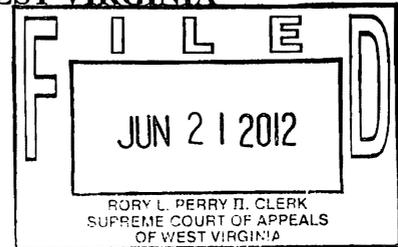


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

**RESPONDENT RONALD K. McKOWN'S
RESPONSE TO PETITION FOR APPEAL**

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I. INTRODUCTION

Comes now the respondent, Ronald K. McKown (“Respondent”), by counsel for the American Federation of Teachers - West Virginia, AFL-CIO, Jeffrey G. Blaydes, and presents this brief in opposition to the brief of the petitioner, West Virginia Consolidated Public Retirement Board (“Petitioner”). Petitioner appeals the January 6, 2012, Decision of the Circuit Court of Kanawha County which reversed the Final Order of the West Virginia Consolidated Public Retirement Board issued on March 2, 2011 (“Board”). In that order, the Board denied Respondent’s request for military service credit under West Virginia Code § 18-7A-17(b). In reversing the Board’s “Final Order,” the Circuit Court granted Respondent six (6) years retirement credit and all costs associated with this proceeding.

Respondent is an honorably discharged veteran of the United States Navy who served in the Vietnam conflict and later taught public school children in West Virginia for nearly three decades. He is a member of the Teachers Retirement System. Respondent served four years active duty and two years in the reserves during Vietnam (a conflict during which the draft was in effect). The Circuit Court of Kanawha County found, in pertinent part, that under West Virginia law, a teacher who served in the military during a conflict in which the draft is in place shall receive retirement credit for his military service. Based upon his military service, the circuit court granted him six (6) years retirement credit pursuant to West Virginia Code § 18-7A-17(b). This case involves the interpretation of a single statutory section - - West Virginia Code § 18-7A-17(b) - - governing retirement credit to military service.

In this case, the Circuit Court properly awarded retirement credit to Respondent for his military service based upon the clear and unequivocal language of West Virginia Code § 18-7A-17(b). West Virginia Code § 18-7A-17(b) states in pertinent part:

For the purpose of this article, the Retirement Board shall grant prior service credit to (1) new entrants and other members of the retirement system for (2) service in any of the Armed Forces of the United States (3) in any period of national emergency (4) within which a Federal Selective Service Act was in effect.

(enumeration added for ease of reference)

The circuit court properly concluded that, under the clear and unambiguous language of West Virginia Code § 18-7A-17(b) Respondent is entitled to receive prior service credit for military service because he meets the enumerated criteria above. Based upon the enumeration provided above, it is uncontraverted that:

- (1) Respondent is a member of the retirement system, or TRS;
- (2) Respondent served in the Armed Forces of the United States;
- (3) Respondent served during a period of national emergency, the Vietnam conflict; and
- (4) Respondent served in a national emergency within which a Federal Selective Service Act was in effect.

The underpinning of this statute and the circuit court holding is that the intent of this statute is to award teachers who served in the military retirement credit for military service.

Moreover, the facts of this case establish that the circuit court properly found that the doctrine of estoppel applies in this case and that Respondent suffered to his detriment as a consequence of relying on the repeated negligent misrepresentation of fact made by the Board's agents.

Accordingly, the order of the circuit court granting Respondent six years retirement credit for his military service should be affirmed.

II. STANDARD OF REVIEW

This Court's review is governed by the West Virginia Administrative Procedures Act. West Virginia Code § 29A-5-1, *et seq.* West Virginia Code § 29-5A-4(g) states,

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or,
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court has stated that, in administrative appeals,

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.

Donahue v. Cline, 190 W.Va. 98, 102, 437 S.E.2d 262, 266 (1993) (*per curiam*) (citing Gino's Pizza of West Hamlin v. West Virginia Human Rights Comm'n, 187 W.Va. 312, 418 S.E.2d 758, 763 (1992)). A review of the circuit court's order granting Respondent six years of retirement credit for his military service demonstrates that the circuit court's decision was not made in error and, thus, the order should be affirmed. Moreover, Respondent contends that the Court's application of the doctrine of estoppel in this case was not in error in any manner.

III. STATEMENT OF FACTS

The relevant facts of this case are not in dispute. Respondent has been a school teacher in the State of West Virginia for approximately twenty-nine years. He also is a veteran of the Vietnam conflict and was honorably discharged from the United States Navy. (T 21-2)¹

Service in the United States Navy

Respondent enlisted in the United States Navy on April 13, 1973. (Petitioner's Ex.1)

Upon enlisting, Respondent could have been called to active duty at any time without his consent. He was a member of the "ready" or "stand-by" reserve. (Petitioner's Ex. 1; T 15)

At the time he enlisted, Respondent had a selective service number (Petitioner's Ex.1) and the draft for the Vietnam conflict was in place and continued thereafter. When he enlisted, Respondent took an oath of enlistment and entered into an "enlistment contract," which required him to serve in the United States Navy for a total of six years. (Petitioner's Ex. 1; T 13)

Respondent completed his six year obligation with the United States military serving from April 13, 1973, until April 12, 1979. He entered active duty on October 2, 1973, while the Vietnam conflict continued, but after the draft had ended. He remained on active duty for four years. (T 19)

Respondent spent a total of two years in the reserves. He was credited with six months in the reserves from April 13, 1973, to October 1, 1973, as well as eighteen months from October 3, 1977, until his discharge on April 12, 1979. (Petitioner's Ex. 2; T 21-2) Respondent was honorably discharged from the Navy. While in the service, he received the National Defense Service Medal and the Good Conduct Medal. (Petitioner's Ex. 2)

¹The transcript and exhibits from the administrative hearing are contained in the Appendix record and the citations used herein are to the original transcript page numbers and exhibit numbers.

Service as a Public School Teacher in West Virginia

Soon after his discharge from the United States Navy, Respondent began his career as a public school teacher in Lincoln County, West Virginia. Respondent became a member of the Teachers Retirement System (“TRS”) which is administered by the Board. He taught for approximately twenty-seven years when he began to investigate his retirement options.

Prior to the commencement of the 2008-09 school year, Respondent contacted the Board to determine when he could retire.² More specifically, he asked the Board, “what’s the earliest date I can retire?” (T 24) The Board advised him that he could use military time toward his retirement and was directed to send in his DD-214, an official military document detailing his military service. Respondent then provided the requested information to the Board. (Petitioner’s Ex. 2; T 24-5)

On or about February 22, 2008, Respondent completed a form requesting an estimate of his pertinent benefits. In the comment section of the form, Respondent 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.

(Emphasis supplied) (Petitioner’s Ex. 7)

Thereafter, the Board informed Respondent that he would receive four years credit for his military service and that he would have to reach age 55 before he was eligible to retire. (T 25-6) Respondent later met and spoke with Board employee Judy King, whose job was to advise members of the retirement system in making retirement decisions.

On behalf of the Board, Ms. King generated at least four printouts dated August 11, 2008,

²At that time, Respondent’s daughter and only grandchild had moved out of state. Because he and his wife wished to move near them, it was his hope to retire as soon as possible.

that provided estimates of Respondent's monthly income under different scenarios. She specifically noted that the monthly income figure was an estimate because accrued sick leave and final salary totals were not final and, therefore, monthly benefits could change. (Petitioner's Ex. 3, 4, 5; T 27) Respondent was also informed that the uncertain nature of accrued sick leave and final salary were the only reason that the monthly income figure was an estimate. It is undisputed that all four documents generated by Ms. King on August 11, 2008, indicated that Respondent would receive four years retirement credit for his military service. During the 2007-08 school year, Respondent rescinded his retirement because his daughter and grandchild had returned to West Virginia. (T 33)

At or near the start of the 2008-09 school year, Respondent again contacted the Board to explore his retirement options, and specifically, to determine what his monthly income would be upon retirement.

Respondent met and spoke with another Board employee, Velma Totten, who, like Ms. King, also advises members of the retirement system in making retirement decisions. Respondent indicated to Ms. Totten that the numbers generated by her were "important" because he believed he needed at least \$3,000 per month in retirement income. (T 36)

On behalf of the Board, Ms. Totten generated at least three printouts: two were dated September 11, 2009, and another was dated October 7, 2009. These documents provided estimates of Respondent's monthly income under different scenarios. Ms. Totten represented that the monthly income figure on each document was an estimate because accrued sick leave and final salary were not final and, therefore, monthly benefits could change. Respondent was again informed that the uncertain nature of the accrued sick leave and final salary were the only reasons that the monthly income figure was an estimate. (T 37)

All three documents generated by Ms. Totten, on behalf of the Board, advised Respondent that he would receive 4.474 years retirement credit for his military service. The final printout indicated that Respondent would receive at least \$3,000 per month in retirement earnings. This information, as well as the previously-described information from the Board, were the impetus for Respondent to retire.³ (T 37-8; Petitioner's Exs. 8, 9 and 10; T 8-10)

Detrimental Reliance on Petitioner's Information

Based upon the information received from the Board, Respondent informed the Lincoln County Board of Education that he would be retiring on June 10, 2010. He gave notice of his retirement on October 8, 2009, one day after he received his last estimate from the Board. (T 37-8)

In light of Respondent's pending retirement, the Lincoln County Board of Education determined it would no longer post Respondent's position.

On June 10, 2010, Respondent retired from his position with the Lincoln County Board of Education. He anticipated that he would begin receiving his retirement benefits soon thereafter. More specifically, he believed he would receive \$6,000 from retirement by August 2010 and \$500 for his early retirement, as well as continued monthly retirement payments. (T 38)

The Board made no contact with Respondent between October 7, 2009, and his retirement date of June 10, 2010. (T 39-40)

Upon his retirement, Respondent's position with the Lincoln County Board of Education was

³It is undisputed that the Board concedes that the above-described documents it provided to Respondent included retirement credit for his military service. It was not until after Petitioner relied to his detriment on those documents that the Board asserted that it improperly applied the statute at issue. In its brief to this Court, the Board does declare that "each of the estimates were incorrect." (Petitioner's Brief, p. 4) Similarly, the Board admits or contends that "each of the estimates Mr. McKown received were erroneous." (Petition for Appeal, p. 4)

no longer available to him.

A. “Quick Audit”: “Obviously a Big Deal” and “Quite a Mix Up”

By letter dated June 15, 2010 – five days after his retirement – the Board informed Respondent that it had performed a “quick audit” of Respondent’s retiree file and determined that he did not meet “retirement eligibility” for the Teachers Retirement System (“TRS”).

TRS Senior Retirement Advisor, John A. Doub wrote:

In your file we found quite a mix up with your military service. In order to receive credit for military service in the Teachers Retirement System (TRS) you must have gone into active duty before “The Draft” ended 07/01/1973. From what I can tell, you went into active duty 10/02/1973 several months after The Draft ended. This is obviously a big deal and I am very sorry to be informing you of this, but I can assure you that it is a fact!

(Emphasis supplied) (Petitioner’s Ex. 12)

In the letter, Mr. Doub continued by saying:

With that being said, I’m afraid you will not meet retirement eligibility in TRS to retire July 1st as you had originally planned. Please get back in touch with me when you receive this, so I know that you fully understand the severity of this situation and we can discuss you options at this time.

(Petitioner’s Ex. 12)

“Negligence”

Respondent then contacted Mr. Doub who apologized for the Board’s mistakes and characterized the actions of the agency as “negligence.” (T 42-3) Mr. Doub informed Respondent of his right to appeal the Board’s decision. He further conceded that because the agency had Respondent’s military and employment information for a long time – apparently more than two years – the agency should have “caught this earlier.” (T 12)

Mr. Doub testified that he relied on an internal guideline, or “cheat sheet” as he called it, to reach his conclusion that Respondent was not eligible to retire. (Board ex. 1; T 71-2) Mr. Doub

further testified that he believes that the guidelines are based upon West Virginia Code § 18-7A-17(b). With regard to this statute, Mr. Doub testified that West Virginia Code § 18-7A-17(b) does not mention “active duty.” He also indicated that Respondent:

- (1) is a member of the retirement system;
- (2) was a member of the Armed Forces of the United States;
- (3) that he served during Vietnam, a period of national emergency, and
- (4) the Selective Service Act was in effect during the Vietnam conflict.

(T 71-3) In other words, he testified that Respondent met the criteria of West Virginia Code § 18-7A-17(b).

Similarly, Teresa Miller, Deputy Director and Chief Operating Officer of the Board, agreed that Respondent was a member of the retirement system; that he served in the Armed Forces; and that the draft was in effect at least during part of the Vietnam conflict. She did not contend that Respondent did not serve during Vietnam. (T 83-5)

Harm to Respondent

Clearly Respondent’s decision to retire was based on the information the Board provided to him on two separate occasions. It is undisputed that Respondent relied on this information to his detriment. Upon learning that he would not receive his retirement and that his old job was no longer available, Respondent was required to take a part-time job as a football trainer and to apply for a new position in order to make ends meet. He applied for five jobs with the Putnam County Board of Education, but was not hired. At the time of the hearing in this matter, he anticipated being hired

into a position with the Lincoln County Board of Education.⁴ (T 44-46)

Based upon his interaction with Board employees, Respondent believed that he would receive retirement credit for 29 years of teaching; at least four years military service; and approximately a year and a half accrued sick leave. This would have allowed him to retire – as Board employees had informed him on multiple times that he could do. However, because he did not receive any credit for his military service,⁵ the Board determined that he was not eligible to retire because he lacked 30 years service.

Decision of the Hearing Officer

Following the evidentiary hearing below, the Board’s Hearing Officer issued a “Recommended Decision,” which denied Respondent’s request for retirement credit for his military service. The Board adopted this decision on March 2, 2011. That decision was appealed by Respondent to the Circuit Court of Kanawha County and was reversed.

IV. PROCEDURAL HISTORY

This case arises from the March 2, 2011, Final Order of the Board to deny military retirement credit to Respondent. In his administrative hearing before the Board, Respondent contended, *inter alia*, that the plain language of West Virginia Code § 18-7A-17(b) required that he be granted retirement credit for his military service. Moreover, Respondent contended that the principle of

⁴After the hearing in this matter, Respondent was, in fact, hired into this new position. Moreover, since the hearing in this matter, Respondent has sought treatment for medical issues caused by the actions of the Board.

⁵Based upon Respondent’s case, Petitioner has changed its method for review of DD-214s and retirement calculations based upon military service. The review process now includes another level of administrative review.

equitable estoppel requires that Respondent receive retirement credit for his military service. The Board disagreed and denied any military credit to Respondent for his military service.

Respondent appealed the Board's decision to the Circuit Court of Kanawha County. By "Final Order and Writ of Mandamus" entered January 6, 2012, the circuit court reversed the decision of the Board and awarded him six years retirement credit. Moreover, the Court issued a writ of mandamus awarding Respondent the costs associated with this proceeding.

It is from the "Final Order and Writ of Mandamus" that Petitioner now appeals.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the Rules of Appellate Procedure, Respondent believes that the facts and legal arguments are adequately presented by the briefs in this case and therefore, a Memorandum Opinion is appropriate in this case. This case presents a record in which the facts are essentially undisputed. Moreover, the legal issues are narrow and involve the application of a single statutory provision, as well as the doctrine of estoppel which has been previously addressed by this Court in the context of public employee retirement issues in Hudkins v. CPRB, 647 S.E.2d 711 (2007).

Should this Court determine that argument is necessary, this matter is most appropriately set for argument under Rule 19 because it presents the application of settled law or a very narrow issue of law involving a single statutory provision governing retirement benefits for teachers.

VI. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT DID NOT ERR IN AWARDING RESPONDENT RELIEF PURSUANT TO ADMINISTRATIVE REMEDIES BECAUSE RELIEF IN MANDAMUS PROVIDES FOR THE EQUITABLE AWARD OF FEES AND COSTS.
- II. THE CIRCUIT COURT DID NOT ERR IN AWARDING RESPONDENT SERVICE CREDIT FOR PERIODS OF INACTIVE MILITARY SERVICE WHEN

NO DRAFT WAS IN EFFECT BECAUSE WEST VIRGINIA CODE § 18-7A-17(b) SPECIFICALLY INCLUDES LANGUAGE THAT AWARDS RETIREMENT CREDIT TO THOSE WHO SERVED IN THE MILITARY RESERVES AND NOTHING IN THE STATUTORY PROVISION AT ISSUE LIMITS THE PROVISION OF RETIREMENT CREDIT TO ACTIVE DUTY.

- III. THE CIRCUIT COURT DID NOT ERR IN FAILING TO GIVE DEFERENCE TO THE BOARD'S INTERPRETATION OF WEST VIRGINIA CODE § 18-7A-17(b) BECAUSE THE PETITIONER'S INTERPRETATION OF THIS PROVISION WAS SO NARROW AND INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE THAT ITS INTERPRETATION WAS NOT REASONABLE UNDER ANY STANDARD.
- IV. THE CIRCUIT COURT WAS CORRECT IN FINDING THAT THE DOCTRINE OF ESTOPPEL IN THIS CASE APPLIED BECAUSE RESPONDENT SUFFERED TO HIS DETRIMENT AS A CONSEQUENCE OF RELYING ON THE REPEATED, NEGLIGENT MISREPRESENTATIONS OF FACT MADE BY AGENTS OF PETITIONER.

VII. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

- I. The Circuit Court did not err in awarding respondent relief pursuant to administrative remedies because relief in mandamus provides for the equitable award of fees and costs.

A review of the record in this case indicates that the circuit court had sufficient information before it to both reverse the administrative decision of the Board pursuant to an administrative appeal and award a writ of mandamus.

The record indicates that Respondent had a clear legal right to the retirement credit at issue and that the Board had a clear legal duty to provide the same. State, ex rel Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (1969). In other words, as it relates to the application of West Virginia Code § 18A-7A-17(b), Respondent had a clear legal right to the relief he seeks and Petitioner had adequate time to provide it.

In this case, the Board contends that because Respondent could attack the decision of the

Board via administrative appeal that this presented an adequate remedy at law. Respondent concedes that the administrative appeal did provide an adequate remedy as it related to his claim under West Virginia Code § 18A-7A-17(b) and the doctrine of estoppel.⁶ The Board’s argument, however, ignores the fact that Respondent has been awarded costs associated with this proceeding and that the award of such costs is consistent with the granting of mandamus relief. Indeed, without the ability to recoup costs in a matter such as this, many potential litigants would be discouraged, if not precluded, from seeking legal redress even - where as here - equity demands the payment of such costs and fees. Thus, the award of a writ of mandamus in this case is not foreclosed because it allows Respondent to seek his fees and costs as a part of an equitable remedy with regard to this issue.

II. The Circuit Court did not err in awarding Respondent service credit for periods of inactive military service when no draft was in effect because West Virginia Code § 18-7A-17(b) specifically includes language that awards retirement credit to those who served in the military reserves and nothing in the statutory provision at issue limits the provision of retirement credit to active duty.

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

The Board asserts that Respondent can only be awarded retirement credit for his active duty.⁷ Nothing in the statute authorizes the Board to interpret the statute in this limited fashion. No language in the statute indicates that the military service must be “active duty.”

⁶The Board asserts that an administrative appeal was appropriate herein, Respondent agrees that the circuit court properly treated this matter as an administrative appeal. However, equitable concerns unique and obvious in this case dictate that the award of fees and costs was appropriate under mandamus.

⁷The Board asserts that Respondent sought active duty credit in this process. However, in its “Proposed Recommended Decision of Appellant Ronald McKown” Respondent sought six years retirement credit for the totality of military service.

In an effort to find support for its conclusion, the Board relies on the Illinois decision of Lieb v. Judges Ret. Sys of Ill., 731 N.E.2d 809 (Ill. App. Ct. 2000), to assert that “at least one other court” has found that “military service” refers to active duty. A review of Lieb indicates that it does not apply to the facts herein.

In Lieb, the Plaintiff asserted that the term “military service” encompassed both active and inactive service, while the defendant retirement system asserted that “military service” included only active service. The Court acknowledged that the statute at issue was “ambiguous because it is susceptible to two equally reasonable and conflicting interpretations.” *Id.* at 813. In order to address the ambiguity unique to that retirement scheme, the court in Lieb looked to another section of the statute (which made specific reference to “active duty”) and legislative history (which included specific statements showing legislative intent to exclude non-wartime service from retirement credit). Given the totality of the Illinois statutory scheme and its legislative history, the Illinois court reached its holding that military service was “active service.”

It is important to emphasize that the Court in Lieb looked to other portions of the statute at issue that addressed the very issue at hand: whether a judge could purchase military credit for inactive duty. The Court in Lieb found support to disallow the purchase of retirement credit for inactive military service in the very section governing the purchase of this credit. Moreover, the legislative history relied upon by the Lieb court included specific comments from legislators indicating that the bill at issue was passed with the understanding that it did not include “non-wartime reserve duty” and that it did not include service as it “relates to the National Guard and ROTC, et cetera.” This type of support for the Board’s interpretation of the statute simply does not exist in this case.

Thus, the facts and circumstances surrounding the Illinois statute are vastly different from those in this case. The Board cites no other cases or legislative history to offer insight into the meaning of West Virginia Code § 18A-7A-17(b).

Given that the desire of the Legislature is plain on its face, there is no need to resort to such methods of interpretation. West Virginia Code § 18A-7A-17(b) simply requires that Respondent receive credit for his entire time in the service.

The intended breadth of the statute is also demonstrated by the second sentence of West Virginia Code § 18-7A-17(b) which states:

For the purposes of this section, “Armed Forces” includes Women’s Army Corps, women appointed volunteers for emergency service, Army Nurse Corps, SPARS, Women’s Reserve and other similar units officially part of the military service of the United States.

(emphasis supplied)

It is undisputed that Respondent was in the Naval Reserves beginning on April 13, 1973, for six months until he assumed active duty in October of 1973. Respondent then spent eighteen months in the reserves after he completed active duty.

The second sentence of West Virginia Code § 18-7A-17(b) requires that Respondent receive prior service credit for his reserve and active duty service. The Legislature has indicated that those in the “Women’s Reserve” and “other similar units officially part of the military service” are included in the definition of “Armed Forces.” Thus, those members of the military in the Naval Reserves – like Respondent – would receive equal treatment under the statute with those in the Women’s Reserves. Clearly, Respondent’s service in the United States Naval Reserves (particularly with the requirement that he could be called to active duty without his consent) falls within the

“other similar units officially a part of the military service of the United States.”⁸ Thus, under the clear and unambiguous language of West Virginia Code § 18A-7A-17(b), Respondent is entitled to six years prior service credit for his military service.

Other provisions of the statutory scheme for public employees provide additional support for Respondent’s position. West Virginia Code §5-10-15(a)(1) states in part:

The Legislature recognizes the men and women of the state who have served in the armed forces of the United States during times of war, conflict and danger.

(emphasis supplied) Although this language appears in the Public Employees Retirement Act, it states the Legislature’s intent – without limitation – that it recognizes the service of our citizens in the armed forces. The Legislature in no way distinguishes between those who are drafted and those who enlisted.

For the first time on appeal to this Court, the Board contends that its argument with regard to “active” duty finds support in West Virginia Code § 18-7A-17 (c), (e), and (f). A review of those provisions, however, indicates that those statutes do not relate in any manner to military service.

Specifically, West Virginia Code § 18-7A-17(c)⁹ relates to prior teaching experience with

⁸In its brief, the Board contends that a member of the Women’s Reserve would only get retirement for active duty. Again, this is not stated in the statute.

⁹West Virginia Code § 18A-7A-17(c) provides: For service as a teacher in the employment of the federal government, or a state or territory of the United States, or a governmental subdivision of that state or territory, the Retirement Board shall grant credit to the member: *Provided*, That the member shall pay to the system double the amount he or she contributed during the first full year of current employment, times the number of years for which credit is granted, plus interest at a rate to be determined by the Retirement Board. The interest shall be deposited in the reserve fund and service credit granted at the time of retirement shall not exceed the lesser of ten years or fifty percent of the member's total service as a teacher in West Virginia. Any transfer of out-of-state service, as provided in this article, shall not be used to establish eligibility for a retirement allowance and the Retirement Board shall grant credit for the transferred service as additional service only: *Provided, however*, That a transfer of out-of-state

the federal government, or another state or territory. One would anticipate that the teacher would receive retirement benefits from a prior job and is, under this provision, permitted to “buy into” (with double payments) the TRS. Thus, West Virginia Code § 18A-7A-17(c) is wholly inapplicable to the military retirement credit issue presented in this case.

Likewise, West Virginia Code § 18-7A-17(e)¹⁰ addresses instances where a member of the TRS is also serving in the Legislature. Again, this provision in no way addresses military service. Instead, it indicates that a teacher will not lose retirement credit while performing his or her legislative duties.

Finally, West Virginia Code § 18-7A-17(f)¹¹ addresses instances where a teacher serves as “an officer with a statewide professional teaching association,” not military service. As with section (c) discussed above, such a teacher must make a “double” payment to the retirement fund for the

service is prohibited if the service is used to obtain a retirement benefit from another retirement system: *Provided further*, That salaries paid to members for service prior to entrance into the retirement system shall not be used to compute the average final salary of the member under the retirement system.

¹⁰West Virginia Code § 18A-7A-17(e) states: No members shall be considered absent from service while serving as a member or employee of the Legislature of the state of West Virginia during any duly constituted session of that body or while serving as an elected member of a county commission during any duly constituted session of that body.

¹¹West Virginia Code § 18A-7A-17(f) states: No member shall be considered absent from service as a teacher while serving as an officer with a statewide professional teaching association, or who has served in that capacity, and no retired teacher, who served in that capacity while a member, shall be considered to have been absent from service as a teacher by reason of that service: *Provided*, That the period of service credit granted for that service shall not exceed ten years: *Provided, however*, That a member or retired teacher who is serving or has served as an officer of a statewide professional teaching association shall make deposits to the Teachers Retirement Board, for the time of any absence, in an amount double the amount which he or she would have contributed in his or her regular assignment for a like period of time.

teacher's time with the professional teaching association in order to earn credit. Thus, West Virginia Code § 18-7A-17(f) does not apply to military retirement credit for teachers.

West Virginia Code § 18-7A-17(c), (e), and (f) further underscore the unique standing of an honorably discharged veteran who enters the teaching profession. An out of state teacher and an officer with a statewide professional association are required to buy into the system for their service as a teacher or professional association officer. In fact, in order to secure retirement credit for the period of time at issue, the out of state teacher or professional association officer must pay "double" to get retirement credit. A military veteran is not required to do so.

The Board argues that the language in West Virginia Code § 18-7A-17(b), "military service is considered equivalent to public school teaching" demonstrates that time in the military reserves should not receive retirement credit. However, this language immediately follows the sentence that grants retirement credit to those who served in the armed forces in: "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." West Virginia Code § 18-7A-17(b) (emphasis supplied)

Indeed, the critical language of West Virginia Code § 18-7A-17(b) is: "similar units officially parts of the military service of the United States." There is no question that Respondent was a part of the military services of the United States when he was in the reserves. Given that this language quite clearly broadens the services to be included for retirement credit, the inclusion of retirement credit for Respondent's time in the reserves is wholly consistent with the statutory scheme.

Finally, the Board contends that because Respondent graduated from college, got married, and worked during his period in the reserves, that such experiences should not be credited for

retirement purposes. Of course, this argument ignores the fact that Respondent was committed to serve in the Armed Forces at a moment's notice. He testified that he was a member of the "ready reserve," or someone that could be called into active duty on extraordinarily short notice. This is the very nature of reserve duty. The circuit court correctly awarded Respondent retirement credit for this service.

Numerous other states have included non-active duty in calculating retirement credit for military service. In Reinelt v. Public School Employees Retirement Board, 276 N.W.2d 858, the Court of Appeals of Michigan addressed an issue where the petitioner taught in public schools for nearly forty years except for a period from 1942 to 1946 when he enlisted in the United States Navy. The defendant retirement board granted retirement credit for the time petitioner was on active duty, but not for a period of six months while he was enlisted, enrolled in college, and not yet on active duty. During that six month period, petitioner was not paid by the Navy, required to wear a uniform, live in Navy barracks, or receive a housing subsidy.

The applicable Michigan statute in Reinelt only spoke to "active service" with regard to the end of the time period for which a veteran would get retirement credit. The statute did not identify the starting point for receiving such credit. The applicable statute simply referred to "armed service of the United States government during time of war or emergency[.]" Thus, petitioner contended that the credit computation date should start with enlistment, while the defendant board asserted that it should start with initiation of active duty.

The court in Reinelt agreed with the petitioner and found that the determination for credit should start with the enlistment date. The Court of Appeals of Michigan held:

The intention of the Legislature is manifest. The purpose of the statute is to provide

retirement credit for that time during which members of the retirement system were unable to continue their school employment because of a conflicting obligation to serve their country in the armed forces. Ordinarily that obligation would conflict with a teaching career at the time of the draft or enlistment, and we may infer that the Legislature assumed without expressly considering that draft or enlistment would automatically lead to active duty. We decline to write into the statute a distinction not then made by the Legislature, which would be essentially arbitrary and thwart the general purpose of the statute in cases such as this. Upon plaintiff's enlistment, he was obligated to serve his country in a capacity which interrupted his teaching career. His sacrifice was no less than it would have been had he first been placed on active duty and then sent to school. We are certain that, had the Legislature expressly considered this type of situation, it would have drawn the statute in such a manner as to make clear its intention to allow the credit.

Applying this same logic to the present case, the intention of our Legislature is clear: teachers are to receive retirement credit for their military service during a conflict in which the draft is in place. Such credit can only arise from the recognition by our Legislature that service men and women sacrifice for their country and, as a result, their civilian careers are delayed and unalterably shortened. Important, productive years of civilian work (and the accumulation of retirement benefits) are lost. As in Reinelt, this Court should not write into the statute a distinction between active and inactive service that was not made by the Legislature and that would thwart the purpose of the statute. Respondent's sacrifice was not diminished because he waited several months from enlistment to active duty in order to finish his education.

Similarly, in Densley v. Department of Retirement Systems, 173 P.2d 885, the Supreme Court of Washington addressed an instance where a deputy prosecuting attorney sought military credit for his time in the Army Reserve and National Guard. The court reviewed the appropriate statutory scheme and determined that the legislature had used different terms to describe military service to be credited. The court stated that the legislature referred to: "active federal service in the military or naval forces" and "service in the armed forces." The court stated: "One clearly appears

broader than the other.”

Clearly and unequivocally, the court in Densley concluded that the language “service in the armed forces” is broader than “active federal service.” Of course, such an interpretation is fair, reasonable and consistent with the language of the Washington statute at issue. Thus, the Court concluded that a statute that gives retirement credit for “service in the armed forces” was clear and unambiguous and did not require active service; therefore, the retirement member received credit for Army National Guard drilling and training. In this case, West Virginia Code § 18-7A-17(b) states only “service in any of the armed forces” and does not contain the limiting language contained in Densley. In other words, there is no reference in the statute to “active duty.” Therefore, the “broader” interpretation relied upon in Densley is appropriate in this case.

Numerous other courts have viewed cases such as this in a similar manner and have specifically looked at the plain statutory language to determine eligibility for retirement based, in part, on military service. See, City of Natchez and Public Employees Retirement System v. Sullivan, 612 So.2d 1087 (Miss. 1992) (Where statute is clear and unambiguous, all time served in military up to four years whether before or after employment began will count toward retirement credit); Goodwin v. Employees Retirement System of Georgia, 275 S.E.2d 136 (If legislature had intended to preclude service for midshipmen from being counted toward retirement credit it would have enacted a statute with this language.); Basehore v. Commonwealth of Pennsylvania, Public School Retirement Board, 318 A.2d 392 (Legislature placed no “limitation” on type or length of service, therefore, retiree was clearly eligible under statute for retirement credit for military service based upon clear and unambiguous language of statute.)

Furthermore, it is well settled that statutes involving the rights of public employees and

school teachers are to be liberally construed. Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Additionally, this Court has traditionally construed pension and relief funds for municipal employees in a liberal fashion. Stull v. Firemen’s Pension and Relief Fund of the City of Charleston, 202 W. Va. 440, 504 S.E.2d 903 (1998) (holding that statutes creating pension funds for municipal employees should be liberally construed “in favor of those to be benefitted.”) See also Spencer v. Yerace, 155 W. Va. 54, 180 S.E.2d 868 (1971).¹²

Respondent’s duty to his country began the day he enlisted. From that day, he was bound to serve and could be called up at any moment; his contract with the armed services required him to report for active service. He was bound to the armed services for six years from the date of enlistment. Nothing in West Virginia Code § 18-7A-17(b) excludes this period of time from retirement credit.

Given the plain language of the statute at issue and, alternatively, the liberal construction to be given to statutes awarding military conduct, it is clear that the Board’s interpretation permitting only “active duty” to count toward retirement credit is contrary to law, arbitrary and capricious and an abuse of discretion. Thus, the decision of the circuit court was correct in this regard.

¹²Moreover, many other jurisdictions indicate that retirement and pension plans are to be “liberally construed in favor of the pensioner.” In the matter of Cable, et al., 31 P.3d 392 The court in Cable emphasized the application of this rule in the context of military service credit, stating:

The liberal construction of pension statutes is especially significant when addressing military service credit, because laws regarding “employees who enter the armed forces in time of war or emergency are favored.” Quam v. City of Fargo, 43 N.W.2d 292, 295 (N.D. 1950) (quoting Gibson v. City of San Diego, 25 Cal.2d 930, 156 P.2d 737, 740 (Cal. 1945)); see also Raney v. Board of Admin of Retirement Sys., 201 Tenn 283, 298 S.W.2d 729, 732 (Tenn. 1957) (liberally construing statute allowing credit for military service).

B. Service “in a period of national emergency within which a federal selective service act was in effect” does not refer to service occurring during both a period of national emergency and a period in which a draft is in effect, but requires that a member’s service occur in a national emergency within which the draft was in effect.

In this case, the circuit court properly awarded retirement credit to Respondent for his military service based upon the clear and unequivocal language of West Virginia Code §18-7A-17(b). This section states in pertinent part:

For the purpose of this article, the Retirement Board shall grant prior service credit to new entrants and other members of the retirement system 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.

It is clear that the intent of this statute is to award teachers who served in the military retirement credit for military service.

It is undisputed that Respondent meets the four statutory criteria to receive prior service credit for military service:

- (1) Respondent is a member of the retirement system, or TRS;
- (2) Respondent served in the Armed Forces of the United States;
- (3) Respondent served during a period of national emergency, the Vietnam conflict; and,
- (4) Respondent served in a national emergency within which a Federal Selective Service Act was in effect.

West Virginia Code §18-7A-17(b) requires that Respondent serve in a “national emergency within which” the draft was in effect. The inclusion and location of the phrase “within which a Selective Service Act was in effect” modifies “national emergency.” The phrase does not modify “service in any of the Armed Forces” and is intended to distinguish those national emergencies

within which the draft was in effect from those national emergencies or military conflicts with no draft. Despite the plain language of the statute, Petitioner focuses on the start and end date of the draft - - which are nowhere mentioned in the statutory provision at issue. Reliance on the start or end date of the draft is misplaced because the statute does not differentiate between those who are drafted and those (like Respondent) who enlist. According to the statute, those who serve – by virtue of draft or enlistment – receive the credit. Thus, it is illogical to cabin the eligibility requirements with the dates of the draft (which are nowhere mentioned in the statute).

The circuit court concluded that the Board’s interpretation of the statute at issue is so narrow as to be arbitrary and capricious and an abuse of discretion. The Board refused to grant Respondent retirement credit for his military service despite the clear and unambiguous language of West Virginia Code §18-7A-17(b). Appropriately, the Circuit Court of Kanawha County disagreed with the Board’s ruling and awarded Respondent retirement credit.

Had the Legislature intended the period for eligibility for retirement credit to end with the cessation of the draft, it would have enacted the statute in this manner. Yet, it did not. Instead, the Legislature clearly and unequivocally stated only that the conflict had to be one in which a draft was in effect.

On appeal, the Board argues that the decision of the circuit court “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 the draft was in effect.” (Petitioner’s Brief, p. 24)

However, a review of the circuit court’s order reveals that it in no way diminishes the language contained in West Virginia Code § 18-7A-17(b), but rather adheres to it. As previously

noted, the statute requires that retirement credit will be granted “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.” The circuit court’s order is consistent with this language and should not be disturbed. Moreover, the dates of the “Vietnam era” are defined by statute. The “Vietnam era,” defined in West Virginia Code § 5-10-15(b)(7) states as follows:

“The Vietnam era” means the period beginning on the twenty-eighth day of February, one thousand nine hundred sixty-one, and ending on the seventh day of May, one thousand nine hundred seventy-five, in the case of a veteran who served in the Republic of Vietnam for that period; and the fifth day of August, one thousand nine hundred sixty-four, and ending on the seventh day of May, one thousand nine hundred seventy-five, in all other cases.¹³

(footnote added)

Thus, it is only within this time frame that one would qualify for retirement credit for military service in Vietnam. Clearly, the Legislature has taken an expansive view of the Vietnam era in order to include those who served in the military during that national emergency. This statutory definition clearly includes the time in which Respondent was in the reserves (starting on April 13, 1973) and when he began active service (from October 2, 1973, to October 3, 1977). Under this statute, Respondent qualifies for retirement credit.

Thus, one must ask, would it be likely that the Legislature would permit a Vietnam veteran to get military credit if he were a state employee, but would deny the Respondent military retirement

¹³Petitioner also asserts that the ruling of the Circuit Court makes it “unnecessarily unclear and difficult to administer TRS” ostensibly because there was “no formal declaration of an emergency for military operations during the Vietnam War.” (Petitioner’s Brief, p. 25) The Legislature has clearly defined the “Vietnam era” and Respondent has clearly sought retirement credit for his service therein. Moreover, there is no question that the draft was in effect during this “national emergency.” Thus, the application of the statute is quite simple in this instance. Respondent’s valid claim for retirement credit should not and cannot be conflated with a claim for credit under another national emergency.

credit for a teacher's retirement? Would the Legislature recognize the “men and women of this state who have served in the armed services” and then exclude those who served, as Respondent did, because of a very narrow, unlawful interpretation of the statute?

The Legislature has clearly treated the honorably-discharged veteran the same whether a teacher or state employee. Otherwise, the statutory provisions at issue would be ripe for equal protection and other constitutional claims. The definition of “Vietnam era” under West Virginia Code § 5-10-15(b)(7) should be applied to the facts herein.¹⁴

Rules of statutory construction indicate that the primary goal in construing a statute “is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1 in part, Smith v. State Workmen's Comp. Comm'n, 159 W. Va. 108, 219 S.E. 2d 361 (1975). This Court has made clear that:

[h]owever, “when a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syllabus point 5, State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137, 107 S.E. 2d 353 (1959).

Jones, et al. v. W.Va. State Bd. of Educ., et al., 218 W. Va. 52, 622 S.E.2d 289 (2005).

In this case, the intent of the Legislature is very clear: to award teachers with military service with retirement credit. Indeed, the only manner in which the Legislature limited this retirement credit was to insure that the service occurred during a war with a draft.

The Board imbues the statute with limitations that simply were not a part of the legislative intent. Petitioner has done so through the issuance of an unpublished, interpretative rule that was

¹⁴As noted above, Petitioner is charged with the general administration and management of the retirement system for both the Teachers Retirement System and the Public Employees Retirement System. See West Virginia Code §5-10-5 and 18A-7A-4.

not permitted to be viewed by the public. Since this unpublished rule was not a legislative rule, it is clear that it falls within the category of an “interpretive rule” pursuant to the State Administrative Procedures Act.¹⁵

Moreover, this Court has stated:

In reviewing a rule or regulation of an administrative agency, a West Virginia Court must first decide whether the rule is interpretive or legislative. If it is interpretive, a reviewing court is to give it only the deference it commands.

Kokochak v. The West Virginia State Lottery Commission, 695 S.E.2d 185 (2010). Obviously, the Board’s interpretation does not comport with the plain language of the statute. In fact, it frustrates the very purpose of it. If it is necessary to conduct any construction of the statute at issue, it would be to protect the interests of the members of the pension and public employees protected by the pension.

III. The Circuit Court did not err in failing to give deference to the Board’s interpretation of West Virginia Code § 18-7A-17(b) because the Board’s interpretation of this provision was so narrow and inconsistent with the plain language of the statute that its interpretation was not reasonable under any standard.

Next, the Board contends that the circuit court erred in its ruling because it “failed to give the appropriate level of deference” to the Board’s interpretation of West Virginia Code § 18-7A-17(b). In support of its position, the Board relies on several cases for the proposition that an

¹⁵ The Administrative Procedures Act defines “interpretive rule” as follows:

every rule, as defined in subsection (I) of this section adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency’s interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests.

W. Va. Code §29A-1-2(c).

interpretation by an administrative agency charged with enforcing a statute is “afforded great weight” and given deference in this regard.¹⁶ See, e.g., Sniffin v. DMV, 456 S.E.2d 452 (1995).¹⁷

As a threshold matter, it is clear that this Court has determined that such interpretation will take place where “it is clear that the Legislature has not spoken to the precise question at issue.” *Id.*

¹⁶Indeed, the interpretation of Petitioner in the Board’s “Final Administrative Order” is, at best, conclusory and does not properly interpret the plain language of the statute at issue. It states:

The Applicant asserts ambiguities in this language, asserting that one does not have to be on active duty, thereby permitted service credit for time in the reserves, and that if the Selective Service Act was in effect during any part of the national emergency the service credit is acquired even if the Selective Service Act was not in effect while the member was in the service. Neither of these propositions have merit. It is concluded that only active duty is contemplated to qualify for “free” military service credit. This has long been the application of this statute by this Board and such application is entitled to deference. See Sniffen v. Cline, 456 S.E. 2d 451, 455 (W.Va. 1995). It is further 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. There is no dispute that the draft ended July 1, 1973, by Presidential proclamation. Consequently the period of the Applicant’s active service was not during a time when the Selective Service Act was in effect, thereby precluding him from the requested military service credit. The draft, as opposed to a registration requirement, is concluded to be the operative affect of the Selective Service Act.

¹⁷ It is worthy of note that Sniffin indicates that the DMV statutes at issue in that case did not address the issue at hand: whether the driver was entitled to an administrative proceeding arising out of a criminal act . Thus, the Court was required to interpret the DMV’s construction of its own statutes. The Court stated:

[I]t is clear that the Legislature has not spoken to the precise question at issue. Therefore, we review the DMV’s decision to determine whether its construction is one the Legislature would have sanctioned. [citation omitted]

In Sniffin, therefore, the Court was required to look at the issue of construction given the gap within the statutes at issue. Here, there is no ambiguity with the statute at issue and it is unnecessary for Petitioner to resort to construction. It should have simply applied the plain language of the statute. It has failed to do so.

at 455. Respondent contends that the Board’s interpretation of Petitioner is unnecessary given the plain language of the statute.

The Board also asserts that it is not necessary to place its interpretation of the rule at issue in a legislative rule because, at least in part, it would be impossible to address “each and every interpretation” by the Board with a legislative rule. This analysis is inapplicable to the facts in this case. Here, the Board addresses a significant right defining retirement eligibility and attempting to limit retirement credit for military veterans. Respondent asserts that such interpretations should require legislative oversight. Moreover, given that the Board has seen fit to produce a three page policy entitled “PERS/TRS Military Service Guidelines (for internal use only – do not distribute)” it would appear that this is the type of issue that warrants review and passage by the Legislature.

Next, the Board contends that its interpretation has been in place for “many years” and that it is “reasonable, permissible, and not inconsistent with legislative intent.” According to the circuit court, however, the Board’s interpretation of West Virginia Code § 18A-7A-17(b) is neither reasonable nor consistent with legislative intent or permissible under the rules of statutory construction. As a result, the holding of the circuit court was not in error.

It is axiomatic that:

the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.

(emphasis supplied)

Syl. Pt. 3, Rowe v. West Virginia Dep’t of Corrs, 170 W. Va. 230, 292 S.E.2d 650 (1982).

It follows, then, that:

procedures and rules properly promulgated by an administrative agency with

authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute.

(emphasis supplied)

Syl. Pt 4, State ex rel. Callaghan v. West Virginia Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Stated another way,

[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.

(emphasis supplied) Again, under these well-settled standards, Petitioner has unlawfully interpreted the statute at issue.

It should also be noted that a “public employee’s rights under the State’s statutorily-created pension system are contract rights” under the West Virginia Constitution, Art. III, section 4. Respondent has a contractual right to his pension and all rights attendant thereto. Indeed, the Board is not empowered to interpret such rights away from the employee. Such rights are contractual and cannot simply be removed by a state agency.

IV. The circuit court was correct in finding that the doctrine of estoppel applied because Respondent suffered to his detriment as a consequence of relying on the repeated, negligent misrepresentations of fact made by the Board’s agents.

A. West Virginia Code § 18-7A-14(f) does not require the Board to correct the error made in calculating Mr. McKown’s estimated military service credit when estoppel applies.

In contending that estoppel should not apply in this case, the Board asserts that West Virginia Code § 18-7A-14(f) requires it to correct *its own* error as it relates to the calculation of Respondent’s retirement benefit. A review of the language of the statute demonstrates that this conclusion is not accurate and that this section may not be used by Petitioner to shield it from estoppel in the face of

its own negligence.

West Virginia Code § 18-7A-14(f) provides in pertinent part:

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 to receive had the records been correct, the board shall correct the error [.]

This provision does not shield the Board from exposure to estoppel when it makes multiple errors over a two year period on account of its own negligence. This is particularly true, as will be discussed *infra.*, where the member relies on Petitioner's advice and acts to his or her detriment after repeatedly seeking the assistance of the Board's agents.¹⁸

B and C. The Hearing Officer's factual finding that Respondent did not detrimentally rely upon the multiple representations of the Board's agents was not substantially supported by evidence in the record and was appropriately reversed by the Circuit Court when it relied upon the appropriate factors to find that estoppel should lie against the Board.

Despite the Board's contentions to the contrary, further support for the grant of prior service credit to Respondent for his military service can be found in Respondent's detrimental reliance on

¹⁸In support of its position, the Board relies on Myers v. West Virginia Consolidated Public Retirement Board, 226 W. Va. 738, 704 S.E.2d 738 (2010), to support its contention that it must correct an error. A review of Myers indicates that the error at issue in that case was an error in retirement credit made by the *Division of Highways*, not the Board. Thus, the correction of such error was consistent with the statutory mandate above. *Id.* at 752. Moreover, the extent of Myers reliance on the representations of DOH and/or the Board does not appear to approach the negligence, reliance and ultimate detrimental result that occurred in the instant matter.

Similarly, the Board relies upon a recent memorandum decision of this Court in Lanham v. West Virginia Consolidated Public Retirement Board, 2012 Lexis 152. A review of that case distinguishes it from the decision herein. In Lanham, this Court was presented with an instance where the Board erred in permitting Lanham to participate in the Public Employees Retirement System for co-op experience. Although this Court concluded that the error could be corrected by the Board, the facts in that case are not similar to those herein. In Lanham, it does not appear that the member was repeatedly informed of his retirement benefits by an agent of the Board and then – after relying to his detriment on the same – being stripped of those benefits.

the actions and representations of the Board's agents. As set forth above, Respondent sought information from two agents of the Board in order to determine when he should retire. Over a two year period, Board employees supplied Respondent with information upon which he relied to make his retirement decisions.

Respondent provided his dates of active service in February of 2008 and the agents of the Board included anywhere from 4.0 to 4.474 years of military service for purposes of retirement. On at least seven occasions, Respondent received written statements from the Board that included military service in his retirement credit.¹⁹

Respondent clearly and unequivocally relied upon this information. Within one day of receiving his last statement from the Board, he notified his employer that he was retiring at the end of the school year. Only after Respondent retired and his job was eliminated did the Board inform Respondent of its error or "negligence," as Mr. Doub testified. By then, Respondent had officially retired and his job was no longer available. Through no fault of his own, Respondent was left with no retirement income and no job.

Respondent relied to his detriment on the information provided by Petitioner. He has been injured by the same. The Board is estopped from denying responsibility for its negligence in this case.

This Court's decision in Hudkins v. State of W. Va. Consolidated Public Retirement Bd., 220 W.Va. 275, 647 S.E.2d 711 (2007), is instructive in this case. In Hudkins, a representative of the Board advised a long-term state employee that she was eligible to use her unused sick leave to claim

¹⁹Respondent provided his dates of active service to the Board at least as early as February 22, 2008. Thus, the Board had this information for nearly two years, four months at the time it sent its June 15, 2010, letter informing Respondent he would not receive credit for military service.

service credit. The Court noted that the Board employee who advised the respondent had in her “possession all of the facts necessary to correctly advise” the respondent with regard to her retirement benefits. *Id.* at 717. Moreover, the Court recognized that the respondent relied to her detriment on the Board’s representations. The Court further emphasized that the Board’s staff was dedicated to the “business of advising employees concerning retirement benefits.” *Id.*

The Court stated:

We believe Ms. Hudkins had every right to rely upon the advice of the Board representative regarding the right to “freeze” her unused sick leave for purposes of calculating her retirement benefits.

Id. In finding for the respondent in Hudkins, the Court emphasized that its decision prevents “manifest and grave injustice” and that “no strong public interest” or policy would be defeated by the decision.

The analysis in Hudkins applies herein. As in Hudkins, the employees of the Board were in possession of all of the information it needed to correctly advise Respondent; in fact, the information was in their possession for more than two years when he retired. Respondent clearly relied to his detriment on the Board’s advice.²⁰ The employee’s of Petitioner in this case were dedicated to advising employees regarding retirement benefits. The mistakes surrounding Respondent’s case have given rise to a new procedure for evaluating similar cases with greater scrutiny by retirement advisors. To deny the Respondent his benefits would be a manifest and grave injustice by denying him credit for his military service; would violate no strong public policy (and would, in fact, adhere to the clear public policy that allows military veterans to receive non-contributory retirement

²⁰Respondent gave up his prior job and the job was eliminated. He had to apply for a part-time job and then a new job to earn a living. And, Respondent has suffered medically as a result of Petitioner’s actions. Clearly, Respondent was harmed and has suffered from his reliance on the Board employees’ representations.

benefits); and it would apply only to the specific facts of this case so that the exercise of the Board's functions would be unimpaired and any public interest would be unharmed.

The Board contends that its obligation to correct an error pursuant to West Virginia Code § 18-7A-14(f) requires it to deny Respondent retirement credit for his military service. However, the holding in Hudkins dictates otherwise. In Hudkins, this Court addressed an instance where the Board erred with regard to retirement credit. In that case, this Court found that a "manifest injustice" would occur if respondent was denied the benefit the Board had said he was entitled to. Thus, even though an error occurred in that case, the injustice that would have been heaped upon the individual appropriately outweighed any such obligation to correct an error. Indeed, this is the very nature of estoppel: where the State acts in such a manner to cause such an injustice, the harm to the individual (as in this case) cannot be ignored and brushed aside because the Board has too many members to service properly. Members of a retirement system deserve better and the doctrine of estoppel protects them from the Board's negligence and, ultimately, manifest injustice.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court deny the West Virginia Consolidated Public Retirement Board's appeal and affirm the decision of the Circuit Court of Kanawha County granting Respondent six years credit; that he be declared eligible to receive his full retirement including credit for accrued sick leave; and that he receive back payments with interest dating back to his retirement date, costs and fees, and any other appropriate relief.

Respectfully submitted,

Ronald K. McKown,
By counsel



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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.

CERTIFICATE OF SERVICE

I, Jeffrey G. Blaydes, do hereby certify that I have served a copy of the foregoing
“Respondent Ronald K. McKown’s Response to Petition for Appeal” by placing a true copy, postage
prepaid, in the United States mail, on this 21st day of June, 2012, upon the following:

Lenna Chambers, Esquire
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