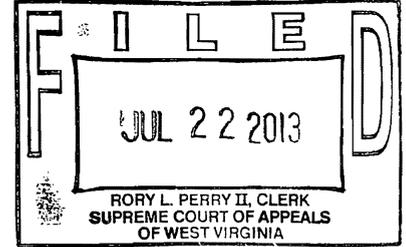


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 13-0403



**WEST VIRGINIA  
CONSOLIDATED PUBLIC  
RETIREMENT BOARD**

Petitioner

V.)

**KEITH A. WOOD, WILLIAM E.  
WALKUP, TED M. CHEATHAM,  
HERBERT E. LATTIMORE, JR.,  
and JOHNNY L. R. FERNATT**  
Respondents

Appeal from a final order  
of the Circuit Court of Kanawha  
County (11-AA-143)

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**Petitioner's Brief**

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## **ASSIGNMENTS OF ERROR**

- I. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE RESPONDENTS WERE ENTITLED TO MILITARY SERVICE CREDIT UNDER WEST VIRGINIA CODE SECTION 5-10-15 FOR MILITARY SERVICE DURING ANY PERIOD OF TIME NOT SPECIFICALLY EXCLUDED BY THE STATUTE.
- II. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE FOURTEENTH AMENDMENT OF THE WEST VIRGINIA CONSTITUTION REQUIRES THE BOARD TO RECOGNIZE ADDITIONAL PERIODS OF TIME AS "PERIODS OF ARMED CONFLICT" FOR PURPOSES OF MILITARY SERVICE CREDIT AWARDED PURSUANT TO WEST VIRGINIA CODE SECTION 5-10-15.
- III. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT RESPONDENT WOOD WAS ENTITLED TO MILITARY SERVICE CREDIT ON THE BASIS OF ESTOPPEL, BECAUSE THE HEARING OFFICER'S FACTUAL FINDING OF NO DETRIMENTAL RELIANCE WAS NOT CLEARLY WRONG, AND BECAUSE THE LEGAL ELEMENTS REQUIRED TO SHOW ESTOPPEL WERE NOT MET.
- IV. IT WAS AN ERROR FOR THE COURT TO CONCLUDE THAT THE BOARD DID NOT PROPERLY ARTICULATE ITS INTERPRETATION OF WEST VIRGINIA CODE SECTION 5-10-15, AND TO AFFORD RESPONDENTS MILITARY SERVICE CREDIT ON THAT BASIS.
- V. THE CIRCUIT COURT ERRED WHEN IT GRANTED RELIEF TO THE RESPONDENTS BASED ON PRIOR BOARD AND CIRCUIT COURT DECISIONS INVOLVING OTHER INDIVIDUALS, BECAUSE THE RESPONDENTS FAILED TO ESTABLISH THAT SUCH DECISIONS WERE BINDING ON THE BOARD.

## **STATEMENT OF THE CASE**

Respondent Keith A. Wood joined the West Virginia Public Employees Retirement System (PERS) in 1992, after being hired by the Department of Administration's Aviation Division. A.R. 1, 110-11, 356-7, 1083. PERS is administered by Petitioner, the West Virginia Consolidated Public Retirement Board (the Board). W. Va. Code § 5-10D-1(a). Prior to becoming an employee of the State, Respondent

Wood served on active duty in the United States Army, from January 7, 1978, to September 29, 1992. A.R. 3, 111, 356, 1083. Respondent Wood recalls that two government officials, not acting on behalf of the Board, verbally told him he would receive five years of free military service credit in PERS as a result of his active military service, as soon as he started working. A.R. 112-14, 356-57, 1083-84. At the time Respondent Wood alleges these statements occurred, PERS statutes permitted the award of military service credit only for service beginning during a compulsory period, which ended July 1, 1973, almost five years before Respondent Wood's active duty service commenced. A.R. 152, 365-66; W. Va. Code § 5-10-15 (1992) (providing military service credit in PERS for military service during a compulsory period); *In re Dostert*, 174 W. Va. 258, 273 n.28, 324 S.E.2d 402, 417 n.28 (1984) (noting that the compulsory period of military service ran from September 16, 1940, to July 1, 1973), *overruled on other grounds by Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991).

Respondent Wood testified at the administrative hearing below that these statements played a part in his decision to accept the position, but he also attributed his decision to leave the military and return to the area to the benefits of State employment in general, and to the fact that the Governor asked him personally to work for the State. A.R. 112-14, 356-57, 1083. In 1994, approximately two years after Respondent Wood accepted the position and enrolled in PERS, he submitted a copy of a Form DD 214 to the Board. A.R. 8-9, 23-25, 171-72. The copy of the DD 214 Respondent Wood provided was difficult to read and appeared to show he commenced active duty service in January of 1973. A.R. 9, 24, 171-72, 356, 1083. Believing

Respondent Wood had begun active service in January of 1973, during the compulsory period, Board staff preliminarily determined that he would be eligible for a full five years of military service credit under West Virginia Code Section 5-10-15. A.R. 8, 23, 171-72, 356, 1083. As a result of this preliminary determination and its entry into the Board's computer system, statements sent to Respondent Wood each year indicated that he would receive five years of military service credit. A.R. 8, 23, 114-17, 188-89, 214-223. The statements Respondent Wood received were automatically generated, like those sent to each of the approximately forty thousand other PERS members once a year. A.R. 171-72.

In 2000, eight years after Respondent Wood began working for the State, the Legislature enacted a new PERS provision, West Virginia Code Section 5-10-15b, granting military service credit to PERS members who served on active duty during a "period of armed conflict." A.R. 239-42; H.B. 4391, 2000 Leg., Reg. Sess. (W. Va. passed Mar. 10, 2000). The Legislature provided that "for purposes of this section" the term "period of armed conflict" was to be defined as:

the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War and any other period of armed conflict by the United States, including, but not limited to, those periods sanctioned by a declaration of war by the United States Congress or by executive or other order of the President.

W. Va. Code § 5-10-15b(e)(1) (2000). The statute set forth specific beginning and ending dates for each of the named "periods of armed conflict," and provided that credit can be given for service beyond the end date of an officially recognized conflict if

the member was stationed in a hostile territory. *Id.* at (e)(2)-(9). The Board was given the authority to determine the amount of credit to which a member was entitled in case of any doubt. *Id.* at (c). Initially enacted as West Virginia Code Section 5-10-15b, this provision was eventually merged with and into West Virginia Code Section 5-10-15 and, for purposes of the issues raised in this appeal, remains in force today without substantive change. A.R. 246-49; H.B. 2516, 2001 Leg., Reg. Sess. (W. Va. passed Apr. 14, 2001); W. Va. Code § 5-10-15 (2013). Commencing with the adoption of the “period of armed conflict language” in 2000, the Board began awarding service credit for service only during the specific “periods of armed conflict” listed in the statute. A.R. 155-56, 270, 448-50. In October of 2001, the Board determined that military service credit under this provision would be awarded for active duty service occurring after September 11, 2001, as well. A.R. 358, 155-56, 270, 448-50.

In 2011, in the course of reviewing Respondent Wood’s file in relation to an unrelated matter, Board staff learned that Respondent Wood’s service did not actually begin until 1978, almost three years after the end of the draft. A.R. 12, 21, 119-123, 171-72, 366, 1084. Board staff removed the five years of credit from Respondent Wood’s statement and ultimately issued him a written denial, explaining that he was eligible for eight months of service credit for his service during the Persian Gulf War, as defined in West Virginia Code Section 5-10-15, but that he was not eligible for any additional military service credit. A.R. 5-6, 15-16, 123-2, 1084. In determining the amount of military service credit to which Respondent Wood was entitled, Board staff applied the Board’s longstanding policy and interpretation of West Virginia Code

Section 5-10-15 that no additional “periods of armed conflict” for purposes of this statute occurred between the Vietnam era and the Persian Gulf War, as defined in the statute, or from the close of the Persian Gulf War, as defined in the statute, to September 11, 2001. A.R. 155-56, 363-64, 1082.

Respondent William E. Walkup joined PERS in 1989, after being hired by the State. A.R. 370, 402, 559, 1086. Prior to becoming an employee of the State, Respondent Walkup served on active duty in the United States Army, from May 5, 1983, to May 4, 1987. A.R. 373, 403, 559, 1086. In 2011, Respondent Walkup submitted a copy of a Form DD 214 to the Board and requested military service credit for his four years of active duty service. A.R. 372-74, 409-10. Board staff informed him that he was not eligible for any military service credit. A.R. 371, 410, 1086. In determining the amount of military service credit to which Respondent Walkup was entitled, Board staff applied the aforementioned interpretation of West Virginia Code Section 5-10-15. A.R. 371, 560-61, 1082.

Respondent Herbert E. Lattimore, Jr. became a member of PERS in May of 2002 after becoming employed by the State of West Virginia’s Division of Homeland Security and Emergency Management. A.R. 578, 682, 774, 1089. Prior to becoming a State employee, Respondent Lattimore had a career in the United States Army, serving on active duty from May 4, 1975, through February 28, 2001. A.R. 576, 684-85, 1089. Respondent Lattimore submitted a DD 214 to the Board as part of his retirement planning process. A.R. 572-77, 696-97. The Board informed him that he was eligible for eight months of military service credit in PERS for his active duty service from August 2, 1990, to April 11, 1991. A.R. 570-74, 697, 1088. In

determining the amount of military service credit to which Respondent Lattimore was entitled, Board staff applied the aforementioned interpretation of West Virginia Code Section 5-10-15. A.R. 570-74, 775, 1083.

Respondent Teddy M. Cheatham became a member of PERS in September 2006 after becoming employed by the State of West Virginia's Public Employees Insurance Agency. A.R. 580, 624, 773, 1087. Prior to becoming a State employee, Respondent Cheatham served on active duty in the Army from May 29, 1977, to October 15, 1988. A.R. 582, 625, 762, 1087. In 2011, Respondent Cheatham submitted a DD 214 to the Board and was informed that he was not eligible for any military service credit in PERS. A.R. 581, 637, 1088. In determining the amount of military service credit to which Respondent Cheatham was entitled, Board staff applied the aforementioned interpretation of West Virginia Code Section 5-10-15. A.R. 581, 775, 1083.

Respondent Johnny L. R. Fernatt became a member of PERS in August 1998 after becoming first employed by the State Board of Risk and Insurance Management. A.R. 588, 646, 774, 1090. Prior to becoming a State employee, Respondent Fernatt served on active duty in the Navy from July 18, 1980, to February 16, 1990. A.R. 594-97, 648-50, 774, 1090. Respondent Fernatt submitted two DD 214s to the Board and was informed that he was not eligible for military service credit in PERS. A.R. 586-87, 598-602, 660-63, 1091. In determining the amount of military service credit to which Respondent Fernatt was entitled, Board staff applied the aforementioned interpretation of West Virginia Code Section 5-10-15. A.R. 586-87, 598-602, 775, 1083.

Each of the Respondents individually requested an administrative appeal of the Board staff's denial. A.R. 1-2, 368-69, 568, 579, 585. Prior to the administrative hearings, each Respondent moved the Hearing Officer for an order allowing them to pursue the appeal as class representatives for all State employees with military service and for an order directing the Board to produce documents to identify all State employees who served in the military but were denied military service credit requests by the Board for military service occurring from July 2, 1973, through September 10, 2001. A.R. 27-33, 377-385, 605-613. These motions were denied by the Hearing Officer. A.R. 80-81, 395-96, 614-15. Ultimately, the Respondents' requests were denied by the Board upon recommendations by a Hearing Officer. A.R. 354-67, 557-67, 771-81. The Petitioners each appealed the Board's Final Orders to the Circuit Court of Kanawha County, which were eventually consolidated into a single civil action. A.R. 782-84, 889-92, 946-68, 1008-10. On March 20, 2013, the Circuit Court ruled in favor of the Respondents and granted each of their military service credit requests in full. A.R. 1080-1113.

### **SUMMARY OF ARGUMENT**

West Virginia Code Section 5-10-15 requires the Board to award military service credit to a member of PERS who served in active duty in the armed forces of the United States during a "period of armed conflict." Most relevant to these appeals, the Board grants service credit for service during the Vietnam era, the Persian Gulf War, and post-September 11, 2001. The Board denies all other military service credit requests based on military service performed during other time periods and applied this interpretation to deny the Respondents' military service credit requests.

The Circuit Court reversed the Board's denials and held that the Board was required to recognize all military campaigns and periods of armed conflict as "periods of armed conflict" for purposes of this provision, unless such a period was specifically excluded by the statute itself. The Circuit Court ruled this result was required by applying the "ordinary" meaning of the term "period of armed conflict"; however, the Board believes that applying the Circuit Court's interpretation to the Respondents' requests for military service credit, as well as requests made by other PERS members, would require the Board to ignore other portions of West Virginia Code Section 5-10-15. The Board's reasonable interpretation of the ambiguous statute should be upheld as consistent with the language and structure of the statute as a whole, its legislative history, and the fundamental rules of statutory construction this Court applies when construing an ambiguous statute. The Board also disputes the Circuit Court's application of the Fourteenth Amendment of the West Virginia Constitution, which governs cash bonus payments made by the State to veterans, and has no application to PERS benefits.

In addition to appealing these rulings, the Board appeals the Circuit Court's conclusions that the Board's denial of Respondents' requests for military service credit was prohibited by two prior Board and Circuit Court decisions, which involved other parties, and did not actually result in the award of any military service credit to the parties. The Circuit Court also concluded that the Board's denials were invalid because the Board did not articulate its interpretation of the statute in a legislative rule, a ruling the Board appeals because it is unsupported by the law, and would effectively prohibit the Board from fulfilling its statutory duties as an administrative agency.

Finally, the Board appeals the Circuit Court's award of military service credit to Respondent Wood on the basis of estoppel. Although this Court has, in limited instances, applied estoppel to government agencies, it should not have been applied here due to the absence of evidence of detrimental reliance by Respondent Wood, statutory requirements relating to error correction, and important public policy considerations.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

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

### **ARGUMENT**

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are

accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl. pt. 1, *W. Va. Consol. Pub. Ret. Bd. v. Carter*, 219 W. Va. 392, 633 S.E.2d 521 (2006) (quoting Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)).

**I. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE RESPONDENTS WERE ENTITLED TO MILITARY SERVICE CREDIT UNDER WEST VIRGINIA CODE SECTION 5-10-15 FOR MILITARY SERVICE DURING ANY PERIOD OF TIME NOT SPECIFICALLY EXCLUDED BY THE STATUTE.**

At the heart of this case is a question of statutory construction: whether the Board properly interpreted and applied West Virginia Code Section 5-10-15 to the Respondents’ requests for military service credit in PERS. “Interpreting a statute . . . presents a purely legal question subject to *de novo* review.” Syl. pt. 1, *Appalachian Power Co. v. State Tax Dept. of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (citations omitted).

**A. The meaning of “period of armed conflict” is ambiguous in the context of the Respondents’ military service requests.**

The Board denied the Respondents’ various requests for military service credit for service occurring between 1975 and 2001, concluding that although the statute was ambiguous, rules of statutory construction supported this position. A.R. 354-67, 557-67, 771-81. The Circuit Court reversed the Board’s decisions and, claiming to apply the plain and ordinary meaning of “period of armed conflict,” held that all periods of time constitute a “period of armed conflict” unless specifically excluded by the language of the statute. A.R. 1093. As a result of refusing to recognize the ambiguity in West Virginia Code Section 5-10-15 as it applied to the

Respondents' requests for military service credit, the Circuit Court failed to appropriately construe the statute. This Court has previously described the initial rules that apply when a case involves a dispute over the Board's interpretation and application of a statute:

The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature. A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect. A statute that is ambiguous must be construed before it can be applied.

*W. Va. Consol. Pub. Ret. Bd. v. Weaver*, 222 W. Va. 668, 674, 671 S.E.2d 673, 679 (2008) (internal quotations and citations omitted).

On the central question raised by this case – what, aside from those periods specifically listed in the statute, is a “period of armed conflict”? – West Virginia Code Section 5-10-15 is ambiguous. It defines a “period of armed conflict” as:

the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War and any other period of armed conflict by the United States, including, but not limited to, those periods sanctioned by a declaration of war by the United States Congress or by executive or other order of the President.

W. Va. Code § 5-10-15(b)(1). With respect to the named periods for which the statute provides exact beginning and ending dates, the statute is clear: only military service occurring during those dates will qualify for service credit, unless a member petitions the Board and establishes that his service beyond an end date occurred in a territory considered hostile and dangerous. W. Va. Code § 5-10-15(a)(7), (b)(2)-(8).

With respect to periods of time other than those specifically listed in West Virginia Code Section 5-10-15, however, the Legislature has not spoken clearly. In particular, the use of the phrase “and any other period of armed conflict . . .” to define a “period of armed conflict” renders the statute ambiguous on the broad issue determined by the Circuit Court – what additional periods of time, if any, qualify a PERS member for military service credit. *See, e.g., H & R Block E. Tax Servs., Inc. v. State, Dep't of Commerce & Ins., Div. of Ins.*, 267 S.W.3d 848, 858-59 (Tenn. Ct. App. 2008) (holding a statute defining an “contract of insurance” as a contract that covers “something in which the other party has an *insurable interest*” ambiguous in light of the use of a circular definition).

The Legislature did provide some additional direction, stating that additional periods that could qualify consisted of “any other period of armed conflict by the United States including, but not limited to, those periods sanctioned by a declaration of war by the United States Congress or by executive or other order of the President.” However, this language does little to resolve the question, since the use of “including, but not limited to” does not narrow the “periods of armed conflict” to which the statute might apply. *See, e.g., In re Greg H.*, 208 W. Va. 756, 761, 542 S.E.2d 919, 924 (2000) (per curiam) (comparing a statute stating what a “particular term ‘means’, [which] is ordinarily binding upon the courts and excludes any meaning that is not stated,” with “[a] term whose statutory definition declares what it ‘includes,’ [which] is more susceptible to extension of meaning by construction than where the definition declares what the term ‘means.’”) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:07, at 231 (6th ed. 2000)).

In the context of this case, West Virginia Code Section 5-10-15 is a perfect example of a statute susceptible of two or more meanings. *Vanderbilt Mortgage & Fin., Inc. v. Cole*, Nos. 11-1288, 11-1604, --- W. Va. ---, 740 S.E.2d 562, 567 (Mar. 8, 2013) (“A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.”) (quoting *Hereford v. Meek*, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949)). The Circuit Court adopted the essentially limitless meaning proposed by the Respondents, asserting that such a meaning was mandated by the plain language of the statute: that West Virginia Code Section 5-10-15 provides military service credit for all military service at any time unless the statute clearly excludes a particular military campaign from being considered. A.R. 1093.

However, another construction is possible: that, aside from the specifically listed periods, the Legislature intended that only those periods occurring after enactment of the legislation, similar in scope, nature and purpose to those specifically listed would qualify a PERS member for military service credit. This is the meaning the Board ascribed to West Virginia Code Section 5-10-15 after appropriately determining the statute was ambiguous and applying longstanding rules of statutory construction and which the Board asked the Circuit Court to apply when considering the Respondents’ appeals. A.R. 354-67, 557-67, 771-81. By failing to acknowledge the ambiguity in the statute and, therefore, failing to apply rules of statutory construction, the Circuit Court’s analysis was fundamentally flawed.

**B. The plain and ordinary meaning afforded by the Circuit Court does not resolve the dispute, because its application renders other portions of West Virginia Code Section 5-10-15 without meaning, violating a fundamental rule of statutory construction.**

In other cases, after finding a statute ambiguous, this Court has resolved a dispute by applying the plain and ordinary meaning of an ambiguous phrase or term, based on the assumption that this best reflects the Legislature's intent. *See, e.g., Weaver*, 222 W. Va. at 675 ("If the Legislature has failed to provide a definition for a particular word or term it has employed in a statute, meaning can be ascribed to such statutory language by referring to the common, ordinary, accepted meaning of the undefined terminology."). The Circuit Court held that the ordinary meaning of the phrase "period of armed conflict" would apply. A.R. 1093. While it did not explicitly state what that meaning was, the opinion suggests that the Circuit Court believed that all military "campaigns" and "periods of armed conflict" – also undefined – meet the ordinary meaning of the phrase "period of armed conflict." A.R. 1093-95. Although in other cases, resorting to the plain and ordinary meaning of an undefined term might resolve a dispute, in this case, the Court's inquiry must go further because, as the Board argued in the proceedings below, the ordinary meaning adopted by the Circuit Court is clearly contrary to the meaning intended by the Legislature, as evidenced by West Virginia Code Section 5-10-15 as a whole. A.R. 812-13, 912-13, 1020-21.

The Legislature made clear that its intent was to provide military service credit only for discrete periods of time: "time served in active duty . . . when the duty was during any period of compulsory military service or during a period of armed conflict, as defined in this section." W. Va. Code § 5-10-15(a)(1). The effect, if not the

intent, of the Circuit Court's ruling and the Respondents' position, however, is that all active duty service be considered service during a "period of armed conflict." The Respondent's position and Circuit Court order relied heavily on a list of military campaigns published by the Veterans of Foreign Wars of the United States (VFW), which together encompass every day since as early as 1940. A.R. 508-15, 1094-95. Neither the Circuit Court nor the Respondents have ever identified a period of time in modern history which would not, applying their standard, be considered a "period of armed conflict." *See, e.g.*, A.R. 666-67, 701-02 (For example, Respondent Lattimore testified that the "possibility that you can get killed" is what defines a "period of armed conflict" and asserted that at least the last two hundred years of history would constitute such a period, applying his understanding; Respondent Cheatham asserted that, in his opinion, "as long as we have military personnel with live ammunition, armed, overseas, that is an armed conflict.") This interpretation goes well beyond the stated purpose of the statute.

In fact, the Circuit Court's adoption of the Respondents' broad interpretation violates the very definition of "period of armed conflict" it purports to apply. West Virginia Code Section 5-10-15 specifically defines, with beginning and ending dates, one of the two "periods of armed conflict" that occurred in the last fifty years as the Persian Gulf War, as beginning August 2, 1990, and ending April 11, 1991. W. Va. Code § 5-10-15(b). Although the use of specific dates makes clear that service credit is not to be awarded for service occurring immediately prior or subsequent to those dates, this fact is further underscored by an exception created by the

Legislature, in cases where a person's military service beyond the end date of a "period of armed conflict" occurs in a hostile territory:

The Board may consider a petition by any member whose tour of duty, in a territory that would reasonably be considered hostile and dangerous, was extended beyond the period in which an armed conflict was officially recognized, if that tour of duty commenced during a period of armed conflict, and the member was assigned to duty stations within the hostile territory throughout the period for which service credit is being sought. . . .

W. Va. Code § 5-10-15(a)(7) (The statute does not otherwise require military service during a "period of armed conflict" to have been rendered in any particular geographic location, or even be in furtherance, directly or otherwise, of a mission related to the "period of armed conflict." None of the Respondents have asserted any entitlement to service credit beyond the date of an officially recognized armed conflict on the basis of this provision.)

The Circuit Court ignored this clear language when it determined the service credit to which Respondent Wood and Respondent Lattimore were entitled. The Circuit Court awarded Respondent Wood military service credit based on his service from January 7, 1978, to September 29, 1992, concluding, among other things, that he was entitled to service credit for service during the Persian Gulf operation, based on a date range of July 24, 1987, through August 1, 1990, provided in a VFW handbook. A.R. 1095-96. This ignored West Virginia Code Section 5-10-15(b)(8), which clearly limits service credit awards for the Persian Gulf War to service from August 2, 1990, to April 11, 1991. The Circuit Court ignored the definition of the Persian Gulf War in the same way when it awarded Respondent Lattimore service

credit. A.R. 1104-06. These rulings violated “[a] cardinal rule of statutory construction[:] that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Syl. pt. 6, *Davis Mem’l Hosp. v. W. Va. State Tax Com’r*, 222 W. Va. 677, 679, 671 S.E.2d 682, 684 (2008) (quoting Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999)). Moreover, the Circuit Court’s more general ruling that all periods of time are a period of armed conflict, unless specifically excluded in the statute, is clearly contrary to the language of the statute, as well as the purpose evidenced from its structure. It does not expressly exclude any particular time period but, rather, is designed to apply only to limited, discrete periods of time. Respondents have made clear they intend the Circuit Court’s broad principle be applied to all PERS members, and not just those with military service during the same periods of time as the Respondents. Thus, the Circuit Court’s ruling, if it stands, could cause the Board to award service credit to PERS members in a way that directly violates West Virginia Code Section 5-10-15. Whether it reached this decision through an application of the “ordinary” meaning of the disputed language or on the basis of liberal interpretation, this was an improper result.

In other cases, this Court has avoided reaching unreasonable results based on an application of the plain and ordinary meaning of a term by giving a term a broader definition than would otherwise be warranted. *See, e.g., In re Greg H.*, 208 W. Va. at 761. This is because:

[w]hile courts are generally bound by statutory definitions, there are exceptions: “[I]f the definition is arbitrary, creates obvious incongruities in the statute, defeats a major

purpose of the legislation or is so discordant to common usage as to generate confusion, [the statutory definition] should not be used.” 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:07, at 228–29 (6th ed.2000) (footnote omitted). ... As we have frequently emphasized, it is the “duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.”

*Id.* (additional citations omitted); *see, also*, Syl. pt. 3, *Lee v. W. Va. Teachers Ret. Bd.*, 186 W. Va. 441, 413 S.E.2d 96 (1991) (per curiam) (“In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.”) (citations omitted); *Carter*, 219 W. Va. at 397 (“Each word of a statute should be given some effect and a statute should be construed in accordance with the import of its language.”) (citations omitted).

These principles should apply here – in order to avoid an unreasonable interpretation that makes portions of the statute meaningless, the Court must afford a more narrow definition that might be warranted by the use of the plain and ordinary meaning of “period of armed conflict” adopted by the Circuit Court. Even to the extent the broad, “ordinary” meaning of “period of armed conflict” is as described by the Circuit Court and Respondents, the Legislature made clear that this was not to apply, both through the provisions of West Virginia Code Section 5-10-15, taken as a whole, as well as through the explicit statement that the purpose of the law was to award credit for military service during a “period of armed conflict as defined in this section.” W. Va. Code § 5-10-15(a) (emphasis added).

The Circuit Court’s reliance on the ordinary meaning of “period of armed conflict” was also in error, because no such ordinary meaning exists. The

term “period of armed conflict” appears in several other public pension plan statutes in the West Virginia Code, but the definitions in those statutes, which are substantially similar to that found in PERS, are just as ambiguous. *See* W. Va. Code §§ 7-14D-27(b) (Deputy Sheriffs Retirement System), 15-2-28 (State Police Death, Disability, and Retirement Fund), 15-2A-19(b) (West Virginia State Police Retirement System), and 16-5V-30(Emergency Medical Services Retirement System Act). Other state and federal statutes defining the term show the wide range of ways in which the phrase “period of armed conflict” can be used. For example, Tennessee’s public retirement plan defines a “period of armed conflict” as: World War I, World War II, Korean, and Vietnam. Tenn. Code Ann. § 8-34-605 (West 2009) (granting free military service credit to a member who served in armed forces during “any period of armed conflict”). Department of Defense regulations governing active duty service for civilian or contractual groups employ a similar definition:

A prolonged period of sustained combat involving members of the U.S. Armed Forces against a foreign belligerent. The term connotes more than a military engagement of limited duration or for limited objectives, and involves a significant use of military and civilian forces.

(a) Examples of armed conflict are World Wars I and II, and the Korean and Vietnam Conflicts.

(b) Examples of military actions that are not armed conflicts are as follows:

(1) The incursion into Lebanon in 1958, and the peacekeeping force there in 1983 and 1984.

(2) The incursions into the Dominican Republic in 1965 and into Libya in 1986.

(3) The intervention into Grenada in 1983.

32 C.F.R. § 47.3. The Geneva Convention, on the other hand, defines an “armed conflict” broadly:

Any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 . . . It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4.

*U.S. v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992). These examples illustrate that there is no “ordinary” meaning for the phrase that could have been applied by the Circuit Court.

**C. Other rules of statutory construction, which are to be applied when the language of the statute is ambiguous and not susceptible to plain and ordinary meaning, support the Board’s interpretation but were ignored by the Circuit Court.**

The Circuit Court failed to consider other rules of statutory construction that are designed to aid in determining the Legislature’s intent with regard to an ambiguous statute.

First, the history and context of the adoption of the language at issue here reveals that the Legislature intended only to authorize the Board to recognize “periods of armed conflicts” occurring after the enactment for PERS military service credit. The Circuit Court should have given weight to the fact that, in 2000, when the “period of armed conflict” provision was adopted, the Legislature was surely aware of the extent of the U.S. military’s worldwide, daily involvement in myriad incidents, campaigns and

operations, but chose not to include any others in its historical list within the statute. The Fiscal Note prepared to accompany House Bill 4391 supports the Board's position that the Legislature understood its enactment as approving only the specific "periods of armed conflict" listed in the statute prior to 2000. With regard to the intent of the legislation, the Actuary stated that:

the proposed language is somewhat broader in scope and it must be expected that this bill would result in a few PERS members being able to claim credit for military service under this bill who would not qualify under the current statute. . . . The number of such claims is expected to be extremely small.

A.R. 243. Although the Actuary went on to note that there was insufficient data to prepare a precise estimate, he expected the bill to "give rise to a very minor increase in the actuarial cost of PERS, but [that] the level of such additional cost will be *de minimus*." A.R. 243.

The cost of the new benefit afforded by House Bill 4391 could not have been *de minimus* if it were intended to grant up to five years of service credit to all PERS members with military service at any time, the effect of the interpretation adopted by the Circuit Court. In 2006, the CPRB's actuary completed an actuarial study to determine the cost of a proposal to grant this benefit, and estimated that the increase in total Unfunded Actuarial Accrued Liability (UAAL) of treating essentially the entire post-Vietnam era as a series of overlapping periods of armed conflicts could reach the \$260 million dollar range. A.R. 269-73. The cost accrues because the credit awarded by this provision is "free" to the member, meaning the cost is actually borne entirely by the PERS plan itself (and by extension, other employers and employees contributing to

the plan, since it is a defined benefit retirement plan). A.R. 150-151. Thus, the only way the cost of implementing the statute could be *de minimus* (as estimated in 2000, at the time the Fiscal Note was prepared) was if it were understood to grant military service credit only to those with military service during the particular periods of time enumerated in the statute. The Fiscal Note's description of the amendment is important evidence of the Legislature's intent, that the Circuit Court should have considered. *See, e.g., Telecom\*USA, Inc. v. Collins*, 393 S.E.2d 235, 238-9 (Ga. 1990) (referring to a description of a bill in a fiscal note as "[a]dditional evidence of the intent of the legislature"), and *Robey v. Maryland*, 918 A.2d 499, 503-4 (Md. 2007) (citing *Moore v. State*, 882 A.2d 256, 263 n. 4 (Md. 2005) (referring to language in a fiscal note as support for the court's interpretation of a statute and acknowledging that "fiscal notes are persuasive sources of evidence in divining legislative intent").

Moreover, the Circuit Court should have taken into account evidence that this is how the Board has consistently interpreted its authority. The Board's approval of an additional "period of armed conflict" shortly after September 11, 2001, shows that only one year after the amendment went into effect, the Board understood that "a period of armed conflict" was not ongoing at the time of the 9/11 attacks, despite the fact that U.S. troops were deployed overseas throughout the world in situations that were already potentially hostile and which would, applying the Circuit Court's expansive definition, constitute periods of armed conflict for purposes of this statute. A.R. 155-56, 270, 358, 448-50. The Circuit Court should have considered evidence of this contemporaneous interpretation afforded by the Board to West Virginia Code Section 5-10-15. Syl. pt. 4, *Hawkins v. W. Va. Dep't of Pub. Safety*, 223 W. Va. 253,

254, 672 S.E.2d 389, 390 (2008) (“Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.”) (quoting Syl. pt. 7, *Evans v. Hutchinson*, 158 W. Va. 359, 214 S.E.2d 453 (1975)).

The Circuit Court also failed to apply a long-recognized principle of statutory construction, which holds that:

In the construction of statutes, where general words follow the enumeration of particular classes of persons or things, the general words, under the rule of construction known as *ejusdem generis*, will be construed as applicable only to persons or things of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown.

Syl. pt. 2, *Parkins v. Londeree*, 146 W. Va. 1051, 124 S.E.2d 471 (1962). This rule respects the principle, discussed above, that a statute should be read as a whole, giving all parts, provisions or sections meaning. *Id.* at 1059-60. The Court explained that “[t]he rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes.” *Id.* at 1061 (citations omitted). When this rule applies, “general words do not amplify particular terms preceding them, but are themselves restricted and explained by the particular terms.” *Id.* Applying *ejusdem generis* also serves to avoid a reading of a statute that renders portions of it meaningless. *Id.* at 1063 (observing that without the application of the rule of *ejusdem generis*, other portions of a statute would have been superfluous and wholly unnecessary).

Thus, in *Parkins*, the Court held that a statute establishing a “system for the appointment, promotion, reduction, removal and reinstatement of all officers, policemen or other employees of said police [municipal] departments . . .” only applied to employees of police departments who were “paid municipal policemen who are clothed with power of the state customarily exercised by policemen or other police officers,” not to literally all other employees of police departments. *Id.* at 1057-58, 1060. Similarly, in *Ohio Cellular RSA Ltd. P’ship v. Bd. Of Pub. Works*, the Court held that under a statute defining property as including “all notes, bonds, and accounts receivable, stocks and other intangible property,” an FCC license was not “other intangible property” subject to taxation by applying *ejusdem generis*, because it was not of the same “family” as the specific property preceding it. 198 W. Va. 416, 420-23, 481 S.E.2d 722, 726-2922 (1996).

When the legislature defined a “period of armed conflict” as meaning “the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War and any other period of armed conflict . . .,” it evidenced an intent that any other periods of time to be considered creditable must be similar in nature or class to the specifically identified periods. The evidence in the record shows that the Board properly applied this rule when considering Respondents’ requests. As the Hearing Officer concluded:

It is apparent from the statutorily defined events of periods of armed conflict that the listed events are characterized by full-scale military operations of significant duration, unlike the events for which the Applicant[s] assert[] entitlement. . . . There is nothing in the record to suggest that this Board has acted in an arbitrary or capricious manner in declining to recognize any of the myriad events of limited scale and

duration as periods of armed conflict. This is particularly true when viewed in the context of the lack of any general requirement that the member actually be in the theater of operations.

A.R. 363-64; *see also* A.R. 566, 779-80.

Because the Circuit Court did not recognize the ambiguity inherent in West Virginia Code Section 5-10-15, it failed to look to the various rules and principles that guide judicial bodies when interpreting and construing statutes of doubtful meaning, which the Board properly applied. Accordingly, the Board respectfully requests that this Court reverse the decision of the Circuit Court and affirm the interpretation of West Virginia Code Section 5-10-15 applied by the Board to the Respondents' military service credit requests.

**II. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE FOURTEENTH AMENDMENT OF THE WEST VIRGINIA CONSTITUTION REQUIRES THE BOARD TO RECOGNIZE ADDITIONAL PERIODS OF TIME AS "PERIODS OF ARMED CONFLICT" FOR PURPOSES OF MILITARY SERVICE CREDIT AWARDED PURSUANT TO WEST VIRGINIA CODE SECTION 5-10-15.**

After determining that the Board should have applied the "ordinary" meaning of "period of armed conflict," and that such meaning encompassed all military campaigns not specifically excluded by the statute, the Circuit Court held that "[t]o the extent [the Board] has asserted there is some confusion over what dates to include in the various periods of armed conflict, clearly the dates included in the Fourteenth Amendment of the West Virginia Constitution should be dispositive on the issue." A.R. 1095. The Board appeals this conclusion because it is clear that the Legislature did not intend those dates to apply to PERS military service credit.

The Fourteenth Amendment of the West Virginia Constitution was ratified November 3, 1992, having been proposed by House Joint Resolution 109 in 1991. The amendment provided for the sale of state bonds:

for the purpose of paying a cash bonus to veterans of the armed forces of the United States who (1) served on active duty ... during the Persian Gulf conflict, Operation Desert Shield/Desert Storm, between [August 1, 1990] and the date determined by the president or congress of the United States as the end of the involvement of the United States armed forces in the Persian Gulf conflict, both dates inclusive; or (2) veterans . . . of the armed forces of the United States, who served on active duty in one of the military operations for which he or she received a campaign badge or expeditionary medal during the periods hereinafter described. For purposes of this amendment, periods of active duty in a campaign or expedition are designated as: The conflict in Panama, between [December 20, 1981, through January 31, 1990], both dates inclusive; the conflict in Grenada, between [October 23, 1983, and November 21, 1983], both dates inclusive; and the conflict in Lebanon, between [August 25, 1982, and February 26, 1984], both dates inclusive.”

This provision has no application whatsoever to PERS: nowhere in the Fourteenth Amendment is a “period of armed conflict” referred to, nor does PERS ever refer to the Amendment, which preceded its enactment by almost ten years. In fact, West Virginia Code Section 5-10-15 specifically states that the Board is to award credit for service during a “period of armed conflict as defined in this section.” W. Va. Code § 5-10-15(a)(1). If anything, the Amendment shows that, years later, when amending PERS with regard to “periods of armed conflict,” the Legislature was fully aware of the events in Panama, Grenada, and Lebanon, and chose not to identify them as “periods of armed conflict.” The Circuit Court erred when it applied the dates found in the West Virginia

Constitution to the Respondents' appeals, and the Board requests that this Court correct the error by reversing the Circuit Court's decision.

**III. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT RESPONDENT WOOD WAS ENTITLED TO MILITARY SERVICE CREDIT ON THE BASIS OF ESTOPPEL, BECAUSE THE HEARING OFFICER'S FACTUAL FINDING OF NO DETRIMENTAL RELIANCE WAS NOT CLEARLY WRONG, AND BECAUSE THE LEGAL ELEMENTS REQUIRED TO SHOW ESTOPPEL WERE NOT MET.**

The Circuit Court awarded Respondent Wood a full five years of military service credit on the basis of a second theory: collateral estoppel. A.R. 1097-1101. The Circuit Court found that Respondent Wood relied on the receipt of written statements, indicating he would receive five years of military service credit, as well as representations made to him prior to taking the job:

as part of his motivation for remaining in State government. With his experience and skills, [Respondent] Wood easily could have moved into the private sector, but the five years of military service credit made keeping his State job more desirable. . . . [In addition, Respondent] Wood relied on these representations in taking a State job in the first place, when he could have had many other opportunities either in the military or in the private sector.

A.R. 1097, 1101. These factual findings, which formed the basis for the Circuit Court's decision, were in error because they were unsupported and, in fact, contradicted by the evidence developed during the administrative proceeding.

While the statutory interpretation and other legal questions raised by the Respondents' appeals were to be reviewed by the Circuit Court *de novo*, the Circuit Court was required to review factual findings of the Hearing Officer and Board, applying a more deferential standard: "findings of fact by the administrative officer are accorded

deference unless the reviewing court believes the findings to be clearly wrong.” See, e.g., *Carter*, 219 W. Va. at 396 (quoting Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)). The Hearing Officer below considered both of the bases for Respondent Wood’s estoppel argument and found that, even though Respondent Wood was apparently told by non-Board officials prior to employment that he would receive five years of service credit and received written service credit statements from the Board throughout his employment indicating he would receive such credit, there was no detriment or reliance on either. A.R. 357. Respondent Wood actually sought State employment, not because he believed he would receive military service credit, but because he was looking for employment after returning to the area due to his father’s illness, and because the Governor asked him to take the job. A.R. 112-14, 356-57, 1083. Moreover, he did not identify how, if at all, obtaining or remaining in State employment was detrimental to him. For example, Respondent Wood did not even argue, much less prove, that he gave up more lucrative opportunities to become employed with the State on the basis of the military service credit alone. Under these facts, the Board’s decision was not clearly erroneous and should have been upheld by the Circuit Court. See *Myers v. W. Va. Consol. Pub. Ret. Bd.*, 226 W. Va. 738, 750-51, 704 S.E.2d 738, 750-51 (2010) (per curiam) (finding that the Board did not clearly err when it ruled that PERS members failed to show detrimental reliance by making statements about their reliance on the PERS plan as a whole without introducing evidence to show a decision made on the basis of the particular promised benefit sought on the basis of reliance); see, also, Syl. pt. 6, *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 92 S.E.2d 891 (1956) (explaining that estoppel requires, among other things, that “the party to whom

[a false representation of material facts] was made must have relied on or acted on it to his prejudice.”).

The Hearing Officer also concluded, as a matter of law, that Respondent Wood’s reliance, if any, on the verbal statements made to him prior to employment was not reasonable. A.R. 365-66. “The doctrine of estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her *reasonable* reliance on another party’s misrepresentation or concealment of a material fact.” *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 270, 387 S.E.2d 320, 324 (1989) (citations omitted) (emphasis added). It was unreasonable for Respondent Wood to rely on verbal statements made to him in the course of interviewing for State employment that he would receive five years of military service credit when the statute in effect at the time awarded such service credit only for service during a compulsory period. *See* W. Va. Code § 5-10-15 (1992). Respondent Wood was well aware that his service was not compulsory.

With respect to Respondent Wood’s alleged reliance on receipt of service credit statements from PERS, the Hearing Officer concluded that estoppel should not apply because the Board did not have knowledge of the real facts at the time the statements were prepared. A.R. 366. Thus, another essential element of estoppel could not be shown. *See* Syl. pt. 6, *Stuart*, 141 W. Va. 627 (observing that “[t]o constitute estoppel, there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; [and] the party to whom it was made must have been with knowledge or the means of knowledge of the real facts . . .”).

There are additional reasons why estoppel should not apply in this case. For example, as the Hearing Officer noted, this Court applies estoppel to a government agency only cautiously and does not do so “against a governmental unit when functioning in its governmental capacity.” *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 59, 174 S.E.2d 318, 325 (1970) (citations omitted). Moreover, as the Court in *Carter* also observed, the representation Respondent Wood relied upon was one of law rather than fact and, therefore, should not form the basis for estoppel. 219 W. Va. at 401 (noting that “estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party’s misrepresentation or concealment of a material fact.”) (quoting *Ara*, 182 W. Va. 266, at 270). Nonetheless, the Hearing Officer’s factual findings and conclusions with respect to Respondent Wood’s estoppel claims, standing alone, were sufficient and proper and should have been upheld by the Circuit Court.

The Circuit Court’s ruling relied primarily on *Hudkins v. W. Va. Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) (per curiam), in which this Court applied equitable estoppel against the Board. The *Hudkins* decision is distinguishable from this case for several reasons. First, the representation made to Respondent Wood that he would receive service credit for his service beginning in 1978 was not consistent with the Board’s policies and practices, a fact that is undisputed, and that was explained to Respondent Wood as soon as the error was discovered. A.R. 5-6, 15-16, 21-22, 155-56, 1083. In *Hudkins*, on the other hand, the erroneous representation, albeit incorrect, had actually been the practice of the Board staff for many years. *Hudkins*, 220 W. Va. at 281.

The fiscal impact, another factor considered by this Court in *Hudkins*, is much more significant in this case, because it would result in Respondent Wood receiving five full years of additional service credit without having made any contribution to the plan whatsoever for that time period. In *Hudkins*, the result was a monthly increase in Ms. Hudkins' pension of \$51.00. *Hudkins*, 220 W. Va. at 281-82. Mr. Wood, on the other hand, will be given five full years of additional service credit if the Circuit Court's decision stands, representing an almost 25 percent increase, in that he currently has approximately twenty-one years of service credit. A.R. 4. Additionally, the Board's representation in this case was not made with all of the facts necessary to correctly advise Respondent Wood, inasmuch as the documentation provided by Respondent Wood was simply misread as a result of poor photocopy quality. A.R. 8-9, 23-24, 171-72, 356, 1083. On the other hand, this Court ruled that the Board had full possession of all necessary facts when handling Ms. Hudkins' request. *Hudkins*, 220 W. Va. at 281.

The Circuit Court's award was in error because it was inappropriate to apply estoppel to these facts. In another case, this Court declined to award service credit on the basis of equitable considerations, despite incorrect annual service credit statements issued by the Board indicated. *Myers*, 226 W. Va. at 752-54. In that case, the Court declined to reinstate two months of service credit to Mr. Myers on the basis of equity, despite the fact that it had appeared on every retirement statement issued to him by PERS throughout his career. Among other things, the Court observed that the Board was "statutorily bound by West Virginia Code Section 5-10-44 to correct errors in the calculation of a PERS member's service credit, . . . and that [t]he statute does not

limit this requirement for equitable reasons.” The same principle should apply here: the Board only began indicating Respondent Wood would receive the credit due to an error associated with reviewing an illegible document. A.R. 8-9, 23-24, 171-72, 356, 1083. The Board should not be prohibited from correcting the error on the basis of equitable reasons when it is required by a clear and unambiguous statute to do so.

**IV. IT WAS AN ERROR FOR THE COURT TO CONCLUDE THAT THE BOARD DID NOT PROPERLY ARTICULATE ITS INTERPRETATION OF WEST VIRGINIA CODE SECTION 5-10-15, AND TO AFFORD RESPONDENTS MILITARY SERVICE CREDIT ON THAT BASIS.**

In addition to ruling on the substantive question of what other periods of time must be recognized as a “period of armed conflict,” the Circuit Court ruled on procedural grounds, concluding that the Board could not deny credit under the statute without having in place a legislative rule explaining why it has declined to adopt other “periods of armed conflict.” A.R. 1107-09. The Board appeals this ruling because there is no requirement, in the Administrative Procedures Act (APA) or otherwise, that prohibits an administrative agency from acting on a request unless it has first promulgated a legislative rule describing how it will interpret a statute and why. The Circuit Court’s ruling threatens the ability of state agencies to carry out their duties, since every action or inaction taken by an administrative agency constitutes an interpretation of a statute. *See, e.g.,* Syl. pt. 4, *McDaniel v. W. Va. Div. of Lab.*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citations omitted) (observing that the power of administrative agencies is dependent upon statutes, “so that they must find within the statute warrant for the exercise of any authority which they claim.”)

This Court has recognized that a legislative rule is not a prerequisite to an agency's application of a statutory interpretation. In *Haines v. Workers' Comp. Comm'r*, 151 W. Va. 152, 157, 150 S.E.2d 883, 886 (1966), this Court upheld a policy of the Workers' Compensation Commissioner that an uncorrected visual loss of 20/20 is and should be considered industrial blindness, and that any claimant suffering such a loss should be compensated for the entire loss of the eye. The Court rejected the employer's argument that the policy had to be filed in the office of the Secretary of the State pursuant to the APA and, instead, held that such a policy "is not such rule as is contemplated by the provisions of Code, 1931, 29A-1-1, as amended, and 29A-2-1, as amended." *Id.* The question was only whether the policy conformed with the law. *Id.*

It is undisputed that the Board is aware of and has considered whether other periods of time should be recognized under this statute, including examining many of the same lists and documents submitted by Respondents in support of their appeals and, for valid reasons, has not taken action to adopt them as such (in contrast to its express approval of the post-September 11, 2001, era as a "period of armed conflict"). A.R. 155-71, 181, 184-85, 245, 252-73, 357-58, 448-63, 472, 508-15, 548-50, 774-75. There is no additional requirement that the CPRB promulgate a legislative rule specifically stating that it will not recognize any other periods of time and why.

The Board recognizes that its interpretation, having not been promulgated as a legislative rule, is not entitled to the "controlling weight" that would be afforded to a legislative rule. *See, e.g., W. Va. Health Care Cost Review Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 335-6, 472 S.E.2d 411, 420-1 (1996) (citations omitted). This does not mean, however, that the fact alone that the Board did not propose a legislative rule

entitles the Respondents to relief. If anything, the relief appropriate, if there were a requirement, would be an order directing the Board to issue such a rule; awarding the Respondents military service credit on this basis would constitute a windfall.

**V. THE CIRCUIT COURT ERRED WHEN IT GRANTED RELIEF TO THE RESPONDENTS BASED ON PRIOR BOARD AND CIRCUIT COURT DECISIONS INVOLVING OTHER INDIVIDUALS, BECAUSE THE RESPONDENTS FAILED TO ESTABLISH THAT SUCH DECISIONS WERE BINDING ON THE BOARD.**

Finally, the Circuit Court erred when it concluded that the Board's denial of Respondents' requests for military service credit did not afford sufficient respect or deference to the Final Order of the Circuit Court of Kanawha County, West Virginia, in *Olthaus v. W. Va. Consol. Pub. Ret. Bd.*, Civil Action No. 08-AA-109 (Cir. Ct. Kanawha County, W. Va., Mar. 3, 2009) (J. Kaufman) (A.R. 34-45), or the Board's Final Order in *In re Hubbard* (W. Va. Consol. Pub. Ret. Bd., Feb. 13, 2008) (A.R. 224-38). Neither of these decisions conclusively settled the matters raised by Respondents' requests; therefore, they were not binding on the Board and should not now serve as a basis for the award of military service credit to the Respondents.

In *Olthaus*, a 2009 decision, Judge Kaufman granted an appeal on behalf of then-PERS member Daniel Olthaus, which sought five years of military service credit in PERS. A.R. 34-35. Mr. Olthaus served in the Navy for twenty years, from 1983 to 2003. A.R. 36. Judge Kaufman ordered the Board to award Mr. Olthaus a total of five years of military service credit, concluding simply that Mr. Olthaus had established entitlement by introducing a list of military campaigns published by the VFW (see A.R. 508-15), as well as lists of recent military incidents, operations, conflicts, wars and/or terrorist attacks, with reported casualties (see A.R. 252-56). A.R. 43.

The Circuit Court concluded that the Hearing Officer should not have rejected the “precedent” established in *Olthaus*, but failed to acknowledge that Judge Kaufman’s Order itself specifically directed that it apply only to Mr. Olthaus. A.R. 45. Thus, the Board was not required to apply the effect of that ruling to any other PERS members submitting military service requests subsequently. More importantly, the *Olthaus* ruling did not actually adopt any particular “periods of armed conflict” and, therefore, as a practical matter, could not have been applied by the Board. By concluding simply that Mr. Olthaus had established entitlement to five years based on his twenty-year career in the military, the Order failed to provide the type of specific ruling that could be applied by the Board in subsequent cases.

The Respondents have argued throughout these proceedings that the Board was bound by the *Olthaus* Order since it did not appeal that decision to this Court. The Board did not need to appeal the decision because by the time it was rendered, the case was moot. Mr. Olthaus brought his appeal after having been employed by the State for only two years and, thus, he was not actually eligible to retire – or receive military service credit – at the time of the proceedings. A.R. 36; *see also*, W. Va. Code § 5-10-20 (requiring a minimum of five years of contributory service, in combination with attaining age sixty, to become eligible for retirement). Mr. Olthaus then left State employment while his appeal was pending and prior to reaching retirement eligibility. A.R. 90-91. Thus, by the time the *Olthaus* order was entered, it was clear it would have no actual effect on the Board. The Board sought relief from the *Olthaus* Order in light of this and, although Judge Kaufman declined the motion, he

specifically noted that the military service credit was only to be granted if Mr. Olthaus ultimately became eligible to receive benefits in the future. A.R. 90-91.

The practical effect of the Circuit Court's ruling in this case, taken to its logical conclusion, has the potential for a significant impact on state agencies: if the fact that a party does not appeal a nonbinding order that has no real effect on its actions will now be held a complete waiver in every subsequent case involving a different adversary, state agencies like the Board will be forced to waste public and judicial resources by appealing any order containing any statement the agency does not agree with, even though in the end that appeal will have made no difference in terms of the rights of the parties actually involved in the case. *See Campbell v. Lake Hallowell Homeowners Ass'n*, 852 A.2d 1029, 1041 (Md. App. 2004) (observing that “[w]here a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is . . . moot, the judgment is not conclusive against him in a subsequent action on a different cause of action.”) (citations omitted). The Board was not required to appeal an otherwise moot decision of a Circuit Court expressly limited in its application to the named party.

In *In re Hubbard*, the Board adopted a Hearing Officer's Recommended Decision, which included a conclusion that, with respect to Mr. Hubbard, the period from October 18, 1983, to October 24, 1983, constituted a “period of armed conflict,” as a result of Operation Urgent Fury, the U.S. invasion of Grenada. A.R. 231-32, 235-37. The Hearing Officer's recommendation and Board's conclusion in that case was expressly based on an assumption that there was no suggestion in the language of West Virginia Code Section 5-10-15, or otherwise, that “period of armed conflict” referred to

only periods of limited duration or for limited objectives. A.R. 236. The Hearing Officer and Board subsequently recognized that the rule of *ejusdem generis* does impose that limitation and began applying it in all appeals involving requests for PERS military service credit that followed Mr. Hubbard's, including Mr. Olthaus' appeal and all of the appeals of the Respondents, and has consistently declined to treat the period from October 18, 1983, to October 24, 1983, as a "period of armed conflict" on that basis. A.R. 363-64, 566, 779-80. The Board, like a court, should be free to amend its decisions and conclusions when new principles of law or facts are considered. *See Adkins v. St. Francis Hosp. of Charleston, W. Va.*, 149 W. Va. 705, 143 S.E.2d 154 (1965) (observing that "stare decisis is not an inflexible policy . . .").

Moreover, much like the case in *Olthaus*, the decision in *Hubbard* did not result in the Board actually awarding any service credit to Mr. Hubbard. The thirteen-day period approved as a "period of armed conflict" was not sufficient to yield him any additional service credit. As Board staff explained, the minimum amount of service credit that can be awarded is one month, and one month of military service credit is only granted to PERS members with qualifying military service for at least one-half of a month. A.R. 196-98, 464-65, 485-86, 494-95. *See, also,*

Moreover, the Circuit Court's determination in this regard is clearly incorrect. The Circuit Court held that "under W. Va. Code § 5-10-14(a)(1), in calculating service credit, ten or more days of service equals one month of service credit." A.R. 1094. This holding is clearly incorrect. West Virginia Code Section 5-10-15(a)(1) merely provides that "[i]n no event may less than ten days of service rendered by a member in any calendar month be credited as a month of service," thus setting a floor for the rules

the Board is authorized to adopt with respect to the service to which a PERS member is entitled. Through the legislative rule, West Virginia Code of State Rules Section 162-5-4, which Board staff applies when calculating military service credit, the Board has adopted a rule that meets that requirement by requiring more than ten days of service in a month in order for a member to receive one month of credit. The Circuit Court was incorrect when it determined that there was a conflict between the regulation and statute. West Virginia Code Section 5-10-15(a)(1) simply sets a minimum; through the application of West Virginia Code of State Rules Section 162-5-4, PERS members working and contributing to the plan must actually be employed for one-half of a calendar month. The Board properly applied the rule to military service credit requests pursuant to its authority to determine the amount of military service credit to which a member is entitled in “any case of doubt.” W. Va. Code § 5-10-15(a)(6).

To the extent the Respondents’ arguments and the Circuit Court’s holding with regard to *Hubbard* and *Olthaus* are based on a concern for consistency and fairness, these issues are adequately addressed by the undisputed fact that the Board routinely denies requests for military service credit for periods of service other than the identified armed conflicts in the statute and the post-9/11 conflict duly recognized by the Board. Therefore, it was in error for the Circuit Court to have considered either of these decisions as anything other than non-binding precedent when it ruled on Respondents’ appeals.

### **CONCLUSION**

The Board respectfully requests that this Court reverse the March 20, 2013, Final Order of the Circuit Court of Kanawha County in all respects and reinstate

the Board's administrative final orders denying Respondents' requests for additional military service credit in PERS.

Respectfully Submitted,

West Virginia Consolidated Public  
Retirement Board

By Counsel



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of July 2013, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail, contained in a postage-paid envelope, addressed to counsel for all other parties to this appeal as follows:

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