

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Gary D. Lanham, Petitioner Below,
Petitioner**

vs) No. 11-0778 (Kanawha County 10-AA-133)

**West Virginia Consolidated Public
Retirement Board, Respondent Below,
Respondent**

FILED

March 9, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Gary D. Lanham, by counsel, James B. Lees, Jr., appeals from the circuit court's order upholding the decision of Respondent West Virginia Consolidated Retirement Board ("Board") denying petitioner credit for work performed in a co-op program for the State Department of Highways. The Board has responded, by counsel, J. Jeaneen Legato.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner is employed by the West Virginia Division of Highways ("DOH") with approximately thirty-five years of service credit in the Public Employee's Retirement System ("PERS"), which is administered by the Board. Prior to becoming a full-time employee, petitioner was employed by the DOH for a total of thirteen, non-consecutive months, from 1968 through 1971, in a co-operative education program ("co-op program") administered by the DOH. During that period of time, petitioner attended the West Virginia Institute of Technology from which he graduated in December of 1971. He became a full-time, permanent employee of the DOH in January of 1972.

Petitioner states that during his participation in the co-op program, he was required to participate in PERS, but was allowed to withdraw his contributions. In a letter dated August 5, 1991, the Board offered petitioner an opportunity to buy back his thirteen months of service credit. Petitioner accepted the offer and bought back his service credit. The Board states, however, that it mistakenly permitted petitioner to participate in PERS during his co-op periods and later mistakenly permitted him to reinstate that service credit. The Board states that in 2009, its staff learned of the

mistake and attempted to refund petitioner the money he had paid to recoup that service credit. Petitioner refused to accept the refund and administratively appealed the Board's act.

Following an administrative hearing, the hearing officer issued a recommended decision in favor of the Board. In its final order dated August 4, 2010, the Board adopted the recommendations of the hearing officer and denied petitioner's request to retain service credit attributable to his participation in the co-op program.

Petitioner appealed the Board's decision to the circuit court. Relying upon *Myers v. W. Va. Consol. Pub. Ret. Bd.*, 226 W.Va. 738, 704 S.E.2d 738 (2010) (per curiam), the circuit court affirmed the actions of the Board and found that the Board had no statutory authority to allow petitioner to buy back and reinstate his prior service and that petitioner's reliance upon the Board's actions in allowing him to reinstate his service was irrelevant under West Virginia Code §5-10-44, which requires the Board to correct its errors. Regarding petitioner's contractual argument, the circuit court ruled that the contract between the Board and petitioner is invalid because the Board was not statutorily allowed to give service credit to petitioner for the time that he was a provisional employee in the co-op time program and not a full-time employee.

Petitioner concedes that the definition of full-time employment in West Virginia State Code of Rules §162-5-2.3 appears to eliminate his co-op employment with the DOH for participation in PERS. Petitioner also notes that *Myers* involved a virtually identical issue where Mr. Myers was denied service credit for his time in the co-op program many years ago. Petitioner argues that the Court's conclusion in *Myers* that "reliance" is not relevant is misplaced and is contrary to *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1994), wherein this Court held that the issue is whether the employee had substantially relied to his or detriment on the existing benefits. Here, however, there is no statutory authority that would permit the Board to give petitioner service credit for the period of his co-op employment since he was not a full-time employee at that time.

Based upon our review of the joint appendix record and the arguments of the parties in their respective briefs filed with this Court, we conclude that the Board's decision to deny petitioner service credit for his co-op employment was mandated by statute and is consistent with *Myers*. In footnote 7 of *Myers*, we stated that "[w]hile Mr. Myers may have relied on the Board's erroneous representation that he would receive service credit for those two months [of co-op service with DOH], the Board is statutorily bound by West Virginia Code §5-10-44 to correct errors in the calculation of a PERS member's service credit . . . The statute does not limit this requirement for equitable reasons." Here, as in *Myers*, petitioner was not entitled to service credit for the time he participated in the co-op program because he did not meet the statutory eligibility requirements for memberships in PERS, which requires full-time employment. W. Va. Code § 5-10-17; *see also* W.Va. Code § 5-10-2 (defining "employee") and W.Va. Code R. §162-5-2.3 (defining "full-time" employment). For these reasons, we find that the Board was required to correct its error involving petitioner.

Regarding petitioner's contract argument, we agree with the circuit court that the Board only has the power given to it by the legislature and that any contract between petitioner and the Board is invalid because petitioner was given service credit when the Board was not statutorily allowed to do so for the reasons set forth above.

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4 [(g)] and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.’ Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).” Syl. Pt. 1, *Myers*, 226 W.Va. 738, 704 S.E.2d 738. With these standards in mind and based upon our review of the record, the arguments of the parties, and for the reasons stated above, we affirm.

Affirmed.

ISSUED: March 9, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh