

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-0846

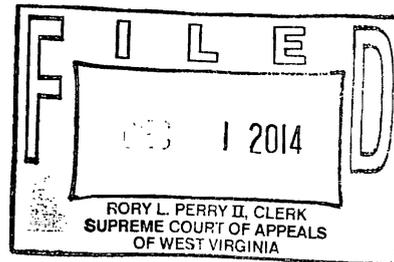
ARDEN J. CURRY, II,

Petitioner, Petitioner Below,

v.

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

Respondent, Respondent Below.



Appeal from the Circuit Court of Kanawha County, West Virginia

PETITIONER'S APPEAL BRIEF

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TABLE OF CONTENTS

Assignment of Error.....1
Statement of Case.....1
Summary of Argument.....5
Statement Regarding Oral Argument.....7
Argument.....7
Conclusion.....18

TABLE OF AUTHORITIES

West Virginia cases:

<i>Appalachian Power Company v. Tax Dep't.</i> , 195 W.Va. 573, 466 S.E.2d 424 (1995).....	7
<i>Booth v. Sims</i> , 193 W.Va. 323, 456 S.E.2d 167 (W.Va. 1965)	6, 10, 16, 18
<i>Crystal R.M. v. Charlie A.L.</i> , 194 W.Va. 538, 459 S.E.2d 415 (1995).....	7
<i>Davis Memorial Hospital v. West Virginia State Tax Commissioner</i> , 222 W.Va. 677, 671 S.E.2d 682 (2008).....	13
<i>Dadisman v. Moore</i> , 181 W.Va. 779, 384 S.E.2d 816 (1988).....	6, 9, 10, 16, 18
<i>Duckworth v. Stalnaker</i> , 68 W.Va. 197, 69 S.E.2d 850 (1910).....	12
<i>Farley v. Buckalew</i> , 186 W.Va. 693, 414 S.E.2d 454 (1992).....	14
<i>Flanigan v. West Virginia Public Employees Retirement System</i> , 176 W.Va. 330, 335, 342 S.E.2d 414, 419 (1986)	15
<i>Griffith v. Frontier West Virginia, Inc.</i> , 228 W.Va. 277, 719 S.E.2d 747 (2011).....	7
<i>Herford v. Meek</i> , 132 W.Va. 373, 52 S.E.2d 740 (1949).....	14
<i>Meadows v. Walmart Store, Inc.</i> , 207 W.Va. 203, 530 S.E.2d 676 (1999).....	13
<i>Michael v. Marion County Board of Education</i> , 198 W.Va. 523, 482 S.E.2d 140 (1996).....	11
<i>Muscatell v. Cline</i> , 196 W.Va. 588, 474 S.E.2d 518 (1996).....	7

<i>Smith v. State Worker’s Comp Commissioner</i> , 159 W.Va. 108, 219 S.E.2d 361 (1975).....	14
<i>Sniffen v. Cline</i> , 193 W.Va. 370, 456 S.E.2d 451 (1995).....	7, 8
<i>State v. Epperly</i> , 135 W.Va. 877, 65 S.E.2d 488 (1951).....	11
<i>State ex rel. Johnson v. Robinson</i> , 162 W.Va. 579, 251 S.E.2d 505 (2009).....	13
<i>Vanderbilt Mortgage & Fin., Inc. v. Cole</i> , 230 W.Va. 505, 511, 740 S.E.2d 562, 568 (2003).....	14
<i>West Virginia Consolidated Public Retirement Board v. Jones</i> , 233 W.Va. 681, 760 S.E.2d 495 (2014).....	5
<i>West Virginia Consolidated Public Retirement Board v. Wood</i> , 233 W.Va. 222, 757 S.E.2d 752 (2014).....	8, 14
<i>EEOC v. Arabian American Oil Co.</i> , 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).....	8
 Miscellaneous:	
West Virginia Code §5-10-2(11).....	5, 8, 16, 17
West Virginia Code §5-10-5.....	8, 9, 16
West Virginia Code §5-10-3a.....	15, 17
West Virginia Code §5-10-17.....	8, 13, 16, 17
 State Rules	
WV CSR 5-9.....	6, 16, 17

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PETITIONER'S APPEAL BRIEF

I.

ASSIGNMENT OF ERROR

Whether the trial court erred in concluding Petitioner did not meet the statutory eligibility requirement of “full time” employment for participation in the Public Employees Retirement System (PERS) where it is undisputed Petitioner worked in a job that normally requires 12 months per of service, which is the definition of “full time employment” for most of the years governing Petitioner’s employment?

II.

STATEMENT OF THE CASE

Petitioner Arden J. Curry, II, (hereinafter referred to as Curry) is a lawyer who was hired by the West Virginia Department of Agriculture (hereinafter referred to as Department) and was employed and continued to be employed as a “full time” exempt salaried employee of the

Department acting as its General Counsel. (See Affidavits of Commissioner Gus R. Douglass, JA at 236; Brenda Mobley, former personnel manager for the West Virginia Department of Agriculture JA at 247; and Curry Affidavit, JA at 242).¹ As a “full time” exempt salaried employee of the Department, Curry was required to perform any and all legal services the Department requested of him, regardless of the amount of time he was required to spend handling matters on behalf of the Department in any given year and he was required to be available to and on call with the Department 365 days a year, 24 hours a day (JA at 236, 247).

In this position, Curry was required to provide advice and recommendations to the Commissioner of the Department and its employees regarding the entire range of the legal issues faced by the Department. The legal issues included, but were not limited to, areas involving personnel , the interpretation of the rules and regulations of the Department, and legal advice regarding the Department’s responsibilities imposed upon it by the Federal Meat Inspection Act, the Federal Wholesale Meat Act, the Federal Poultry Products Inspection Act, and the Federal Wholesome Poultry Products Act. Curry also provided legal advice to the Department regarding the administration and enforcement of W.Va.Code §19-12A-1, *et. seq.* (Public Markets), W.Va.Code §19-2B-1 (Inspection of Meat and Poultry), W.Va.Code §19-2C-1, *et. seq.* (Auctioneer), W.Va.Code §19-3-1 (Sale of Farm Products by Commission Merchants), W.Va.Code §19-5-1 (Grading and Packing of Fruits and Vegetables), W.Va.Code §19-5A-1 (Controlled Atmosphere Storage of Fresh Fruits and Vegetables), W.Va.Code §19-9-1 (Diseases Among Domestic Animals), W.Va.Code §19-9A-1 (Feeding of Untreated Garbage to Swine), W.Va.Code §19-10-1 (Male Breeding Animals), W.Va.Code §19-10A-1 (The West Virginia Egg Marketing Law of 1998), W.Va.Code §19-10B-1 (Livestock Dealer’s Licensing Act), W.Va.Code

¹Citations to the Joint Appendix will be cited as “JA at ____.”

§19-11-1 (Bulk Milk Trade Law), W.Va.Code §19-11A-1, *et. seq.* (Dairy Products and Imitation Dairy Products Law), W.Va.Code §19-11B-1, *et. seq.* (Frozen Desserts and Imitation Frozen Desserts Law), W.Va.Code §19-12-1, *et. seq.* (Insect, Pest, Plant Diseases and Obnoxious Weeds), W.Va.Code §19-12D-1 (West Virginia Obnoxious Weed Act), W.Va.Code §19-12E-1, *et. seq.* (Industrial Hemp Development Act), W.Va.Code §19-13-1, *et. seq.* (Inspection and Protection of Agriculture), W.Va.Code §19-14-1, *et. seq.* (West Virginia Commercial Feed Law), W.Va.Code §19-15-1, *et. seq.* (West Virginia Fertilizer Law), W.Va.Code §19-15A-1, *et. seq.* (West Virginia Agricultural Liming Materials), W.Va.Code §19-16-1, *et. seq.* (West Virginia Seed Law), W.Va.Code §19-16A-1, *et. seq.* (West Virginia Pesticide Control Act), W.Va.Code §19-18-1, *et. seq.* (General Stock Law), W.Va.Code §19-20-1, *et. seq.* (Dogs and Cats), W.Va.Code §19-20A-1, *et. seq.* (Vaccination of Dogs and Cats for Rabies), and W.Va.Code §19-22-1, *et. seq.* (Vinegars).

As it relates to the administrative enforcement actions, Curry represented the Department as its counsel or as a hearing examiner in internal administrative hearings seeking to enforce the provisions of the Code Sections previously cited and the Department administrative Rules and Regulations related thereto. In addition, he provided advice to, and responded to FOIA requests that were directed to the Department. He also provided advice to the Department in developing administrative rules and regulations, emergency rules and regulations, and proposed legislations that affected the Department. Curry provided legal advice to the Commissioner of the Department regarding the duties prescribed to that office under W.Va.Code §19-1-4, along with legal advice regarding the Department's obligations under W.Va.Code §19-12A-1, *et. seq.*, which is the Farm Management Commission Act. His duties as General Counsel for the Department also

included providing legal advice and the preparation of documents dealing with West Virginia Rural Rehabilitation Trust Fund. He was called upon by the Department to bring legal action against borrowers of the Fund who are delinquent in their payments, represented the Fund in Bankruptcy matters, and brought foreclosure proceedings. Finally, the Department maintained insurance through the West Virginia Board of Insurance and Risk Management. To the extent that the Department was sued for any claims that were covered by its insurance policies, counsel was assigned to the Department by the West Virginia Board of Insurance and Risk Management to handle that litigation. While Curry did not appear in those actions as counsel for the Department, he was required to monitor the litigation on behalf of the Department. (JA at 242).

Curry's employment was renewed on an annual basis. Because of the nature of the legal services provided by Curry, the scope of the areas of expertise he was required to address on behalf of the Department, the unknown timing of when issues may arise within the Department, and because of the volume of services he was required to provide, Curry was employed in a position that not only normally, but actually, required twelve (12) months of service per year. (JA at 236, 247). Each and every paycheck Curry received from the Department deducted Curry's portion of the required contribution to PERS. (JA at 242, 247). While Curry acknowledged he never worked 1,040 hours or more per year, he did provide twelve months a year of service.

By correspondence dated June 17, 2013, Respondent West Virginia Consolidated Retirement Board notified Curry that he was not eligible to participate in PERS because he did not meet the definition of "full time" employment by meeting the requirement that he hold a position which normally requires 12 months per year of service and worked at least 1,040 hours per year. While not contesting that Curry held a position that normally required 12 months per year of

service, Respondent found Curry did not meet the hourly requirement of 1,040 hours per year of service. In issuing its denial of participation letter to Curry, Respondent did not take into consideration that prior to May 13, 2005, the definition of “full time” employment only required a participating employee to meet one of the two requirements (a job that normally requires 12 months per of service **and/or** at least 1,040 hours per year of service in that position) instead of both. (JA at 170).

Curry timely appealed the June 17, 2013 decision of Respondent, asserting that (a) he did meet the definition of a “full time” employee entitling him to participation in PERS and (b) the Board was estopped to deny Curry’s participation in PERS.² Respondent issued its final order denying Curry’s request for participation on March 5, 2014, by adopting the recommendations of Hearing Officer Jack W. DeBolt, dated January 7, 2014, that found against Curry. (JA at 37). Curry timely appealed Respondent’s decision to the Circuit Court of Kanawha County, West Virginia. By final order dated July 30, 2014, the Honorable Judge Tod J. Kaufman, without first allowing the parties to have a hearing, denied Curry’s appeal. (JA at 377).

III.

SUMMARY OF ARGUMENT

Pursuant to W.Va.Code §5-10-2(11), an employee, who is entitled to participate in PERS, “means any person who serves regularly as an officer or employee, ‘full time,’ on a salary basis,

²For purposes of this appeal, Curry concedes that his estoppel argument for participation in PERS based on the assertion that the Department of Agriculture informed him that he was eligible for participation in PERS has been rendered moot by the decision in *West Virginia Consolidated Public Retirement Board v. Jones*, 233 W.Va. 681, 760 S.E.2d 495 (2014). Curry nonetheless asserts that the Circuit Court of Kanawha County committed error, as a matter of law, in concluding that Curry did not meet the statutory eligibility requirements of “full time” employment for participation in PERS.

whose tenure is not restricted as to temporary or provisional appointment, in the service of...any political subdivision.” Curry became employed as a “full time” exempt employee of the West Virginia Department of Agriculture in approximately 1987 and with only a short interruptions in service, continued to be employed by the West Virginia Department of Agriculture until May 16, 2013. He was paid on a salary basis, by a participating employer, and his tenure was never restricted to a temporary or provisional appointment.

From the date of Curry’s initial employment in approximately 1987 up until May 13, 2005, it is uncontested that he was employed by the West Virginia Department of Agriculture, was carried on their books and records as a “full time” exempt employee, and no one disputes that he was employed in a position that not only normally, but actually, required 12 months per year of service. During this time, Respondent defined “full time” employment to be “employment of an employee by a participating public employer in a position which normally requires twelve (12) months per year of service **and/or** one thousand forty hours (1,040) per year of service in that position shall be considered as ‘full time’ employment.” (Emphasis added). WV CSR 5-9. It was not until May 13, 2005 that Respondent amended its definition of “full time” employment, removing the “or” provision from its definition and thus requiring, for the first time, that “full time” employment be defined as both a job that normally requires 12 months per year of service **and** the requirement that the employee work a minimum of 1,040 hours per year. Under this Court decisions of *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988) and *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (W.Va. 1965), Respondent could not, by changing its definition of “full time” employment in the year 2005, deprive Curry of his vested rights to participate in PERS earned prior to that date.

IV.

STATEMENT REGARDING ORAL ARGUMENT

Curry believes that oral argument under is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

V.

ARGUMENT

The trial court erred in concluding Petitioner did not meet the statutory eligibility requirement of “full time” employment for participation in the Public Employees Retirement System (PERS) where it is undisputed Petitioner worked in a job that normally requires 12 months per of service, which is the definition of “full time employment” for most of the years governing Petitioner’s employment

The question raised in this case is based upon undisputed facts and involves the interpretation of statutes and administrative rules and regulations. This Court has held that “[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syllabus Point 1, *Appalachian Power Company v. Tax Dep’t.*, 195 W.Va. 573, 466 S.E.2d 424 (1995); *see also Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996); *Crystal R.M. v. Charlie A.L.*, 194 W.Va. 538, 459 S.E.2d 415 (1995) and *Griffith v. Frontier West Virginia, Inc.*, 228 W.Va. 277, 719 S.E.2d 747 (2011).

Curry anticipates Respondent may argue that notwithstanding the general rule of *de novo* review of issues of law, this Court should follow the rule announced in *Sniffen v. Cline*, 193 W.Va. 370, 375, 456 S.E.2d 451, 455 (1995), where this Court held that “Absent clear legislative intent to

the contrary, we afford deference to a reasonable and permissible construction of (a) statute by (an administrative agency)” having policymaking authority relating to the statute. Nonetheless, this Court must at all times temper the principal announced in *Sniffen* with its pronouncement in *West Virginia Consolidated Public Retirement Board v. Wood*, 233 W.Va. 222, 228, 757 S.E.2d 752, 758 (2014), where this Court held that “While this Court agrees with the proposition that the Board’s interpretation is entitled to deference, it is imperative that a reviewing Court also consider the possibility, as the Circuit Court did in the present case, that the Board’s interpretation is erroneous” along with what Justice Scalia stated in his concurring opinion in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991), “[D]eference is not abdication and it requires us to accept only those agency interpretations that are reasonable and right of the principles of construction Courts normally employ.”

The ultimate issue in this appeal is not overly complicated. In W.Va.Code §5-10-17, the Legislature provided that all “employees” of appropriate participating public employers were entitled to participate in the PERS system. The Department of Agriculture was a participating employer. Our Legislature then defined an employee as “any person who serves regularly as an officer or employee, ‘full time,’ on a salaried basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of, in whose compensation is payable, in whole or in part, by any political subdivision,” which are all requirements Curry met. W.Va.Code §5-10-2(11). The Legislature elected to not define the term “full time,” but instead delegated to Respondent the responsibility for making effective the provisions of the Act, including granting to Respondent the authority “to make all rules and regulations” necessary to effectuate the Act. W.Va.Code § 5-10-5.

In compliance with the authority granted it under W.Va.Code §5-10-5, Respondent on December 20, 1982, filed with the Secretary of State its first set of rules and regulations, which included a definition of “full time” employment. (JA at 171). These rules and regulations, filed in December, 1982, defined “full time” employment as follows:

Employment of an employee by a participating public employer in a position which normally requires twelve (12) months per year of service **and/or** one thousand forty (1,040) hours per year of service in that position shall be considered as full time employment. (Emphasis added)

When Curry became employed by the Department in 1987, this Rule defining “full time” employment was in effect and remained in effect until May 13, 2005, when Respondent changed the definition of “full time” employment by amending its rules and regulations. (JA at 228). Instead of defining “full time” employment as being employed in a position which normally requires twelve months per year of service **and/or** requires at least one thousand forty (1,040) hours per year, it abolished the “or” language previously found in its regulations and for the first time required that “full time” employment include both (a) being employed in a position that normally requires twelve months per year of service **and** (b) requiring at least one thousand forty (1,040) hours per year of service in that position. The question in this appeal is whether Respondent’s election to alter the definition of “full time” employment and make it more restrictive in May of 2005, can be used to deprive Curry of his constitutionally and contractually vested rights.

Respondent does not dispute that in *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988), this Court recognized that, by participating in a public retirement plan, public employees obtain constitutionally protected contractual rights and that the State cannot divest plan

participants of their rights except by due process. Likewise, Respondent does not contest that seven years later in *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1965), this Court expanded upon the principles established in *Dadisman* and clarified that even employees who are not yet eligible to retire can have constitutionally protected or “vested” rights to their expected pension plan benefits. Specifically, in Syllabus Points 5, 11, 12, and 18 of *Booth*, this Court held:

5. In public employee pension cases, what often concerns the court is not the technical concept of "vesting," but rather the conditions under which public employees have a property right protected under the contract clauses because of substantial detrimental reliance on the existing pension system.

11. If the State (or its political subdivisions) promise to defer salary until a person's retirement from state or local employment and to pay that deferred salary in the form of a pension, the State (or its political subdivisions) cannot eliminate this expectancy without just compensation once an employee has substantially relied to his or her detriment.

12. The cynosure of an employee's *W.Va. Const. art III, § 4* contract right to a pension is not the employee's or even the government's contribution to the fund; rather, it is the government's promise to pay.

18. Because *all* employees who contribute to a state pension fund and who have substantially relied to their detriment on specific contribution and benefits schedules have immediate legitimate expectations that rise to the level of constitutionally protected contract property rights, we overrule *Mullett v. City of Huntington Police Pension Board*, 186 W.Va. 488, 413 S.E.2d 143 (1991) and its test of reasonableness for determining the constitutionality of legislative amendments to a pension plan. in Syllabus Point 18, this Court held:

In *Booth*, this Court focused on the employee’s expectation of and reliance on, receiving the promised benefits and sought to ensure that employees of the State would be able to rely on promised benefits in planning their futures. Thus, this Court held that once an employee had relied on a promise of certain benefits, the Legislature (or in this case Respondent) cannot simply

take them away without providing something of equal value. Moreover, recognizing that because many employees may not be able to produce tangible evidence to show they relied, to their detriment, on any specified promises benefit, this Court held that “after ten years of state service detrimental reliance is presumed.” 193 W.Va. at 340, 456 S.E.2d at 184.

Curry asserts that from the time he started with the Department 1987, to May 13, 2005, he believed that he was entitled to participate in PERS because of the definition of “full time” employment that had existed in Respondent’s rules and regulations from the very date he was first hired. (JA at 242). No one disputes that he held a position that normally required twelvemonths per year of service. Prior to Respondent’s amendment of the definition of “full time” employment in May of 2005, an individual was considered to be employed “full time” for pension purposes in the State if they held a position that normally required twelve months per year of service **and/or** they worked at least one thousand forty (1,040) hours per year of service in that position. Either would suffice and Curry clearly was employed in a job that not only normally but actually did require twelve months of service per year even though he did not meet the hourly criteria alternative. (JA at 236, 247).

A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the Courts (or an administrative agency) but instead must be given full force and effect. *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951). The plain meaning is to be accepted without resorting to the rules of interpretation. *Michael v. Marion County Board of Education*, 198 W.Va. 523, 482 S.E.2d 140 (1996). Curry asserts that the plain meaning of the regulation that was in effect from the time he was hired until May of 2005 allowed him to qualify as a “full time” employee if he met either of the criteria and that, because of the “and/or” language,

he was not required to meet both. One only has to look so far as Black's Law Dictionary, 5th edition, where it defines the word "or" to see that when used in a statute or regulation it provides for an alternative. Black's Law defines "or" as: "A disjunctive particle used to express an alternative or to give a choice of one among two or more things...The word or is to be used as a function word to indicate an alternative between different or unlike things."

Further, this Court in *Duckworth v. Stalnaker*, 68 W.Va. 197, 69 S.E.2d 850 (1910), appears to have concurred with this definition of the word "or" when it found that when "or" is used in a statute it must be construed as a disjunctive particle used to express an alternative or to give a choice among two or more things. In that regard, this Court held:

Counsel for Defendant in Error insists that the word "or" should be read as "and." But to insert "and" instead of "or" would be to transform the meaning of the language. It would change the sense of the instruction. "Or", as the word is here used, does not mean "and" and we are compelled to give the word its usual and ordinary meaning, there being nothing to indicate that it was intended to have any other meaning.

The above principles of statutory construction make it clear that prior to May 13, 2005, an individual employed by a participating public employer in the State met the definition of "full time" employment if (a) they were employed in a position which normally required twelve months per year service and/or (b) they were employed by a participating public employer in a position that required at least one thousand forty (1,040) hours of service in that position. Either would suffice. This reading of the definition of "full time" employment and how it should be interpreted is reinforced by the very fact that in May 2005, Respondent amended the definition of "full time" employment removing the "or" language. This Court has long recognized that a (a) "Cardinal rule of statutory construction is that significance and effect must, if possible, be given to

every section, clause, word, or part of ‘a statute’.” (Syllabus Point 3, *Meadows v. Walmart Store, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999); *see also* Syllabus Point 3, *State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 251 S.E.2d 505 (2009) (“A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.”). *Accord* Syllabus Point 3, *Davis Memorial Hospital v. West Virginia State Tax Commissioner*, 222 W.Va. 677, 671 S.E.2d 682 (2008).

These cardinal rules of statutory construction should also apply to interpreting administrative regulations. The word “or” that was included within the original definition of “full time” employment should not be considered just superfluous. The word “or” was drafted into the original definition because it was meant to provide for two different options for an individual to qualify as having “full time” employment. This reading of the original definition is further supported by the fact that if “or” really didn’t mean anything in the original definition, then why was it removed in 2005? The answer is simple. Respondent wanted to make the definition of “full time” employment more restrictive, and the only way it could do so was to remove the “or” language. The courts are not entitled, as Respondent suggests, to just simply eliminate the word “or” and pretend it never existed.

Respondent would like for this Court to ignore this argument and for some reason the trial court never even addressed it, even though it was presented in the briefs. Instead, Judge Kaufman simply found that the “and/or” requirement found in the definition of “full time” employment when Curry was originally hired was merely “ambiguous language” and because W.Va.Code §5-10-17(d), grants Respondent the final power to decide issues regarding membership status, Respondent’s decision, even though it may have been completely arbitrary, had to be accepted by

the trial court. Even if this Court was to find that the “and/or” language was “ambiguous,” it would be of no salvation to Respondent.³

A statute or administrative regulation is to be considered ambiguous if it is susceptible of two or more meanings. *Vanderbilt Mortgage & Fin., Inc. v. Cole*, 230 W.Va. 505, 511, 740 S.E.2d 562, 568 (2003) (“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 are of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.”) (Quoting *Herford v. Meek*, 132 W.Va. 373, 52 S.E.2d 740 (1949). See also *West Virginia Consolidated Public Retirement Board v. Wood*, 233 W.Va. 222, 757 S.E.2d 752 (2014).

Even if the trial court and Respondent were correct that the regulations’ “and/or” language is actually ambiguous, this Court has held that “[a] statute that is ambiguous must be construed before it can be applied.” (Syllabus Point 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992) “Ambiguity is a term connoting doubtfulness, doubleness of meaning of indistinctness or uncertainty of expression used in a written instrument.” As this Court in *Wood*, if statutory or regulatory language is found to be ambiguous, then the Court is required to “construe the statute and determine its proper application to the facts.” In endeavoring to construe an ambiguous statute, this Court has stated that it is cognizant that “[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” (Syllabus Point 1, *Smith v. State Worker’s Comp Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

³The Hearing Examiner who issued the original ruling in this matter found that “If the Legislative Rule is considered by itself, ‘and/or’ probably should be considered to mean ‘or’.” The Hearing Examiner, however, went on to find, like Judge Kaufman, that “The language ‘and/or’ is patently ambiguous.”

In some cases, it might be difficult for a Court to try and determine what the “intent” of the Legislature or an agency was when attempting to figure out how to construe a statute or regulation. However, in the case of PERS that is an easy endeavor. When establishing the entire PERS system, the Legislature in W.Va.Code §5-10-3(a), announced how all of the provisions of the Act and the regulations that were ultimately to be adopted to implement it must be construed. Our Legislature stated that, “The provisions of this article shall be liberally construed so as to provide a general retirement system for the employees of the State herein made eligible for such retirement.”

Similarly, in *Flanigan v. West Virginia Public Employees Retirement System*, 176 W.Va. 330, 335, 342 S.E.2d 414, 419 (1986), this Court re-emphasized that the provisions of the Act must be construed liberally in favor of its intended beneficiaries when this Court declared, “In approaching a resolution of this matter, W.Va.Code § 5-10-3(a) (1979 replacement volume) we are directed to give substantial weight to the remedial nature of the PERS Act by the legislative ordination to the construe its provisions liberally in favor of its intended beneficiary.”

What this really means is that even if this Court were to find that the “and/or” language found in the original rules and regulations were to be ambiguous, it must still construe that language liberally to provide for Curry’s participation in PERS. If the language can be interpreted as providing the alternative for meeting the definition of “full time” employment that Curry asserts, then it must be interpreted to find that Curry was covered under PERS. Thus, regardless of whether the “and/or” language is clear on its face and provided two alternatives to meet the definition of “full time” employment as Curry asserts, or even if it is found to be ambiguous, Curry still clearly met the definition of “full time” employment when he was initially

hired in 1987. And, as a result of this Court's decisions in *Dadisman* and *Booth*, Curry cannot be deprived of his constitutional and statutorily vested rights to participate in PERS.

Finally, Judge Kaufman suggested in his ruling, (JA at 377), that even if the "and/or" language would be construed to mean "or," it would still be in direct conflict with the statutory requirement of being employed "full time" as is set forth in W.Va.Code §5-10-2(11). Curry respectfully submits this rationale makes no sense and should be rejected by this Court. As noted earlier, the Legislature in W.Va.Code §5-10-17, references "full time" employment, but left it up to Respondent to adopt a regulation defining that term. Instead, the Legislature, pursuant to W.Va.Code §5-10-5, granted Respondent the exclusive authority to "make all rules and regulations" that were necessary to effectuate the Act. Respondent, as part of the duties specifically delegated to it, defined "full time" employment in its regulations beginning in December 1982, at WV CSR 5-9. Under the irrebuttable presumption of ten years of service found in *Booth*, Curry is entitled to have his contractual and constitutionally vested benefits protected. Likewise, even if this Court had never adopted the irrebuttable presumption of detrimental reliance after ten years of service in *Booth*, Curry has also shown uncontested detrimental reliance upon the Board's definition of "full time" employment that existed at the time he accepted and continued employment with the Department of Agriculture. (JA at 242). At no time has Respondent ever contested Curry's assertion of detrimental reliance, whether it be based on the ten year rule or actual detrimental reliance.

Curry readily agrees that Respondent's definition of "full time" employment must be read *in pari materia* with the provisions of W.Va.Code §§5-10-17 and 5-10-2(11). Furthermore, Respondent's definition of "full time" employment also must be read *in pari materia* with the

overriding expression of intent by the Legislature in W.Va.Code §5-10-3a, which provides that all of the provisions of the Act “shall be liberally construed so as to provide a general retirement system for the employees of the State herein made eligible for such retirement.”

Taking into consideration these factors, there is literally nothing inconsistent between the requirement in W.Va.Code §5-10-2(11), that defines an employee as one who works “full time” and Respondent’s adoption of the definition of “full time” employment in WV CSR 5-9. Very simply, the Legislature mandated that in order to be able to participate in PERS, the employee must be “full time,” but left it up to the retirement system itself to define what “full time” employment was. This gave Respondent the discretion, over time, to expand or constrict those who would be eligible to participate in PERS based upon the ever-changing financial condition of the State. That is exactly what Respondent did in May 2005, when it made the definition of “full time” employment more restrictive than that that had existed for the previous 23 years. However, when it did so, Curry already had vested contractual and statutory rights to participate in PERS, which could not be taken away by Respondent changing the definition of “full time” employment.

VI.

CONCLUSION

For the foregoing reasons, Petitioner Arden J. Curry, II, respectfully moves the Court to reverse the final order issued by the Circuit Court of Kanawha County and to hold, consistent with *Dadisman* and *Booth*, that Petitioner is entitled to retirement benefits under PERS because he met the definition of “full time” employment, established by Respondent West Virginia Consolidated Public Retirement Board, from 1987, to May 13, 2005. Furthermore, Petitioner seeks such other relief as the Court may deem appropriate.

ARDEN J. CURRY, II, Petitioner,

–By Counsel–



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-0846

ARDEN J. CURRY, II,

Petitioner, Petitioner Below,

v.

WEST VIRGINIA CONSOLIDATED

PUBLIC RETIREMENT BOARD,

Respondent, Respondent Below.

Appeal from the Circuit Court of Kanawha County, West Virginia

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that on the 1st day of December, 2014, filed the foregoing **PETITIONER'S APPEAL BRIEF** with the Clerk of the Court and served the same upon counsel for Respondent via U.S. mail, postage prepaid, a true copy thereof to the following:

J. Jeaneen Legato
4101 MacCorkle Avenue, SE
Charleston, West Virginia 25304



Lonnie C. Simmons (W.Va. I.D. No. 3406)