 N.W.2d 858 (Mich. Ct. App. 1979), in support of his claim. For the reasons discussed in the Petitioner's Brief (*see* p. 20), this case is

distinguishable, but it bears worth noting that Mr. McKown's own admissions about how he spent his time on inactive duty underscore the erroneous assumption underpinning the Michigan court's decision. As Mr. McKown set forth in his own Response Brief, the Michigan court assumed that the obligation to serve the country in the armed forces would ordinarily "conflict with a teaching career at the time of the draft or enlistment," and that the "Legislature assumed ... that draft or enlistment would automatically lead to active duty." Response Brief p. 20 (quoting *Reinelt*, 276 N.W.2d at 861-2).

Mr. McKown's own testimony proves that this assumption is incorrect: although he signed an enlistment contract in April 1973, until he was placed in active duty in October 1973, his obligation to the country would not have conflicted with a teaching career, as he was able finish school and handle personal affairs. (A.R. 34). Similarly, once released to the Reserves and placed on inactive duty, his obligation to the country would not have conflicted with a teaching career, as he was able to return to school and work in the private sector. (A.R. 41-42). *Reinelt* is not only distinguishable for the reasons the Petitioner has already discussed, but because it is based on an assumption that Mr. McKown himself has proven to be incorrect.

Mr. McKown points to two additional decisions not already addressed in the Petitioner's Brief: *City of Natchez, Miss. v. Sullivan*, 612 So.2d 1087 (Miss. 1992) and *Goodwin v. Employees Ret. Sys. of Georgia*, 275 S.E.2d 136 (1981). These decisions, like the others addressed in the Petitioner's Brief and Mr. McKown's Response, do not address the question at hand. In *City of Natchez*, at issue was whether a statute providing retirement system credit for active duty military service allowed such credit only for post-employment military service, or also pre-employment. 612 So.2d at 1088-9. At issue in *Goodwin* was whether attendance at a naval academy qualified as active duty for purposes of a statute providing retirement system

credit for the same. 275 S.E.2d at 558. Neither of these decisions support Mr. McKown's reading of W. VA. CODE § 18-7A-17(b).

Finally, Mr. McKown argues that W. VA. CODE § 18-7A-17(b) should be liberally construed, and that doing so would support his claim for six years of TRS service credit. The doctrine of liberal construction does not mean that every member should be granted every request, simply because he or she can identify another possible interpretation of a statute. *See* n. 9, *In re Appeal or Judicial Review of Decision of the W. Va. Consol. Pub. Ret. Bd.*, 197 W. Va. 514, 476 S.E.2d 185 (1996) (observing that while “[o]rdinarily, the PERS provisions are ‘liberally construed so as to provide a general retirement system for the employees of the state herein made eligible for such retirement’, ... [the] Court may not confer retirement benefits for employment where the legislature has not so authorized.”) Ultimately, the Board had to consider the language and intent of W. VA. CODE § 18-7A-17 when construing the phrase “service in the armed forces of the United States.” The fact that it did not construe this phrase in a way that would grant maximum benefits to Mr. McKown does not mean that the Board has violated the principle of liberal construction.

Accordingly, for the reasons set forth in the Petitioner's Brief, as well as this Reply, the Board respectfully requests that the Court hold that “service in the armed forces” for purposes of W. VA. CODE § 18-7A-17(b) refers only to active duty service, and does not include inactive service as a member of the Reserves or any other component or branch of the armed forces.

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.

In his Response, Mr. McKown relies heavily on the argument that because his service occurred during the “Vietnam era,” as defined for purposes of PERS, he should be entitled to credit in TRS. The Legislature clearly intended to provide different benefits to PERS members as it does to TRS, as it is its prerogative to do so. The two plans were created at different times, cover different populations, and in many ways provide very different benefits. A comparison of the vast differences between the two military service credit provisions, W. VA. CODE § 5-10-15 (PERS) and W. VA. CODE § 18-7A-17(b) (TRS) makes it abundantly clear that the PERS statutes have no bearing on what was intended for TRS; however, it should be noted that this was not always the case.

TRS was created in 1941, and beginning in 1943, provided military service credit for service during a “period of national emergency within which a federal selective service act was in effect.” PERS was created in 1961, and initially provided military service credit only for active duty service during a “period of compulsory service,” which ended July 1, 1973. *See In re Dostert*, 174 W. Va. 258, 273, n. 28, 324 S.E.2d 402, 417 n. 28 (1984), *overruled on other grounds by Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991) (observing that the period of compulsory military service authorized by the Selective Training and Service Act of 1940 ended July 1, 1973, the date on which the federal government’s general induction authority expired). Thus, for most of the history of these two systems, PERS members, like TRS members, only received credit for active duty service prior to July 1, 1973. The language in PERS defining the “Vietnam era” was not added until 2000, when the Legislature decided that, in addition to providing service credit in PERS for military service during a compulsory period,

it would also provide service credit for service during certain “periods of armed conflict,” and it included and defined the “Vietnam era” as one such period of armed conflict. This definition has no bearing whatsoever on the intent of the Legislature with respect to TRS.

Mr. McKown makes no real attempt to explain how the rule the Circuit Court applied is workable, in light of the history of the use of the national emergency powers and the federal government’s induction authority. *See* Petitioner’s Brief pp. 24-25. Instead, he claims that the application of the statute is “quite simple in this instance,” without addressing that there was not even a declaration of national emergency for the Vietnam era, which Mr. McKown asserts is the “national emergency” during which he served, during which, in turn, a draft was in effect. Mr. McKown’s argument also ignores that the Board is required to administer this statute not only for Mr. McKown’s benefit, but for the benefit of all members of TRS. This is an important issue the Board respectfully asks the Court to consider when deciding this case.

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.

Mr. McKown’s entire response to the Board’s assertion that its interpretation is entitled to deference rests on his argument that the Board’s interpretation violates the clear and unambiguous language of the statute. A clear and unambiguous statute would specify what types of duty are considered “service,” and the exact dates on which a member’s service is during a period of national emergency within which a federal selective service act was in effect. By failing to address those specific matters within the text of W. VA. CODE § 18-7A-17(b), the Legislature gave the Board the discretion to interpret and apply the provision. The deferential

standard of review for agency interpretations of statutes was designed to respect the expertise and experience of agencies like the Board, and the Circuit Court's decision should be overturned for failing to apply that deference.

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 statutes 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 factors this Court looks to when determining whether estoppel should apply to a government agency.

In his Response Brief, Mr. McKown argues that W. VA. CODE § 18-7A-14(f) does not require the Board to correct its own errors. The statute clearly states that it applies to "any change ... in the records of ... the retirement system" - thus, it applies not only to employer errors, but also to Board errors. The errors at issue in *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), for example, were Board errors, to which this Court applied a similar error correction statute governing PERS.

With regard to the factual findings of the Hearing Officer, which the Circuit Court failed to defer to in its ruling, Mr. McKown concedes a key point: Mr. McKown was able to continue working in a TRS-covered position and earn the additional year of retirement service credit he needed to be eligible for the early retirement he initially applied for, and therefore ultimately could not establish detrimental reliance on the erroneous estimates provided by the Board. Response Brief p. 10. Mr. McKown does not articulate - other than stating that he had to apply for a new job (which he received) and has suffered unspecified and unproven medical issues - how he relied to his detriment on the erroneous retirement estimates. To be sure, it is unfortunate that Mr. McKown believed for a time that he was eligible to take an early retirement,

only to learn that he was not, but this is not the type of detrimental reliance that should estop the Board from correcting errors made in retirement estimates.

As the administrator and fiduciary of TRS, the Board makes every effort to give correct advice and estimates to its members. Unfortunately, mistakes may occasionally be made. Both W. VA. CODE § 18-7A-14(f) and this Court's opinions on the doctrine of estoppel recognize that in most cases, the Board must correct errors when they occur. It is only the rare case where the Board should be prohibited from doing so. As discussed in the Petitioner's Brief, the example relied upon by Mr. McKown, *Hudkins v. W. Va. Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) of a case in which this Court has prohibited correction, is distinguishable both legally and factually from the present case. Accordingly, the Board respectfully requests that the Court apply the TRS error correction statute, and decline to extend its ruling in *Hudkins* to this case.

CONCLUSION

For the reasons set forth in the Petitioner's Brief, as well as this Reply Brief, 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
Retirement Board

By Counsel

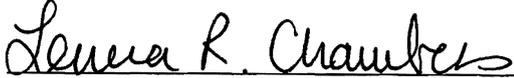


Lenna R. Chambers (WVSB # 10337)
BOWLES RICE McDAVID GRAFF & LOVE LLP
Post Office Box 1386
600 Quarrier Street
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1777
Facsimile: (304) 347-2196

CERTIFICATE OF SERVICE

I, Lenna R. Chambers, do hereby certify that I have caused a copy of the foregoing **Petitioner's Reply Brief** to be served by regular United States Mail on this 11th day of July, 2012, upon:

Jeffrey G. Blaydes, Esquire
CARBONE & BLAYDES PLLC
2442 Kanawha Boulevard, East
Charleston, West Virginia 25311


Lenna R. Chambers (WVSB # 10337)