IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

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No. 22464

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STANLEY W. BOOTH, WILLIAM D. TOTTEN, CHARLES R. MARTIN AND GORDON L. CLARK, INDIVIDUALLY,
Petitioners,

v.

JAMES L. SIMS, AS THE EXECUTIVE SECRETARY OF THE STATE OF WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD, LORETTA K. ELDER, DAVID A. HANEY, DAVID A. WYANT, TONEY LAUTAR, JR., JAMES H. MORTON, ELIZABETH POUNDSTONE, S. S. SATTERFIELD, JANET F. WILSON, ALL AS MEMBERS OF THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD, CHUCK POLAN, AS CHAIRMAN OF THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD, GLEN GAINER, III, AS VICE CHAIRMAN OF THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD, AND GOVERNOR GASTON CAPERTON AND STATE TREASURER LARRIE BAILEY, BOTH AS EX OFFICIO MEMBERS OF THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,
Respondents.

WRIT OF MANDAMUS

WRIT GRANTED AS MOULDED

Submitted: 12 October 1994
Filed: 15 December 1994
Filed as Modified: 24 March 1995

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CHIEF JUSTICE NEELY delivered the Opinion of the Court.
JUSTICE BROTHERTON did not participate.
RETIRED JUSTICE MILLER sitting by temporary assignment.
RETIRED JUSTICE MILLER concurs in part, and dissents in part, and reserves the right to file a concurring and dissenting opinion.

SYLLABUS BY THE COURT

1. Because money is expected to be put away as a condition precedent to fund the state pension systems, pensions are legitimate debts of the State.

2. To the extent that anything in Mullett v. City of Huntington Police Pension Board, 186 W.Va. 488, 413 S.E.2d 143 (1991) or State ex rel. Fox v. Board of Trustees of Policeman's Pension, 148 W.Va. 369, 135 S.E.2d 262 (1964), is inconsistent with this opinion, they are overruled.

3. When considering the constitutionality of legislative amendments to pension plans, an employee's eligibility for a pension does not determine whether he or she has vested contract rights. The determination of an employee's vested contract rights concerns whether the employee has sufficient years of service in the system that he or she can be considered to have relied substantially to his or her detriment on the existing pension benefits and contribution schedules.

4. Considerations of detrimental reliance do not alter the applicable statutes controlling a state employee's eligibility

for a pension, itself. Until a public employee meets the relevant age and service requirements for collection of a pension, he or she may not receive a pension, and the existence of constitutionally protected reliance interests in pension benefit and contribution schedules do not in any way alter the existing procedure for reimbursing pension contributions into the plan upon a public employee's voluntary or involuntary separation from state employment.

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.

6. In pension cases, then, there are two distinct issues of contract: (1) an employee's contract right to collect a pension after statutory eligibility requirements have been met; and (2) an employee's legitimate expectations, also contractual in nature, that the government will not detrimentally alter the pension scheme once the employee has spent sufficient time in the system to have relied to his or her detriment. The first issue involves whether the employee has remained in government service for such a length of

time that he or she can collect benefits; the second issue involves the employee's reliance on promised government benefits after years of government service but before actual retirement age. Pension eligibility and reasonable expectations about the system's benefits are entirely separate issues.

7. By meeting certain eligibility requirements, a public employee acquires a right to payment under a pension plan. For any employee not yet eligible for payment, this is a mere expectancy; if the public employee does not meet the age and service requirements for benefits, his or her participation in a state pension plan does not allow receipt of a pension. But substantial employee participation in the system does create an employee's reliance interest in pension benefits. An employee's membership in a pension system and his or her forbearance in seeking other employment prevents the legislature from impairing the obligations of the pension contract once the employee has performed a substantial part of his or her end of the bargain and relied to his or her detriment.

8. Although participation in a government pension system and forbearance in seeking other employment create an employee's contract right to pension benefits under art. III, § 4 of our Constitution, such participation does not create contract

rights to government employment. The entitlement to continued government employment continues to be controlled by civil service statutes, applicable regulations, the due process and equal protection clauses, the first amendment and other employment-related law.

9. If an employee engages in misconduct during his or her public service, he or she may forfeit rights to collect a pension later. Insofar as West Virginia Public Employees Retirement System v. Dodd, 183 W.Va. 544, 396 S.E.2d 725 (1990) holds that an employee's misconduct results in a forfeiture of the entire pension, it is still good law because the requirement of honorable service has been established in advance and has been made an explicit part of the entire bargain. Otherwise, if misconduct is not at issue, Dodd (and all other similar cases) no longer state the law with regard to legislative amendments to a government pension plan; thus, to the extent Dodd and other cases are inconsistent with this opinion, they are overruled.

10. When the legislature structured the state trooper's pension system to allow for retirement before age fifty, the State encouraged state troopers to forego potential employment opportunities today for real pension benefits tomorrow. By

promising pension benefits, the State entices employees to remain in the government's employ, and it is the enticement that is at the heart of employees' constitutionally protected contract right after substantial reliance not to have their own pension plan detrimentally altered.

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.

13. In Dadisman v. Moore, 181 W.Va. 779, 384 S.E.2d 816 (1989), this Court emphasized the legislature's obligation to fund pension systems on a sound actuarial basis. We are not administrators, however, and we can only articulate what the law is. It is for the governor and the legislature to enforce the law.

14. Because pensions are a lawful debt of the State, the proper remedy for any failure to pay a pension is a mandamus action against the state treasurer and auditor. The funding of any pension program is the legislature's problem--not the state employees' problem--and once the legislature establishes a pension program, it must find a way to pay the pensions to all employees who have substantial reliance interests.

15. Changes may be made in pension systems with regard to new employees who have not yet joined the system and who have not yet relied to their detriment on government promises of future benefits. Furthermore, changes can be made with regard to employees with so few years of service that they cannot be said to have relied to their detriment. Line drawing in this latter regard must be made on a case-by-case basis, but after ten years of state service detrimental reliance is presumed.

16. Our constitutional provision against the State's impairment of obligations of contract, W.Va. Const. art. III, § 4, means only that the government must keep its promises; art. III, § 4 does not mean or even imply that the government must make promises in the first place.

17. To the extent that the government wishes to apportion future wage increases between immediate cash payments to existing workers and improved funding of pension systems, it may do so: No state or local employee has a right to a wage increase, and the State may ask workers to help make pension funds solvent by contributing to the funds new money given to them by the State for this purpose.

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.

19. The pension rights of all current state pension plan members who have substantially relied to their detriment cannot be detrimentally altered at all, and any alterations to keep the trust fund solvent must be directed to the infusion of additional money. "Detrimentally alter" means the legislature cannot reduce the existing benefits (including such things as medical coverage) of

the pension plan or raise the contribution level without giving the employee sufficient money to pay the higher contribution. Should the legislature seek to reduce certain advantages of a pension plan, it must offer equal benefits in their place as just compensation.

20. Until an employee becomes eligible to draw a pension, his or her benefits can be determined on an actuarial basis, and until such time as the employee's reliance interest is so strong as effectively to preclude all other options, the State may buy out the employee's contract property rights. At some point, however, the worker has chosen to remain in public employment for such a substantial part of his or her life that the State can no longer purchase the employee's pension rights without the acquiescence of the employee. At what point in an employee's career it is no longer equitable for the State to buy back the employee's contract rights on a sound actuarial basis without confounding principles forbidding the impairment of contracts can be determined only on a case-by-case basis by the legislature and the courts.

21. Although the legislature may augment pension property rights, the legislature cannot simply reduce a participating employee's pension property rights once it establishes the system unless the employee acquiesces in the change to the pension

plan or unless the employee has so few years in the system that he or she has not detrimentally relied on promised pension benefits.

22. The legislature may increase a public employee's salary contribution to a pension plan if it gives a corresponding raise in salary or other benefits that offsets the public employee's increased contribution to the system. To be valid under W. Va. Const. art. III, § 4, the additional salary or other benefits must at least cover the public employee's extra contribution to the system.

23. This Court has never imposed a fiduciary duty upon the contributing members of a pension system. Requiring public employees to protect the future solvency of a pension system is an unconstitutional shifting of the State's own burden.

24. W. Va. Code 15-2-26 [1994] (the increased contribution provision) and W. Va. Code 15-2-27(c)(2) [1994] (the provision eliminating use of annual and sick leave to allow earlier benefits) do not impair the State's obligations of contract; however, to the extent that W. Va. Code 15-2-27a [1994] (the provision reducing state troopers' cost-of-living adjustment) impairs the

obligations of contract under W. Va. Const. art. III, § 4, it is unconstitutional.

Neely, J.:

This mandamus proceeding presents the question whether certain 1994 amendments to our State's public safety pension plan impair the obligations of contract under art. III, § 4 of the West Virginia Constitution. We granted a rule to show cause to set the law in clear and unambiguous terms concerning the pension rights of thousands of West Virginia public employees who have given their lives to government service and now rely for their future health, welfare and security upon the promises made to them by their fellow citizens through the elected legislature. For the reasons given below, legitimate expectations of government servants cannot be confounded after those servants have partially performed their part of the bargain with the people, relied to their detriment, and foreclosed other career options. Accordingly, to the extent that we find the 1994 public safety amendments unconstitutional in this opinion, we award the petitioners a writ of mandamus.

I.

THE FACTS

For the past seventy-five years, the West Virginia Division of Public Safety ["Division"] has employed hundreds of state troopers. These troopers are charged with protecting the life, liberty and property of our citizens, and this Court takes judicial notice that law enforcement is a physically demanding and dangerous occupation. Rule 201, W.Va. Rules of Evidence.

In 1919, the Division began its mission with one hundred and twenty-five men who had uniforms adapted from the World War I infantryman uniform. Today, the Division employs over five hundred men and women who are charged with law enforcement duties in what remains a paramilitary organization.

The legislature established a pension plan for the Division's trooper members in 1935. The plan originally required all troopers to make contributions amounting to 4 percent of their salaries and it was provided that the Division would match these contributions with an equal 4 percent payment.

Previously, the "Division of Public Safety" was known as the "Department of Public Safety," and the Division's members are popularly referred to as "state police" or "state troopers."

Miscellaneous fees also funded the system.

By 1993, the pension system required all state troopers to pay 6 percent of their salaries into the retirement system, and the Division made matching contributions of 12 percent. W.Va Code 15-2-26 [1990]. After meeting eligibility for retirement, a state

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W.Va. Code 15-2-27 [1994] governs eligibility for collection of a pension. The statute provides that:

> (a) The retirement board shall retire any member of the [division] of public safety when the member has both attained the age of fifty-five years and completed twenty-five years of service as a member of the [division], including military service credit granted under the provisions of section twenty-eight of this article.
>
> (b) The retirement board shall retire any member of the division of public safety who has lodged with the secretary of the consolidated public retirement board his or her voluntary petition in writing for retirement, and:
>
> (1) Has or shall have completed twenty-five years of service as a member of the division (including military service credit granted under the provisions of section twenty-eight of this article);
>
> (2) Has or shall have attained the age of fifty years and has or shall have completed twenty years of service as a member of the division (excluding military service credit granted under section twenty-eight of this article); or
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> (3) Being under the age of fifty years has or shall have completed twenty years of service as a member of the division (excluding military service credit granted under section twenty-eight of this article).

trooper could then expect to receive an annual pension equal to 5.5 percent of his or her cumulative lifetime earnings as a state trooper or $6,000, whichever was greater. W.Va. Code 15-2-27(c)(1) and (2)

Under W.Va. Code 15-2-27(2), if a member had served twenty years or longer but less than twenty-five years as a member of the Division and was retired before reaching age fifty, payment of the pension would not begin until the member reached fifty. Beginning in 1988, however, W.Va. Code 5-16-13(e), part of the West Virginia Public Employees Insurance Act, conceivably allowed retiring troopers under the age of fifty to credit their accumulated annual and sick leave in order to satisfy the twenty-five year service requirement. This not only allowed troopers to increase their pensions, but also to draw them earlier. W.Va. Code 5-16-13(e) [1992] currently states that:

> In the alternative to the extension of insurance coverage through premium payment provided in the two preceding subsections, on and after the first day of July, one thousand nine hundred eighty-eight, the participating employee's accrued annual leave and sick leave may be applied, on the basis of two days retirement service credit for each one day of accrued annual and sick leave, toward an increase in the employee's retirement benefits with such days constituting additional credited service in computation of such benefits under any state retirement system. However, such credited service shall not be used in meeting initial eligibility for retirement criteria, but only as additional service credited in excess thereof.

On January 25, 1994, the Consolidated Public Retirement Board voted to allow a state trooper to use his accrued sick and annual days to receive his pension before age fifty, as well as to collect greater monthly benefits under Code 5-16-13(e). After this decision, the legislature enacted W.Va. Code 15-2-27(c)(2), which states that "[b]eginning on the fifteenth day of July one thousand nine hundred ninety-four, in no event may the provisions of [W.Va.

[1988]. In other words, if a trooper had earned $500,000 in total salary payments as a trooper over twenty-five years of service, his or her pension would be $27,500 per year for the rest of his or her life. In addition, beginning in 1988, the legislature also allowed all eligible retired members who had reached age fifty-six and over to collect an additional 3.75 percent of their pension awards as an annual annuity adjustment. W.Va. Code 15-2-27a [1988].

Before the legislature amended the plan's benefits in 1988, concern had arisen concerning the future solvency of the Division's pension system. According to a 1987 actuarial study, the existing contributions into the system were not sufficient to meet future pension payments, and the periodic increases in benefits without the necessary additional contribution levels from the employees and the Division created an $11,400,000 fund deficit. Although the plan's contribution levels had remained at the 18 to 20 percent of salary during the 1970s and 1980s, the 1987 actuarial review suggested that the required contributions should have been between 25 and 30 percent of the existing salary level. By 1990,

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Code 5-16-13] be applied in determining eligibility to retire with either immediate or deferred commencement of benefit."

The constitutionality of this enactment, as it involves existing contract rights of the petitioners, is reserved for our discussion in section V.

the unfunded liability of the fund totalled over 88 million dollars, and the actuarial report prepared for the Division estimated the pension fund would be in a deficit by 2005.

Following the retirement of twenty-four state troopers during the calendar year 1993, the legislature responded to concerns about the fund's actuarial soundness and amended the pension plan in 1994. The newly wrought changes at issue here: (1) increased the monthly payroll deduction from state troopers' salaries from 6 percent to 7.5 percent effective 1 July 1994 and raised these contributions to 9 percent effective 1 July 1995; (2) prohibited the state troopers' use of accumulated but unused annual and sick leave as credit toward years of service in determining eligibility for retirement benefits (effective 15 July 1994); and (3) reduced

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According to the Consolidated Public Retirement Board's Annual Report for the year ending June 30, 1994, a total of fifty state troopers retired from the Division during fiscal year 1993-94. Thirty-six of these retirements occurred during the six-month period between January 1, 1994 and June 30, 1994.

The legislature also enacted a new retirement system known as The West Virginia State Police Retirement Act ["Act"], W.Va. Code 15-2A-1 to 15-2A-19, which is intended to cover all future troopers of the Division. The petitioners claim the Act could be interpreted to apply to "all" troopers in the system before the enactment, and, consequently, that this enactment would create a more severe reduction of benefits. For the reasons given below, however, we find the Act does not govern pension eligibility for any state trooper who was a member of the Division's pension fund before the amendments of 12 March 1994.

the public safety retirement annual annuity (cost of living) adjustment from an annual 3.75 percent to 2 percent (effective 15 September 1994). W. Va. Code 15-2-26, 15-2-27(c)(2) and 15-2-27a [1994].

On the effective dates of the amendments, the petitioners were all state police officers under the age of fifty who had over twenty years' service with the Division. Thus, although no law compels them to do so, the petitioners may retire now and collect their respective pensions on the date that each of them reaches the age of fifty. W. Va. Code 15-2-27(c)(2) [1988 and 1994].

Rather than retire before 15 September 1994 in order to protect their rights to a greater annuity, however, the petitioners sought to enjoin the respondents' implementation of the amendments

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The 1994 legislature also amended certain provisions of the Division's pension plan that established new benefits for members. See n. 24, infra. Although not at issue here, these other provisions do influence our analysis of the constitutionality of the Amendments at issue, and, consequently, we reserve our discussion of them for section V.

The petitioners had also contributed into the Division's predecessor fund.

Alternatively, the petitioners contend they may also apply their respective accrued annual leave and sick leave time to allow their collection of a pension before age fifty. See the discussion in n. 4.

and filed a declaratory judgment action in the Circuit Court of Kanawha County on 7 July 1994. The petitioners challenged the constitutionality of the amendments under the contracts clauses of the State and federal Constitutions. Thereafter, petitioners brought this original mandamus action in this Court and on 16 September 1994, the circuit court dismissed the petitioners' declaratory judgment action.

In the mandamus proceeding now before this Court, the petitioners claim the pension amendments unconstitutionally impair the vested rights to which they were entitled before the new legislation. In reply, the respondents assert the petitioners have no vested rights and that the amendments are reasonable because they guarantee the future solvency of the public safety pension fund.

II.

THE CONSTITUTIONALITY OF PENSIONS

Although we have never doubted the constitutionality of pension plans, our past decisions have not elaborated on the reasons why pensions are legitimate debts of the State. However, given the current financial condition of the Division's fund, as well as the impact of our decision here on future legislation that may affect the fund itself, this Court must first address the circumstances

under which pensions of any sort are constitutional if we are to provide a complete statement on our pension law here.

W.Va. Const., art. X, § 4 provides "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years." See also, W.Va. Const., art. X, § 6 (prohibiting the State from granting credit to municipalities and from becoming an owner or stockholder in any company or association). Because debt today leads directly to cuts in services tomorrow, our constitutional provisions against state debt "are designed to prevent one generation of politicians from helping their friends whilst leaving the next generation of taxpayers to foot the bill." Winkler v. School Building Authority, 189 W.Va. 748, 769, 434 S.E.2d 420, 441 (1993)(Neely, J., concurring).

The Winkler decision explored the constitutionality of certain school revenue bonds that were to be liquidated from the general revenue of the state. Before approving the bonds, the legislature placed various disclaimers on the face of the bonds in

order to escape the application of our Constitution's prohibition against the creation of state debt. These disclaimers stated that the legislature was neither creating a debt of the State in violation of art. X, § 4, nor creating an obligation to appropriate money to liquidate the bonds. After analyzing our previous cases on the issue, as well as the reasons for our state's prohibition against state-created debt, this Court ultimately concluded the State could not shirk its responsibilities to fund the bonds once it had undertaken its initial financial commitment. 189 W.Va. at 763, 764, 420 S.E.2d at 435, 436. We, therefore, forbade the issuance of similar bonds in the future.

In Winkler, we did note, however, that in certain instances the State could issue bonds when the bond proceeds, themselves, were to be used to build projects such as toll bridges, or buildings that generated money to liquidate the bond obligation. 189 W.Va. 748 at 756-758, 434 S.E.2d at 428-430 (discussing funding arrangements that do not violate our constitutional debt limitations). In these instances, a special fund derives from the service itself, and, for this reason, lenders, not taxpayers, are the only potential losers if the project does not generate the anticipated returns.

This Court concluded long ago that our pension systems do not involve the creation of an unconstitutional debt. State ex rel. Board of Governors v. Sims, 133 W.Va. 239, 244, 55 S.E.2d 505, 508 (1949). Although Sims did not discuss the rationale behind its reasoning on this issue, given our decision in Winkler it should now be clear that pension systems are constitutional for the same reasons that special revenue bonds are constitutional: The pledge for the pension fund derives from the actuarially sound contributions of the employees and the Division; that is, the fund is expected to generate its own money to meet its eventual obligations. Because money is expected to be put away as a condition precedent to fund the system, pensions are legitimate debts of the state. Consequently, W.Va. Const. art. VI, § 51B(3)(d) requires the Governor to prepare a yearly budget that allows for payment of pensions as constitutionally created debt of the State.

Sims arose from a mandamus action brought by the Board of Governors of West Virginia University to compel the state auditor to pay its teachers certain pensions as provided for by the Board. This Court denied the writ because we concluded the legislature never authorized the Board to create a separate retirement program for its faculty with revenue that was derived from public money. Because Sims concerned the issue of the Board's authority to create a pension program, the opinion did not require a thorough discussion of the constitutionality of pension plans.

W.Va. Const. art. VI, § 51 controls our State's budget procedures. Under Subsection B, part 3 of the section, "[e]ach budget shall embrace an itemized estimate of the appropriations, in such form and detail as the governor shall determine or as may

be prescribed by law: (a) For the legislature as certified to the governor in the manner hereinafter provided; (b) for the executive department; (c) for the judiciary department, as provided by law, certified to the governor by the auditor; (d) for payment and discharge of the principal and interest of any debt of the State created in conformity with the Constitution, and all laws enacted in pursuance thereof; (e) for the salaries payable by the State under the Constitution and laws of the State; (f) for such other purposes as are set forth in the Constitution and in laws made in pursuance thereof." [Emphasis added]. The budget section of the State's finance division acts as staff agency for the Governor in the exercise of his powers and duties under W.Va. Const. art. VI, § 51. See, W.Va. Code 5A-2-1 [1991]. According to W.Va. Code § 5A-2-12(5) [1990]:

> Within fifteen days after the end of each month of the fiscal year, the head of every spending unit shall certify to the legislative auditor the status of obligations and payments of the spending unit for amounts of employee benefits, including, but not limited to, obligations and payments for social security withholding and employer matching, public employees insurance premiums and public employees retirement and teachers retirement systems. [Emphasis added].

> When a spending officer submits an expenditure schedule to the secretary as required by this section, the spending officer shall at the same time transmit a copy thereof to the legislative auditor and the joint committee on government and finance or its designee. If a spending officer of a spending unit fails to transmit such copy to the legislative auditor on or before the beginning of the fiscal year, the legislative auditor shall notify the secretary, auditor and treasurer of such failure, and thereafter no funds appropriated to such spending unit shall be encumbered or expended until the spending officer thereof has transmitted such copy to the legislative auditor.

Until the passage of the amendments at issue in this case, the legislature had not sufficiently increased the contributions of the troopers and the Division to meet the State's eventual pension debt, and according to a 1994 actuarial study, the unfunded accrued liability for the troopers' retirement system now totals $166,668,239. This is not the first time that this has happened. In Dadisman v. Moore, 181 W.Va. 779, 384 S.E.2d 816 (1989), this Court confronted the financial problems of the Public Employees Retirement System ["PERS"], which, because of underfunding from the

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> In the event the legislative auditor determines from certified reports or from other sources that any spending unit is not making all payments and transfers for employee benefits from funds appropriated for that purpose, the legislative auditor shall notify the secretary of the administration, auditor and treasurer of such determination and thereafter no funds appropriated to such spending unit shall be encumbered or expended for the salary or compensation to the head of the spending unit until the legislative auditor shall determine that such payments or transfers are being made on a timely basis.

In 1991, the legislature enacted "The Debt Management Act," W.Va. Code 12-6A-1 to 12-6A-7 ["DMA"], which currently supplements the State's creation of the finance division in W.Va. Code § 5A-2-1 et seq.. The DMA requires the director of the state Board of Investments to act as a liaison with the legislature on all debt matters, including, but not limited to debt issued by the state and its spending units.

legislature, had incurred unfunded liabilities totaling between $55 and $80 million.

Dadisman arose from an original mandamus proceeding brought by a retired public employee against various executive and legislative officials charged with administering PERS. We found the PERS officials had breached their contractual, statutory and trust duties to petitioner by failing to appropriate sufficient money to maintain the actuarial soundness of PERS and we granted a writ requiring proper funding of the system.

In an effort to maintain the actuarial soundness of the Division's pension system here, the legislature enacted the amendments to require greater contributions from the employees and the employer. Thus, in addressing the mandamus action now before us, we must consider whether the actuarial amendments, themselves, are constitutional measures designed to insure the fund's solvency.

III.

PAST CASES NEEDING CLARIFICATION

This Court has never expressly determined whether an employee, who otherwise satisfies the requirements for a pension but is still in active state service, may lose entitlements before he or she formally applies for retirement benefits. Instead, having often considered the issue of pension vesting in the context of retired employees who did not meet eligibility for pensions, we have decided some difficult cases that made incomplete law in this area.

We announced when a police officer may collect a pension under our law in State ex rel. Fox v. Board of Trustees of Policemen's Pension, 148 W. Va. 369, 135 S.E.2d 262 (1964):

> The right to a pension for a member of a municipal fire department or police department is based upon and created by . . . statute [W. Va. Code 8-6-20 (1959)] and such right accrues or vests in such member only when all the statutory conditions are performed and all its requirements are complied with and satisfied. It is then and only then that a vested right to such pension accrues.

148 W. Va. at 373, 135 S.E.2d at 264 (citing State ex rel. Frye v. Bachrach, 175 Ohio State 419, 195 N.E.2d 803 (1964)).

Fox concerned a police officer's right to a pension after his service ended with the City of Bluefield. When the officer

resigned, he had continuously served over twenty-five years with the city, but he had not yet attained the age of fifty. After he reached fifty, however, the officer immediately applied for a pension, and the pension board denied his application. On appeal, we affirmed the board's denial of benefits.

The result in Fox rested on our interpretation of W. Va. Code 8-6-20 [1959], which formerly governed an officer's eligibility for a pension. Given the language of that statute, we found it allowed "a pension only for a member of a municipal fire department or police department who [had] been in the service of such department for twenty years and who [was] a member of such department when he [reached] the age of fifty years." 148 W. Va. at 373, 135 S.E.2d at 265 [Emphasis added]. Because the officer resigned from service before he became fifty, he did not meet the requirements of the statute, and, consequently, he had no vested right in a pension. 148 W. Va. at 375, 135 S.E.2d at 266. In addition, Officer Fox had pled guilty to twenty-four felonies he committed while he was a policeman, and we held the pension statute also implicitly required honorable service to entitle an employee to retirement benefits. Syl. Pt. 3, Fox.

In 1976, the legislature codified Fox's common law requirement of honorable service for receipt of pension benefits

at W.Va. Code 5-10A-1 to 5-10A-10. We were eventually asked to decide the constitutionality of these enactments as they affected the rights of a long-term public employee who had been convicted of a felony for actions taken while Sheriff of Marion County in West Virginia Public Employees Retirement System v. Dodd, 183 W.Va. 544, 396 S.E.2d 725 (1990). Unlike Officer Fox, Sheriff Dodd had contributed to the pension system for over twenty-five years at the time the legislature made the above enactments, and he did not commit his felony until his thirtieth year of employment. Nevertheless, upon the sheriff's application for retirement benefits, the board denied his pension.

The sheriff argued he should receive at least a prorated portion of his pension for the services he rendered until he violated the law. He also asserted the 1976 enactments unconstitutionally impaired his pension rights under his employment contract. This Court, however, found the enactments did not impair the sheriff's contract because the implicit condition of honorable service at all times was never satisfied and, therefore, his contract rights to the pension never fully vested. 183 W.Va. at 550, 396 S.E.2d at

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Technically, Sheriff Dodd had received thirteen years of prior, noncontributing service credit under PERS for his participation before the implementation of the system in 1961.

732. Given his misconduct, we held the sheriff had forfeited his entire pension.

Both Fox and Dodd explored the issue of pension vesting in the context of employees who did not meet eligibility for benefits. However, Wagoner v. Gainer, 167 W.Va. 139, 279 S.E. 636 (1981), examined pension vesting as it applied to employees who were eligible and were receiving benefits.

In Wagoner, the legislature had passed amendments that reduced the pension benefits of retired supreme court justices and circuit court judges. Before the enactment of the amendments at issue in Wagoner, all eligible retired justices and judges could collect retirement benefits equal to 75 percent of the salary of their highest judicial office and their pensions went up as raises were given to active justices and judges. But, in 1979, the legislature repealed this "escalator provision," and the aggrieved retired judges challenged the legislation as an unconstitutional impairment of contract under the state and federal Constitutions. After the circuit court granted the judges a writ of mandamus allowing them payments under the earlier "escalator provision," the state auditor and treasurer appealed.

In Wagoner, the parties did not dispute that the appellees could receive a pension; instead, the dispute centered in the extent of the changes that the legislature could make to the retired pensioners' plans. This Court discussed how other jurisdictions treated pension rights, and after a lengthy examination of the subject, we concluded:

> Legislative modifications to a pension plan must be reasonable, and the test for reasonableness is whether the alteration to the pension scheme serves to keep the system sound and flexible [citations omitted.] Thus, beside the fact that the rights of retired plan members cannot be detrimentally altered at all, alterations to keep the trust fund stable should first be directed at threats to the trust fund's solvency.

167 W. Va. at 154, 279 S.E.2d at 645. [Emphasis added].

By removing the "escalator provisions," the legislature plainly subtracted benefits to which the appellees had a contract right. Consequently, we found the legislation impaired the obligations of contract. 167 W. Va. at 154, 279 S.E.2d at 646.

Until our decision in Dodd, Wagoner seemingly controlled our analysis of public employees' pension rights. In fact, before we issued the Dodd opinion, we held in Dadisman, supra, that "retired and active PERS plan participants have contractually vested

property rights created by the pension statute, and such property rights are enforceable and cannot be impaired or diminished by the State." Syl. Pt. 16, Dadisman [Emphasis added].

As noted earlier, Dadisman, supra, found the executive and legislative branches had failed to make the PERS fund actuarially sound over the course of many years. In analyzing the PERS trustees' duties to members of the fund, we concluded that the PERS trustees' failure to fund the pension system improperly impaired the state's obligations of contract to the participating plan members.

The petitioners suggest Dadisman (and Wagoner) establish contractually vested property interests for all participants in a contributory pension program. Unfortunately, the petitioners' argument does not reflect our previous holdings on this issue because, as our discussion below will reveal, our cases have unnecessarily merged pension eligibility with pension vesting. Our most recent pronouncement on pension vesting, Mullett v. City of Huntington Police Pension Board, 186 W. Va. 488, 413 S.E.2d 413 (1991), serves as an example.

Mullett is deceptively similar to the case now before us because it considered whether the legislature could amend an active employee's pension plan without unconstitutionally impairing the obligations of contract. Officer Mullett began his employment with the Huntington Police Department on 23 April 1968 and remained a full-time employee until his retirement in April 1991. During this period, to qualify for pension benefits, an officer needed at least twenty years' service under former W. Va. Code 8-6-20 [1967] ("1968 statute"). On the date of Officer Mullett's hire, the 1968 statute also conceivably allowed an officer with at least one day of military service to apply for an early pension. In 1985, however, the legislature amended the 1968 statute to limit the military service provision by requiring a "one year or more" interruption of employment before an officer could apply for an early pension. W. Va. Code 8-22-25(c) and 8-22-27 [1985].

Although retired by the time of his appeal, Officer Mullett was active at the time of the amendments affecting his pension plan.

Although Mullett gives 1968 as the date of the statute at issue, the legislative history actually reveals that at the time of the officer's hire, the statute had last been amended in 1967. However, to be consistent, we will refer to the statute as the "1968 statute."

The officer argued the 1968 statute required only a one day interruption for military service. Although this Court did not need to resolve the issue, we expressed doubt about this contention. Mullett, 186 W.Va. at 494, 413 S.E.2d at 149 n. 8.

In July 1977, Officer Mullett enlisted in the National Guard, and his enlistment entailed various weekend drills and summer camps until he retired from the police department. Although he admitted his National Guard service did not interrupt his police duties for a continuous year, Officer Mullett believed his guard duty allowed him an early pension when he applied for one in 1990.

The pension board twice denied Officer Mullett's application for an early pension. The circuit court, however, granted Officer Mullett his early pension because it believed the Wagoner case compelled the application of the 1968 statute in effect at the time of the officer's hire.

On appeal by the pension board, we discussed whether the officer could apply the provisions of the 1968 statute that allegedly entitled him to an early pension. After considering the facts, we decided he could not and held the 1985 legislation applied to his case because there was not "any vesting of rights on [Officer Mullett's] behalf in 1985, the . . . year [that the legislature made

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For the sake of both brevity and clarity, we have not detailed Mullett's exact procedural history.

the amendments]." 186 W. Va. at 493, 413 S.E.2d at 148. [Emphasis added]. We noted:

> Until such time as Mr. Mullett was entitled pursuant to the applicable statute to apply for pension benefits, his rights were clearly not vested. [Emphasis added].

186 W. Va. at 494, 413 S.E.2d at 149 (citing, Fox, 148 W. Va. at 373, 135 S.E.2d at 264; accord Wagoner, 167 W.Va. at 146, 279 S.E.2d at 641 ["in a contributory pension plan, the pensioners' rights vest when all the conditions entitling them thereto have been fulfilled."])

Although the respondents agree that the petitioners may apply for pensions now, which they may collect when they reach age fifty, they argue our holding in Mullett limits vesting to retired-- and not active-- plan members. In support of this contention, they direct us to Syllabus points 2 and 3 of Mullett, where we stated:

> When a municipal police officer retires and ceases to be a contributing member to a pension plan, his rights pursuant to such plan are vested and the pension contract becomes fully executed rather than executory.
>
> During the time period when a pension contract is merely executory with respect to a particular

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At the time of the 1985 amendments, Mr. Mullett had completed only 17 years of service. The retirement statute then in effect required at least twenty years' service before an officer became eligible to apply for a pension. See W. Va. Code 8-6-20 [1968].

> individual due to the fact that he/she is still an active, participating member, the Legislature may amend the plan provided that any amendments survive a test of reasonableness.

The respondents claim this above language clearly precludes any vested pension interest of the petitioners. We now, upon careful reflection, disagree.

We must concede here that Mullett was one of those cases where a hard case made, at least, incomplete law. Officer Mullett was arguing for an utterly absurd result, namely that by reason of his weekend warrior status he was entitled to the same military benefits as a person who had served a standard tour of duty in a regular, full-time armed force. Obviously, the legislature never intended such a result and in Mullett we simply found it more convenient to repair to the language of Fox to decide the case than to discuss legislative intent in the face of inartful draftsmanship. Now, however, we are squarely confronted with a case where: (1) state employees (2) accepted employment with West Virginia (3) under a compensation plan where a substantial part of their entire compensation was to be deferred and paid through a pension (4) the conditions for the vesting of which were clear and unambiguous and (5) (unlike Mullett) there was no inartful draftsmanship leading to a wholly irrational result so beyond any reasonable expectation

that it amounted to a clerical error. Consequently, to the extent that anything in Mullett or Fox (which was also a hard case on the facts, given Officer Fox's felony convictions) is inconsistent with this case, both Mullett and Fox are overruled.

IV.

OUR HOLDING TODAY

When considering the constitutionality of legislative amendments to pension plans, an employee's eligibility for a pension does not determine whether he or she has vested contract rights. Instead, the determination of an employee's vested contract rights concerns whether the employee has sufficient years of service in the system that he or she can be considered to have relied substantially to his or her detriment on the existing pension benefits and contribution schedules. We must, however, stress that our holding here does not alter the applicable statutes controlling a state employee's eligibility for a pension, itself. Until a public employee meets the relevant age and service requirements for collection of a pension, he or she may not receive a pension, and nothing in this opinion alters the existing procedure for reimbursing pension contributions into the plan upon a public employee's voluntary or involuntary separation from state employment. What we are concerned with today is not the technical concept of "vesting,"

but rather the conditions under which public employees have a property right not to have their pension system detrimentally altered that is protected under the contract clauses because of substantial detrimental reliance on the existing pension system.

In pension cases, then, there are two distinct issues of contract: (1) an employee's contract right to collect a pension after statutory eligibility requirements have been met; and (2) the employee's legitimate expectations, also contractual in nature, that the government will not detrimentally alter the pension scheme once the employee has spent sufficient time in the system to have substantially relied to his or her detriment. The first issue involves whether the employee has remained in government service for such a length of time that he or she can collect benefits; the second issue involves the employee's reliance on promised government benefits after years of government service but before actual retirement age. Pension eligibility and reasonable expectations about the system's continued benefits are entirely separate issues.

By meeting certain eligibility requirements, a public employee acquires a right to payment under a pension plan. For any employee not yet eligible for payment, this is a mere expectancy; if the public employee does not meet the age and service requirements

for benefits, his or her participation in a state pension plan does not allow receipt of a pension. But this same participation does create an employee's reliance interest in pension benefits. Consequently, an employee's membership in a pension system and his or her forbearance in seeking other employment prevents the legislature from impairing the obligations of the pension contract once the employee has performed a substantial part of his or her end of the bargain and has substantially relied to his or her detriment.

Although participation in a government pension system and forbearance in seeking other employment create an employee's contract right to pension benefits under art. III, § 4 of our Constitution, such participation does not create contract rights to government employment. We must make clear, therefore, that entitlement to continued government employment continues to be controlled by civil service statutes, applicable regulations, the due process and equal protection clauses, the first amendment and other employment-related law. See, Adkins v. Miller, 187 W.Va. 774, 421 S.E.2d 682 (1992); Snyder v. Civil Serv. Commission, 160 W.Va. 762, 238 S.E.2d 842 (1977); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

If an employee engages in misconduct during his or her public service, he or she may nevertheless forfeit rights to collect a pension later. Thus, insofar as Dodd holds that an employee's misconduct results in a forfeiture of the entire pension, it is still good law because the requirement of honorable service (at least since 1976) has been established in advance and has been made an explicit part of the entire bargain. Otherwise, if misconduct is not at issue, Dodd (and all other similar cases) no longer state the law when we consider legislative amendments to a government pension plan; thus, to the extent that Dodd and other cases are inconsistent with this opinion, they are overruled.

Other jurisdictions have reached similar results when considering the constitutionality of amendments to pension plans because the judges in these jurisdictions also conclude the deferred compensation embodied in a pension entitlement creates a reliance interest in the state employee that the law of contracts protects. See, Halpin v. Nebraska State Patrolmen's Retirement System, 211 Neb. 892 at 897-898, 320 N.W.2d 910 at 913-914 (1982)(citing cases); Singer v. Topeka, 227 Kan. 356, 607 P.2d 467 (1980). Although we

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This Court acknowledges that contrary authority exists on this issue. See, Annot., Vested Right of Pensioner to Pension, 52 A.L.R.2d

agree with the holdings of these cases, we must elaborate on the reasons for our rules to avoid possible misunderstanding.

Law enforcement is dangerous. Injuries and loss of life are inherent in the occupation. In order to protect the public as well as themselves, therefore, law enforcement officers must necessarily have certain characteristics. They must be agile, strong, flexible, resilient and have great stamina--all qualities associated with youth. Because the State understands this, the State seeks to recruit young persons for employment as state troopers. Until 1994, W.Va. Code 15-2-7(c) [1985] provided, in part, that "[e]ach applicant for appointment shall be a person not less than twenty-one nor more than thirty years of age, of sound constitution and good moral character; shall be required to pass such mental examination and meet other requirements as may be provided for in regulations promulgated by the cadet selection board; and shall be required to pass such physical examination as may be

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437. Moreover, although most jurisdictions have adopted contract approaches when considering amendments to public employee pensions, they do not always agree on the time when a public employee acquires contract property rights in a pension. See, 60A Am.Jur.2d, Pensions and Retirement Funds, §1620 (discussing when public employees' rights in a pension "vest"). We think any further discussion of these concerns unnecessarily confuses our decision here, and, for this reason, we choose not to discuss the other approaches to public employee pension rights because this Court rejects them in their entirety.

provided for in regulations promulgated by the retirement board: . . ."

When the legislature structures the state troopers' pension system to allow for retirement before age fifty, the legislature encourages suitable candidates to forego other employment opportunities today for real pension benefits tomorrow.

W.Va. Code 15-2-7(c) formerly allowed modification of its age limit requirement for persons over the age of thirty with active duty military experience who were applying for positions as helicopter pilots in the Division. In 1994, the legislature eliminated this language and W.Va. Code 15-2-7(c) now requires only a minimum age of twenty-one to become a state trooper.

In a 1964 article "The New Property," Professor Charles A. Reich postulated that the wealth of more and more Americans depends upon a relationship to government. Reich, "The New Property," 73 Yale L. Rev. 733 (1964). Although the ownership of property in earlier times was thought to confer power on a person, the government now assumes such power over the regulation of property that it, in essence, controls wealth. As Professor Reich wrote:

> [T]oday more and more of our wealth takes the form of rights or status than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure. For the jobless, their status as governmentally assisted or insured persons may be the main source of subsistence. . . . To the individual, these new forms, such as a profession, job or right to receive income, are the basis of his various

In practical terms, the State's promise results in the recruitment of many state troopers, who, although they may not attain the rank of Captain, may nevertheless complete twenty years' service and

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> statuses in society, and may therefore be the most meaningful and distinctive wealth he possesses.
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> . . .
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> No form of government largess is more personal or individual than an old age pension. No form is more clearly earned by the recipient, who, together with his employer, contributes to the Social Security fund during the years of his employment. No form is more obviously a compulsory substitute for private property; the tax on the wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property. . . .

73 Yale L. Rev. at 738-739, 769 [Emphasis added]. See also, Joseph William Singer, "The Reliance Interest in Property," 40 Stanford L. Rev. 611 (1988).

Under W.Va. Code 15-2-5 [1994], a state trooper who completes a certain amount of service with the Division is entitled to receive reclassification up to the rank of Corporal without the requirement of a promotion. The longevity requirements are as follows: Trooper--less than three years; Senior Trooper--three years to eight years; Trooper First Class--nine years to fourteen years; Corporal--more than fourteen years. No officer, however, may progress to a rank higher than Corporal under the reclassification system, and any other promotion of an officer must result by appointment of the superintendent. W.Va. Code 15-2-4.

Currently, a third-year Trooper earns $22,308 per year, a Corporal earns $27,960 and the highest rank of career troopers Lieutenant Colonel earns $42,360. The rank of Colonel earns $60,000

receive substantial retirement payments. The State's employment system for state troopers, then, not only results in a smooth recruitment of troopers, but also resembles the compensation system of the armed forces of the United States. Employees join the ranks early, complete their service during their most productive years, and then leave the system. By providing pensions, the State clearly entices troopers to remain in the government's employ, and it is the enticement that is at the heart of employees' constitutionally protected contract right after substantial reliance not to have their own pension plan detrimentally altered.

If the State (or its political subdivisions) promise to defer salary benefits until a person's retirement from State (or local) employment, and then promises to pay those deferred salary benefits 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. To permit otherwise would be tantamount to allowing the State (or its subdivisions) to steal a car an employee might have purchased had he or she not been required to allow part of the wage fund to be diverted to pension funding. The difference between

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and is reserved for the commanding officer who is appointed by the Governor. See, W.Va. § 15-2-2 [1991].

a pension and the car lies only in whether the employee may enjoy the benefit today or must wait until tomorrow. Thus, when a public employee has devoted substantial service to the state that translates into substantial detrimental reliance, the State must provide just compensation for any pension expectancy it eliminates.

Today's decision may, at first blush, appear harsh on legislatures and executives who are required to administer public employee pension funds and pay their benefits. The problem, however, is that both legislatures and executives in the past made then current promises to be fulfilled in the future by other legislatures and executives. It is a recurrent problem of government that today's elected officials curry favor with constituents by promising benefits that must be delivered by tomorrow's elected officials.

Unfortunately, the state troopers, secretaries, school service personnel, teachers, highway workers, maintenance employees, assistant prosecuting attorneys and other ordinary state and local workers are not sophisticated politicians who expect their government to lie to them. When, therefore, today's legislature and today's governor make those workers promises, those workers believe the promises and organize their lives in the expectation that their government and their employer will treat them honorably.

In these circumstances, the rules cannot be changed after employees have substantially relied to their detriment. The cynosure, then, 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. Heretofore, in Dadisman, supra, we have emphasized the legislature's obligation to fund pension systems on a sound actuarial basis. We are not administrators, however, and we can only articulate what the law is. It is for the governor and the legislature to enforce the law.

Because pensions are a lawful debt of the State, the proper remedy for any failure to pay a pension is a mandamus action against the state treasurer and auditor. Although the actuarial funding of the pension program may be an interesting issue for lawyers, it means nothing to lay persons who work for this State as troopers, secretaries and janitors and whose expertise is not in the law. Upon attaining eligibility, workers expect to collect their pensions, and their contracts do not condition these benefits upon actuarial soundness of the system. Consequently, the funding of any pension program is the legislature's problem--not the state employees'--and once the legislature establishes a pension program, it must find a way to pay the pensions, at least to those persons who have substantially relied.

Of course, this is not to say that changes may not be made in pension systems with regard to new employees who have not yet joined the system and who have not yet relied to their detriment. Changes can be made with regard to employees with so few years of service that they cannot be said to have substantially relied to their detriment. Line drawing in this latter regard must be made on a case-by-case basis, but after ten years of state service detrimental reliance is presumed. Thus, our constitutional provision against the State's impairment of obligations of contract, W.Va. Const. art. III, § 4, means only that the government must keep its promises; art. III, § 4 does not mean or even imply that the government must make promises in the first place. Furthermore, to the extent that the government wishes to apportion future wage increases between immediate cash payments to existing workers and improved funding of pension systems, it may do so: No state or local employee has a right to a wage increase, and (as in the case before us) the State may ask workers to help make pension funds solvent by contributing to the funds new money given to them by the State for this purpose.

For example, under W.Va. Code 51-2-13 [1994], the legislature recently raised the salaries of circuit court judges from $65,000 to $80,000 effective 1 January 1995; at the same time, the legislature also increased the judges' required contributions

As we noted earlier, under Wagoner, the legislature cannot "detrimentally alter" rights of vested retirees. However, in Mullett, we stated the Wagoner rule "does not automatically apply to amendments [that] affect the rights of non-retired employees." 186 W.Va. at 494, 413 S.E.2d at 149. If an active employee did not qualify for a pension when the legislature amended the plan, we formerly applied the "California rule":

> An employee's vested [sic] contractual pension rights may be modified prior to retirement for the purpose of keeping a pension flexible to permit adjustments in accord with changing conditions and at the same time maintain the

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to the pension fund from 6 percent to 9 percent under W.Va. Code 51-9-4(a) [1994]. Although the legislature increased the judges' required contributions to the pension plan by 3 percent, the legislature nevertheless gave the judges more than enough money to meet the extra contribution. Before the amendment, each judge paid about $3,900 (6 percent of $65,000) to the pension fund; after 1 January 1995, each judge must pay about $7,200 (9 percent of $80,000) to the pension fund; however, the $15,000 new money given to the judges offsets the extra $3,300 burden and actually results in over an $11,000 gain to the judges.

By its own terms, W.Va. Code 51-9-4(b) [1994], in fact, reveals that the legislature followed the rule we have now explained. The section reads: "[t]he Legislature finds that any increase in salary for judges of courts of record directly affects the actuarial soundness of the retirement system for judges of courts of record and, therefore, an increase in the required percentage contributions of members of that retirement system is the same subject for the purposes of determining the single object of this bill."

> integrity of the system. . . . Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantages to employees should be accompanied by comparable new advantages.

186 W.Va. at 495, 413 S.E.2d at 150. [Citations omitted].

According to Mullett, "the key concern raised by both Wagoner and the "California rule" . . . is disadvantage or detriment to the active members as a group rather than on an individual basis." 186 W.Va. at 495, 413 S.E.2d at 150. Because all employees who contribute to a state pension fund and who rely substantially to their detriment on a specific contribution and benefits schedule have immediate legitimate expectations that rise to the level of constitutionally protected contract property rights, we overrule Mullett's test of reasonableness for determining the constitutionality of legislative amendments to a pension system.

By allowing the legislature to diminish pension benefits, the Mullett test frustrates the employees' reliance on the anticipated pensions that they legitimately expect to receive upon qualifying through years of service and age for benefits. We therefore find the Wagoner rule applies to the case here and we hold that the pension rights of all current plan members who have substantially relied cannot be detrimentally altered at all, and that any alterations to keep the trust fund solvent must be directed to the infusion of additional money. See, Syl. Pt. 3, Wagoner ("While the Legislature has the right to make reasonable alterations to the judicial pension fund, such alterations cannot impair the benefit level where there are extant statutorily-created inequities and special unfunded benefit provisions that affect the equal application of the law or the financial integrity or cost of the pension fund.")

"Detrimentally alter" means the legislature cannot reduce the existing benefits (including such things as medical coverage) of the pension plan or raise the contribution level without giving the employee sufficient money to pay the higher contributions.

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[1] This does not mean that the legislature cannot modify medical benefits for working State employees since medical technology and the cost of medical care are constantly changing. However, if the state promises or implies to employees that at retirement they will receive the same medical benefits as active State employees at modest or no cost, then the State may not

Should the legislature seek to reduce certain advantages of a pension plan, it must offer other equal benefits in their place as just compensation. Thus, until an employee becomes eligible to draw a pension, his or her benefits can be determined on an actuarial basis, and until such time as the employee's reliance is so strong as effectively to preclude all other options, the State may buy out the employee's contract property rights. At some point, however, the worker has chosen to remain in public employment for such a substantial part of his or her life that the State can no longer purchase the employee's pension without the acquiescence of the employee. At what point in an employee's career it is no longer equitable for the State to buy back the employee's contract rights on a sound actuarial basis without confounding the principles forbidding the impairment of contracts can be decided only on a case-by-case basis by the legislature and the courts. Of course, the legislature may always augment pension property rights. But the legislature cannot reduce a participating employee's pension property rights once it establishes the system unless the employee acquiesces in the changes to the pension plan or unless the employee

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thereafter raise the cost of medical coverage disproportionately to cost raises applicable to working State employees or change the benefits in any way that does not apply as well to working State employees.

has so few years in the system that he or she has not detrimentally relied on promised pension benefits.

V.

THE AMENDMENTS AT ISSUE

Turning to the case before us of the state troopers, we hold the petitioners clearly have property rights that cannot be withdrawn under the rules that we have explained because the petitioners are all state employees who have contributed into the fund and substantially relied to their detriment in investing more than half of their working lives with the State. When considering the constitutionality of the amendments under Wagoner's test as we have refined it here, therefore, we must determine whether the petitioners are offered any new advantages of equal or greater value to the plan's old benefits.

The initial amendment requires all state troopers to increase their contributions to 9 percent of their pay by 1 July 1995 without any corollary increase in the retirement award itself.

Under this Amendment, the Division must also increase its contributions according to the following schedule: thirteen percent by 1 July 1995, fourteen percent by 1 July 1996 and fifteen percent by 1 July 1997. The fund usually generates about 3 percent additional revenue from miscellaneous payments.

According to the respondents, the increased employee contributions are constitutional because (1) the Division must make greater contributions into the fund and (2) the legislature enacted other changes benefitting the state troopers, one of which included a $1,008 pay raise given to all state employees. Because our inquiry into the constitutionality of the amendments concerns the benefits that petitioners receive under the plan, how much the Division

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In particular, the 1994 Legislature amended W.Va. Code 15-2-37 [1977] and 15-2-27a [1988]. W.Va. Code 15-2-37 formerly provided, in part, that "[a]ny member who shall be discharged by order of the superintendent after such member has or shall have served two full years or more as a member of [the Division] shall, at the request of such member, be entitled to receive from said fund a sum equal to the aggregate of the principal amount of moneys deducted from the salary of such member and paid into said death, disability and retirement fund. . ." In other words, after two years, if a trooper were discharged, he or she could demand the return of all his or her pension contributions into the fund. However, W.Va. Code 15-2-37(a) [1994] now allows troopers leaving the Division after two years to receive 4 percent interest on all their previous contributions into the fund. W.Va. Code 15-2-37(c) [1994] also allows troopers who have completed ten years' service or more and who terminate their employment either to withdraw their contributions to the fund with interest or receive a deferred annuity when they reach age sixty-two. Before this amendment, the statute had required troopers to complete twenty years' service in order to receive an annuity, with exception for annuities payable as a result of disabilities.

Under former W.Va. Code 15-2-27a [1988], retired state troopers who were receiving more than 8 percent of their aggregate salary from the fund were not allowed to collect the annuity adjustment until reaching age sixty-five. W.Va. Code 15-2-27a [1994] completely eliminated this restriction, and, as noted above, all retired members of age fifty-six or older may receive the cost of living adjustment.

contributes to the fund cannot influence our analysis here. For this reason, we do not accept respondents' first argument. We do, however, find the legislature's other 1994 changes offer state troopers advantages of equal or greater value than the ones they expected under the former plan. Consequently, we find the initial amendment constitutional.

The legislature may increase a public employee's salary contribution to a pension plan if it gives a corresponding raise in salary or other benefits that offsets the employee's increased contribution to the system. To be constitutional under art. III, § 4, the additional salary or other benefits must at least cover the public employee's extra contribution to the system. Here, the petitioners are required to contribute an additional 3 percent of their salaries by 1 July 1995; however, the petitioners have also received a $1,008 raise in salary, as well as other benefits that we discussed in footnote 24. Therefore, we find the petitioners have been extended benefits that offset their increased contribution to the pension plan.

We are aware, of course, that the salary increase and other benefits extended to the state troopers may not totally offset the increased contributions of certain high ranking troopers. We think this is a de minimis problem that should be corrected by the legislature at its next session.

Under the next amendment (W.Va. Code 15-2-27(c)(2) [1994]), state troopers can no longer credit accrued, but unused annual leave and sick leave towards early collection of a pension before age fifty. According to respondents, despite the language of W.Va. Code 5-6-13(e), it was not the practice of either the old Public Safety Retirement Board or the Consolidated Public Retirement Board ["Board"] to allow state troopers to use annual and sick leave days at retirement in order to reach twenty-five years of service and thereby begin receiving pensions before becoming fifty. Instead, after the policy decision of the Board (discussed in footnote 4), the practice was allowed only between 25 January 1994 and 12 March 1994. The respondents also contend the practice of counting sick leave to allow increased payments did not begin until 1988, and, consequently, the petitioners enjoy no less advantage in this respect than they did six years ago.

Having examined the language of W.Va. Code 5-16-13(e) [1992], we find the provision does not allow state troopers to receive benefits before reaching age fifty. The provision simply entitles a retiree to collect additional money by using his or her accumulated,

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The Board discontinued the practice upon passage of the Amendment at issue on 12 March 1994.

but unused annual and sick leave; it does not concern a state employee's eligibility for a pension as its last line makes clear: "such credited service shall not be used in meeting initial eligibility for retirement criteria, but only as additional service credited in excess thereof." Apparently, the Board misunderstood the clear use of the word "initial" that precludes troopers from receiving benefits before reaching age fifty. It is clear to us that "initial" serves to clarify the meaning of the first sentence regarding the use of annual and sick leave to allow larger, and not earlier, benefit payments.

Given our construction of W.Va. Code 5-16-13(e) [1992], we think the Board erroneously adopted its policy regarding troopers' use of accrued, but unused annual and sick leave. We find the state troopers had no legal right even before the statutory amendment in this case to apply their accrued, but unused leave to allow payment of a pension before age fifty. This Court, therefore, holds the legislature did not impair this part of the contract and we hold that because W.Va. Code 15-2-27(c)(2) merely clarified but did not change existing law, it is constitutional.

The last amendment, W.Va. Code 15-2-27a [1994], reduces the petitioners' retirement cost of living adjustment from 3.75

percent to 2 percent. The respondents do not argue otherwise; instead, given the 1994 actuarial valuation of the public safety pension system, the respondents argue that this amendment preserves the future solvency of the fund. They also assert that the petitioners have a fiduciary duty to the remaining beneficiaries of the fund under Dadisman. We disagree.

Contrary to respondents' suggestion, this Court has never imposed a fiduciary duty upon the contributing members of a pension plan. Cf. Syl. Pt. 5, Dadisman (The PERS Trustees have the highest fiduciary duty to maintain the terms of the trust, as spelled out in the statute.) Requiring the petitioners to protect the future solvency of the pension system is an unconstitutional shifting of the state's own burden. Consequently, we find W.Va. Code 15-2-27a [1994] an unconstitutional impairment of the state's obligation of its contract but only to the extent that it reduces the petitioners' cost-of-living adjustment. See, doctrine of the least intrusive remedy, Syl. pt. 2, Weaver v. Shaffer, 170 W.Va. 107, 290 S.E.2d 244 (1982). It is a close question whether the doctrine of the least

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As noted earlier, this Amendment also allows all state troopers to collect the annual cost-of-living adjustment at age 56. See n. 24. In our above discussion, we are concerned only with the constitutionality of the Amendment as it involves the reduction of the cost-of-living adjustment.

intrusive remedy is appropriate here; however, we believe that on balance it probably best comports with legislative intent. However, in light of this litigation, the legislature may amend this section to remove benefits that it gave in the last session of the legislature if, indeed, it was the intention of the legislature to tie those benefits inexorably to the reduction of the cost-of-living increase from 3.75 to 2 percent. Furthermore, the legislature may reduce the cost of living adjustment for all state troopers who have not yet substantially relied to their detriment.

Having read the actuarial studies submitted by respondents, this Court acknowledges the legitimacy of the respondents' concern regarding the future solvency of the public safety pension system. Nevertheless, our holding here still allows the legislature to purchase pension rights of some active employees. Furthermore, the legislature may completely amend pension benefits as they involve persons who may someday in the future enter into a public safety employment contract with the state. In short, this Court holds the legislature simply cannot mess with the pension rights of state employees who have invested a substantial part of their working lives with West Virginia.

And, in fact, the legislature did this. See n. 6.

The reason that we have spoken at such length on the subject of government pensions is that increasingly courts are government's preeminent institutional memory. American society has become increasingly volatile, and our social failures in the last twenty years have led to a popular dissatisfaction that translates into pendulum-like changes in elected personnel at the polls. This is democracy and certainly nothing to be decried. But courts, with their life tenure (federal), long elected terms (West Virginia), or Missouri plan retention systems (many other states) are deliberately designed to provide continuity and memory.

Scores of thousands of little people have organized their lives around government pensions, and while in a democracy government has an opportunity for a new life and new direction every four years, these little people do not. While what was promised thirty years ago may not be of much concern to modernists elected to change the mix of government services, cut taxes, or instantiate a new morality, what was promised thirty years ago forms the core of life for those who once upon a time believed their elected leaders.

Because we find W.Va. Code 15-2-26 [1994] (the increased contribution provision) and 15-2-27(c)(2) [1994] (the provision

eliminating use of annual and sick leave to allow earlier benefits) [1994] constitutional, we deny petitioners relief with regard to these two provisions. However, to the extent that W.Va. Code 15-2-27a [1994] (the provision reducing petitioners' cost-of-living adjustment) impairs the obligations of contract under W.Va. Const. Article III, § 4, we grant a writ of mandamus ordering respondents to forbear in implementing that part of the amendment at issue here, and we order the respondents to reinstate the previous 3.75 percent annuity adjustment to which the petitioners were entitled before 1994.

Writ granted as moulded.