IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0350

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Petitioner

v.

Appeal from the Circuit Court of Kanawha County (18-AA-9)

ROBERT CLARK, *ET AL.*,

Respondent.

Brief of Petitioner, the West Virginia Consolidated Public Retirement Board

Counsel for Petitioner, the West Virginia Consolidated Public Retirement Board

Ronda L. Harvey, Esquire (WVSB 6326)
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Phone: (304) 347-1100
E-mail: rharvey@bowlesrice.com

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STATEMENT OF THE CASE

Division of Natural Resources ("DNR") law enforcement officers receive a subsistence allowance to reimburse them for telephone service, dry cleaning, uniforms, meal expenses and other expenses incurred due to the nature of their duties. At issue in this appeal is whether the Consolidated Public Retirement Board ("CPRB") properly concluded that DNR wrongly designated subsistence allowance as pensionable compensation in the Public Employees Retirement System ("PERS"), a system administered by CPRB.

SUMMARY OF ARGUMENT

Respondents are certain active and retired law enforcement officers who are presently or formerly employed by DNR.[1] Respondents are also members of PERS. Like all members of PERS, Respondents and their employer, DNR, make contributions to PERS toward the members' retirement. Retirement benefits are calculated by statute based on the compensation of the individual member. Retirement contributions must meet the statutory definition of "compensation," which means "renumeration paid a member . . . for personal serves rendered by the member to the participating employer."

In addition to compensation, Respondents and other state employees sometimes receive expense reimbursement and other payments that are not for services rendered, and these types of payments are not included as compensation for purposes of calculating pension benefits. Indeed, the PERS statute expressly states that such payments are not considered compensation and expressly gives CPRB the "final power to decide whether payments shall be considered compensation" in PERS.

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[1] Notably, this is not a class action and not all active and retired DNR officers are parties in this lawsuit.

It makes sense that the Legislature did not include these types of other payments, including subsistence allowance, as pensionable[2] compensation. Expense reimbursements are not pensionable, and the Legislature could not have intended to distinguish between public employees who must submit receipts for expense reimbursements and those who, like DNR officers, receive a subsistence allowance instead.

Even though the PERS statute does not include subsistence allowance in the PERS definition of pensionable compensation, DNR, through no consultation with CPRB, began including the amounts paid to its officers for subsistence allowance in the DNR officers' gross salary. CPRB first became aware that the DNR had decided to include subsistence allowance as part of an officer's gross salary in 2014 when CPRB was auditing the Respondent Jon Cogar's file and noticed several months of atypical salaries. (J.A. at 52, ¶ 39.) CPRB staff requested and received from the DNR a list of "special payments" from which retirement contributions were withheld. (J.A. at 52, ¶ 40; 102-114.) Notably, CPRB was not aware that the DNR had included anything other than salary when the DNR submitted its regular Retirement Deduction Reports to CPRB. Rather, the list of "special payments" made to Officer Cogar was the first notice received by CPRB of any payments other than salary included in pensionable compensation by the DNR. The list of "special payments" did not mention subsistence allowance or designate what each payment was for other than by number coding. With the list of "special payments" the DNR provided an explanation identifying the codes and designating code #135 as subsistence. (J.A. at 52, ¶ 41.)

[2] "Pensionable" is not a term defined in statutes governing PERS or CPRB, and is used in this brief only as a shorthand reference to amounts that meet the PERS definitions of "compensation" and "final average salary" and thus are appropriately considered when calculating required contributions to or benefits from PERS.

In less than a month after receiving the list of special payments and becoming aware that DNR viewed subsistence allowance as pensionable compensation, CPRB notified DNR that subsistence allowance is not compensation within PERS. With that notification, CPRB directed DNR to stop including such amounts as compensation when calculating and making employee and employer retirement contributions. CPRB also informed Officer Cogar of the decision and his right to appeal.

On July 1, 2014, the Director of DNR wrote to CPRB's Executive Director explaining DNR's position on subsistence allowance. CPRB promptly responded on July 7, 2014, that it would take a comprehensive look at the issue and advised the DNR to continue with its practice in the interim. Then, in the 2015 Legislative Session, a bill was introduced which would have permitted CPRB to allow members and retirants to choose whether subsistence allowance payments made prior to July 1, 2015, were subject to PERS. The proposed legislation did not ultimately pass.

Meanwhile, CPRB completed its comprehensive review which justified its prior conclusion that subsistence allowance does not comply with the PERS definition of compensation. As a fiduciary of PERS and an administrative agency created by statute, CPRB is required to correct errors relating to the benefits of the plan. Since PERS was created in 1961, W. VA. CODE § 5-10-44 has required the correction of errors that result in any person receiving from the system more or less than he or she would have been entitled to receive. This obligation has been repeatedly recognized by the West Virginia Supreme Court of Appeals, even in cases where a member believed he or she would receive something based on erroneous statements or interpretations by CPRB or a participating employer or in cases where a member is required to repay amounts received in error.

Even though in this case, the errors were through no fault of the Respondents (but rather their employer[3]), CPRB is bound by statute to correct the errors and enforce the statutory requirements of PERS. Thus, once CPRB concluded that the DNR erred in viewing subsistence allowance as pensionable compensation, CPRB then informed the DNR officers on October 5, 2015, that the DNR had erroneously included subsistence allowance in PERS "compensation." The DNR then ceased making employer and employee contributions to PERS based on subsistence allowance. Shortly thereafter, Respondents filed an administrative appeal. The Hearing Officer concluded that CPRB was correct and CPRB adopted the Recommended Decision of the Hearing Officer. Respondents appealed that decision to the Circuit Court of Kanawha County and the Circuit Court entered a "Final Order" on March 19, 2020, basically adopting the proposed order submitted by Respondents. The Final Order granted Respondents' appeal and overturned the decision of CPRB. CPRB is appealing that Final Order.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate under the first 4 options in Rule 19. First, the issue involves application of settled law regarding the error correction statutes in PERS that the Circuit Court applied improperly. Second, the Circuit Court's March 19, 2020 Final Order resonates with multiple abuses of discretion where the law governing the Court's discretion is settled. Third, the Circuit Court's Final Order is a result contrary to an enormous weight of the evidence. Fourth, this appeal involves a narrow issue of law: whether the DNR's subsistence allowance

[3] This scenario is similar to *Bland v. State of West Virginia et al*, 230 W.Va. 263, 737 S.E.2d 291 (2012), where West Virginia State Troopers believed that they should be in a different retirement plan (Plan A) based on the representations to them by the State Police during recruitment. Even though the Troopers' mistaken belief was through no fault of their own (like DNR's improper decision to include subsistence allowance in pensionable compensation), this Court upheld CPRB's decision to place the Troopers in Plan B.

should be included as pensionable compensation. The decision on that issue could impact how other State employers handle expense reimbursement.

ARGUMENT

The primary issue in this case is whether DNR's subsistence allowance should be included in "compensation" as that term is defined in PERS. This, in turn, determines whether subsistence allowance is subject to calculating DNR officers' and DNR's required employee and employer contributions to PERS, as well as whether subsistence allowance forms a part of a DNR officers' "final average salary" used to calculate monthly retirement benefits.[4] (J.A. at 46, ¶ 4.) Because subsistence allowance is an expense reimbursement and not payment "for personal services rendered," it is not included in the statutory definition of compensation.

This Court has held that "[o]n appeal of an administration order from a circuit court, this Court is bound by the statutory standards contained in W. VA. CODE § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." *Curry v. W.V. Consolidated Pub. Ret. Bd.*, 236 W. Va. 188, 788 S.E.2d 637, syl. pt. 1 (2015). West Virginia Code § 29A-5-4 allows a circuit court to reverse an administrative order only if the order is:

> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedures; or

[4] W. VA. CODE §§ 5-10-29 and 5-10-31 set PERS employee and employer contributions as a percentage of the employee's "compensation." "Compensation" is defined in W. VA. CODE § 5-10-2(8). W. VA. CODE §§ 5-10-21 and 5-10-22, among others, set forth retirement annuity amounts based on the employee's "final average salary," which is in turn defined in § 5-10-2(13) as based on the employee's "compensation."

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Here, the Circuit Court entered an Order on March 19, 2020, reversing the Board's decision that subsistence allowance is not compensation, but failed to cite to a specific provision in West Virginia Code § 29A-5-4. The Circuit Court's Order simply declares the Board's decision "to be erroneous and contrary to the applicable law." (J.A. at 640.) Apparently, the Circuit Court is relying on subsection (5), but the Circuit Court has applied that provision in error. "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Curry*, syl. pt. 3. As set forth below, the Board's decision that subsistence allowance is not compensation is legally sound and based on clear Legislative mandates. Thus, the Circuit Court erred in reversing that decision.

I. Contrary to the Circuit Court's Order, CPRB made no legal error when it decided that DNR's Subsistence Allowance does not meet the PERS statutory definition of compensation.

The Legislature has defined "compensation" for calculating retirement benefits in PERS in West Virginia Code § 5-10-2(8) as: "remuneration paid a member by a participating public employer for personal services rendered."[5] The Legislature also clearly designated in West Virginia Code § 20-7-1 what DNR's subsistence allowance compensates, and it is not personal services rendered by the employee. Subsistence allowance reimburses DNR officers

[5] Although the definition of "compensation" has been amended over the years, it has always required, at a minimum, that payments be "remuneration for personal services rendered." *See* W. VA. CODE § 5-10-2(14) (1961).

"in addition to their base salary" for certain specific expenses they incur: "required telephone service, dry cleaning or required uniforms, and meal expenses while performing their regular duties in their area of primary assignment." W. VA. CODE § 20-7-1. Subsistence allowance is also used by DNR officers for additional weapons and body armor. (J.A. at 50, ¶ 26.) These are expenses associated with the unique duties of a DNR officer, who work outside of a traditional office setting. Because the subsistence allowance is an expense reimbursement, rather than a payment for personal services rendered, CPRB correctly determined that the payments were not "compensation." The Circuit Court's order ignores the statutory requirement that a payment can be compensation only if the payment is "for personal services rendered," and without considering the significance of this requirement, the Circuit Court improperly and without basis reversed CPRB's decision.

A. The Circuit Court erred in concluding that subsistence allowance is the same as wages.

When the Legislature re-authorized subsistence allowance in 1996,[6] DNR acknowledged that the Internal Revenue Service ("IRS") deemed it an expense and not an addition to salary. (*See* J.A. at 58-61.) In 1996, DNR paid the subsistence allowance to each officer in a single monthly check, separate from salary payments. (J.A. at 58-59.) However, DNR then decided on its own, through no consultation with CPRB or notice to CPRB, that it would instead include subsistence allowance in each officer's regular bimonthly paychecks and would report subsistence allowance on a Form W-2 as "all wages paid... by the [DNR]". (J.A. at 62-67.) The Circuit Court wrongly concluded that DNR's inclusion of subsistence allowance in

[6] The 1976 version of West Virginia Code § 20-7-1 first established subsistence allowance as an expense "**in addition to salary**" (emphasis added). In 1981, the Legislature amended West Virginia Code § 20-7-1 to remove subsistence allowance, but allowed reimbursement for actual expenses. Then in 1996, the Legislature re-authorized subsistence allowance in addition to actual expenses. (J.A. at 47-48.)

the same paycheck as a DNR officer's salary renders subsistence allowance as a "wage" paid to each DNR officer. Specifically, the Circuit Court's Order holds that "the subsistence allowance is an explanation for increasing wages earned by DNR officers." (J.A. at 619, ¶ 7.) This conclusion is wrong for several reasons.

First, this conclusion ignores the statute that sets a DNR officer's salary, W. VA. CODE § 7-20-1c and salary increases awarded pursuant to W. VA. CODE § 20-7-1a. As is clearly explained in the record before the Circuit Court: "subsistence allowance is easily distinguishable from salary: while a DNR officer's 'salary' will vary based on tenure and experience, subsistence allowance payments remain constant." (J.A. at 247.) Moreover, if subsistence allowance is simply a wage increase, why did the Legislature characterize it as subsistence allowance in the statute and why does the statute specifically mention the types of expenses that subsistence allowance is designed to reimburse, i.e., telephone service, dry cleaning, meal expenses? If the Legislature wanted to include these types of expenses as wages, the Legislature could have amended the salary statutes instead of enacting a separate statute specifically on subsistence allowance. In fact, the Legislature expressly states in W. VA. CODE § 20-7-1c that "any across-the-board pay increase granted [to DNR officers] by the Legislature or the Governor will be added to, and reflected in, the minimum salaries set forth in this section." *Id.* at (d). Thus, the Circuit Court's conclusion that subsistence allowance is part of a DNR officer's salary ignores this provision and is completely contrary to the clear language of this statute governing salary.

A 1977 West Virginia Attorney General Opinion recognizes the distinction between DNR officers' salaries and subsistence allowance. 57 W. Va. Op. Atty. Gen. 188 (1977). In the opinion, the Attorney General's office responds to a question posed by the

Director of DNR regarding whether funds appropriated in the State budget to upgrade DNR officers' salaries should instead be used by DNR to pay a subsistence allowance to DNR officers. The Attorney General's response explains that in 1976, the Legislature passed a bill providing for the payment of subsistence allowances "in addition to salary," and that the budget bill for the fiscal year included a line item appropriate for the same. The following fiscal year, however, the Legislature did not include a line item appropriation for subsistence allowance, but provided the same amount in DNR's "Account 830 for Personal Services for Conservation Officers," and in a letter from the chair of the House and Senate Finance Committees, directed the use of those funds to upgrade DNR officers' salaries. The Attorney General advised that through these actions, the Legislature demonstrated an intent not to pay subsistence allowance, but to give a salary increase instead. The very question posed by DNR and answer provided by the Attorney General confirm that subsistence allowance and salary are distinct from one another.

This Court's opinion in *Campbell v. Kelly* decided a similar issue and strongly supports that subsistence and expense allowances were never intended to constitute pensionable amounts in PERS. 157 W. Va. 453, 202 S.E.2d 369 (1974). In *Campbell v. Kelly*, the Court considered constitutional challenges to 1971 legislation governing the terms of State legislators' participation in PERS, including whether the legislation complied with the Citizens Legislative Compensation Commission's recommendation to permit legislators to participate on the same basis as other employees of the State. The Court observed that the Commission's recommendations in that regard were that "final average salary means their actual compensation in the form of salary and additional per diem compensation ***(not including any expense allowance or reimbursement of expense)*** . . . " making clear that payments like a subsistence allowance were never intended to be pensionable in PERS. *Id.* at 470 (emphasis added).

In addition to this strong case law support for the Board's decision that subsistence is not pensionable compensation, as noted above the Internal Revenue Service ("IRS") considers subsistence an expense reimbursement. Even so, the Circuit Court gives undue weight to the fact that DNR chose to include subsistence allowance in the officers' bimonthly paycheck. The PERS definition of compensation does not mention the timing of any payments or otherwise provide that if a payment is included in a member's paycheck then it is considered compensation. DNR's decision to include subsistence allowance in the bimonthly checks is simply a matter of administrative policy; it does not change the character, purpose and nature of the payments as a form of expense reimbursement.

B. Whether and how subsistence allowance is taxed or treated as wages under federal income tax laws is irrelevant to determining its treatment under PERS.

Subsistence allowance is not pensionable simply because it is subject to federal income tax withholding, as the Circuit Court seems to imply. In 1997, DNR learned that it had incorrectly been treating subsistence allowance as exempt from federal wage withholding for federal, Social Security and Medicare taxes. (J.A. at 58-61.) It was at that point that DNR began including subsistence allowance in contributions to PERS, though without notifying or requesting guidance from CPRB. Amounts subject to federal personal income tax and wage withholding are defined by the Internal Revenue Code very broadly, and there is effectively a presumption that all payments are included, unless the payment falls under a specific exception. Importantly, these amounts can include amounts PERS specifically excludes from consideration as "compensation." *See* Internal Revenue Code §§ 61 and 3401, Treas. Reg. § 1.61-2 and Treas. Reg. § 31.3401(a)-1. DNR's determination that subsistence allowance was subject to federal withholding had nothing to do with whether the amounts were pensionable in PERS; neither the

IRS nor DNR had authority to make that decision. Many payments expressly excluded by the definition of "compensation" in PERS are nonetheless subject to federal wage withholding or are even taxable. For example, the IRS considers lump sum payments based on unused leave as taxable income to an employee, even though lump sum payments are specifically excluded from the definition of "compensation" in PERS. Subsistence allowance is no different.

The United States Court of Appeals for the Fourth Circuit recognized this distinction in *State v. Koerner*, 550 F.2d 1362 (4th Cir. 1977) (per curiam), holding that subsistence allowance paid to state troopers in West Virginia was subject to federal income tax despite the fact that the payments were not considered for retirement purposes. The District Court decision on which the Fourth Circuit ruled expressly acknowledged that "[t]hese payments are not considered as income by the state of West Virginia in determining the retirement pay of the members and are not intended to represent additional compensation." *Koerner v. U.S.*, 404 F.Supp. 1128, 1130 (S.D. W. Va. 1975.

Moreover, subsistence allowance paid to DNR officers is not necessarily ultimately subject to federal income tax, as DNR advised DNR officers at the time to "keep in mind that your receipts for allowable expenses can be used at the end of the year to reduce the tax liability on your subsistence."[7] (J.A. at 58-61.) Whether DNR officers take advantage of this opportunity should not impact how PERS treats these amounts, as the plan cannot possibly be expected to evaluate the personal income tax filings of all employees receiving subsistence allowance to determine whether the payments are pensionable.

[7] Amounts subject to federal withholding may ultimately be exempt from tax, such as in the case of subsistence allowance, upon submission of appropriate documentation and request with the IRS. Withholding merely requires an employer to deduct a presumed tax from the payment, but this presumed tax can be recovered by the individual when he or she files income tax returns and claims an overpayment.

Had the Legislature intended that all federally taxable amounts or wages for purposes of withholdings be considered subject to PERS, it would have so provided. For example, the Deputy Sheriff Retirement System defines "annual compensation" as "the wages paid to the member during covered employment within the meaning of Section 3401(a) of the Internal Revenue Code . . . " W. VA. CODE § 7-14D-2(f).[8] There is no indication in PERS statutes that federal income tax and withholding laws have any impact on determining what amounts are pensionable. Thus, the fact that subsistence allowance *may be* subject to federal wage withholding and taxed in the absence of a claim for deduction by an employee is irrelevant.

C. The Circuit Court erred in completely ignoring key language in the statutory definition of compensation that gives CPRB "final power" to decide whether payments are compensation.

In addition to the language discussed above, the Legislature stated in clear and unequivocal terms that CPRB: "***shall have final power to decide whether the payments shall be considered compensation for purposes of this article.***" W. VA. CODE § 5-10-2(8). The Circuit Court's Order fails to address this provision at all. Rather, the Circuit Court seems to adopt Respondents' position that CPRB is required to yield to a public employer's interpretation of PERS. This position is without merit and would severely undermine the system as a whole. The legislative scheme clearly vests CPRB with centralized authority to manage the retirement system. CPRB's centralized authority would be obviated if it were required to defer to the individual interpretations of each participating employer. Moreover, such deference would create inequitable results—the retirement benefits of participating members would be calculated differently based on the decisions of the more than 600 member employers.

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[8] This definition then goes on to exclude reimbursements or other expenses allowances, making clear that even where the Legislature has elected to more closely align pensionable amounts with taxable or wage withholding amounts, it does not intend that expense allowances be pensionable.

D. Contrary to the Circuit Court's Order, the doctrine of *ejusdem generis* does not apply here because the statutory definition of "compensation" is clear and not subject to interpretation.

The Circuit Court wrongly adopted Respondents' argument and applied the doctrine of *ejusdem generis*: "[w]here general words are used in a contract after specific terms, the general words will be limited in their meaning or restricted to things of like kind and nature with those specified." (J.A. at 628.) Under the doctrine of *ejusdem generis*, the Circuit Court incorrectly reasoned that because the language in PERS expressly delineates some types of irregular payments made to public employees as excluded from the definition compensation and this list does not include subsistence allowance, then the Legislature intended subsistence allowance to be included in compensation.

However, because the statute is clear, there is no need to turn to the doctrine of *ejusdem generis*, as the Circuit Court mistakenly did, to determine whether subsistence allowance is like other exclusions specifically described in statute. *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). By defining "compensation" as "remuneration for personal services rendered," the Legislature clearly excluded expense reimbursements such as those paid to DNR officers through subsistence allowance. W. VA. CODE § 5-10-2(8). The clear and unambiguous language of the statute render doctrines of interpretation like *ejusdem generis* unnecessary and inappropriate. Syllabus Point 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). The specific exclusions identified in the statute were identified because they would have otherwise been considered "compensation," as they <u>are</u> considered remuneration for personal services rendered. Conversely, it was unnecessary to specifically identify subsistence payments because they are

expense reimbursements and already excepted as not being remuneration for personal services rendered.

In addition, the Circuit Court's Order wrongly views the few examples of payments identified in the statute as exempted from compensation as the final word on what payments are not compensation. However, the Circuit Court's conclusion completely ignores that the examples are just that—examples. This conclusion further disregards the explicit language stating that exempted payments "***are not limited to***" the examples contained therein. W. VA. CODE § 5-10-2(8). And, contrary to the Circuit Court's improper conclusion, as previously stated, the final word on determining what payments meet the PERS definition of "compensation" is expressly granted by the Legislature to CPRB: "***[t]he board shall have final power to decide whether the payments shall be considered compensation for purposes of this article.***" W. VA. CODE § 5-10-2(8).

E. The Circuit Court's determination that DNR officers' subsistence allowance is "pensionable" is inconsistent with precedent in West Virginia and beyond.

Decisions by West Virginia courts and courts elsewhere support CPRB's determination that subsistence allowance cannot be included in "salary" for the purpose of determining pension benefits because subsistence allowance is not compensation for "services rendered." *W. Va. Consol. Pub. Ret. Bd. v. Carter*, 219 W. Va. 392, 397, 633 S.E.2d 521, 526 (2006). In *Carter*, this Court held that the term "final average salary" as used in W. VA. CODE §§ 5-10-2(15) and (16) "plainly limits the calculation of retirement benefits to an annual salary paid to a member of [PERS] by a participating public employer for personal services rendered by

the member to the participating public employer . . . " Syl. pt. 2 (emphasis added)[9]. The *Carter* Court excluded from the final average salary calculation payments for unused, accrued vacation days, a decision that turned on the fact that these payments were "neither 'salary' nor 'annual.'" Thus, even though the *Carter* Court did not specifically address whether the payments were "remuneration . . . for personal services rendered," this holding supports a conclusion here that subsistence allowance is also not salary. *Id.* at 397-398.

Other states have expressly determined that subsistence allowance and other similar allowances are not compensation for personal services or salary and have excluded such payments from retirement contributions and benefit calculations. For example, a Michigan court determined that clothing and uniform allowances paid to city police and firemen were not pensionable, explaining that "[h]ad the city . . . furnished uniforms to be worn by the employees during their time of service, we doubt whether it would be suggested the value of the uniforms was compensation. The form of payment is not controlling—whether dollars or coconuts. What is important is whether the payment is a payment for services rendered or to be rendered." *Banish v. City of Hamtramck*, 157 N.W.2d 445, 449 (Mich. App. 1968). That court further observed that "there is no evidence that the uniform allowance was intended or paid as compensation, or that anyone received the allowance who did not wear a uniform, or that, to state it differently, the allowance was anything more than reimbursement for an actual out-of-pocket expense necessarily incurred in the performance of duty." *Id.* at 449-450. Likewise, there is no evidence here that DNR officers did not actually incur expenses for telephone service,

[9] In *Carter*, the Court observed that "[t]he relevant components of the statutory definition of 'final average salary,' namely 'highest annual compensation' and 'compensation,' have remained virtually the same throughout the years since the establishment of PERS in 1961." *Id.* at 396, n. 4.

dry cleaning, uniforms or meal expenses, which the subsistence allowance is designed to reimburse.

An Indiana court similarly concluded that a clothing allowance was not pensionable, as it was "not paid in exchange for services even though recipients need not actually use the full amount for the materials designated or otherwise provide an accounting for their expenditures." *Hilligoss v. LaDow*, 368 N.E.2d 1365, 1371 (Ind. App. 1977). That court further recognized that the amounts were "supplemental to, and not an integral part of, the employee's regular salary," since the salary and clothing allowance were provided for by different statutes. *Id.* at 1371. *See also Holland v. City of Chicago*, 682 N.E.2d 323 (1997) (affirming lower court's denial of request to include clothing allowance and other fringe benefits in police and firemen's "salary" because "the disputed items of compensation are appropriately categorized as fringe benefits as they are in addition to the regular wage . . . "); *State ex rel. City of Manitowoc v. Police Pension Bd. for City of Manitowoc,* 56 Wis. 2d 602, 203 N.W.2d 74 (1973) (finding that retiring police officer was not entitled to pension calculated upon fringe benefits such as city's pension contribution, health and life insurance premium contributions, and holiday pay allowances); *Fratinardo v. Employees' Ret. Sys. of State of Hawaii*, 129 Haw. 107, 295 P.3d 977 (Ct. App. 2013) (holding that the definition of compensation for the purpose of calculating retirement benefits under the Hawaii police officer's retirement system excludes car, firearm, and uniform allowances); *Parente v. State Bd. of Ret.*, 80 Mass. App. Ct. 747, 956 N.E.2d 791 (2011) (finding that the retiree's annual allowance for expenses, travel per diem allowance, and the taxable value of her State house parking space were properly excluded from her retirement calculations because such benefits were not "compensation" for "services provided"); *Larsen v. State Employees' Ret. Sys.*, 22 A.3d 316, 323 (Pa. Commw. Ct. 2011) (finding that "the

restrictions on the types of compensation that may be used in calculating an employee's final average salary serve to ensure the actuarial soundness of the retirement fund by preventing employees from artificially inflating compensation as a means of receiving greater retirement benefits;" and that the retirement board "properly excluded the unvouchered expense allowances from the calculation of Claimant's final average salary for retirement purposes").

As the foregoing decisions from courts across the country explain, subsistence allowance and other similar expense allowances cannot be considered payment for "services rendered" or "salary," even when paid in the same manner as the subsistence payments made by DNR. Thus, there is ample support for overturning the Circuit Court's Order and reinstating CPRB's decision.

F. Other public employees in West Virginia receiving subsistence or similar expense allowances have never been permitted to include those amounts in calculating their pensions and there is no reason why DNR officers should be treated differently.

Similar subsistence allowances paid to other public employees in West Virginia are excluded from pension calculations. However, the Circuit Court's Order incorrectly states that "DNR officers are the only State employees who are authorized by statute to receive a subsistence allowance as part of the wages they earn." (J.A. at 619, ¶ 7.) In Respondents' own Reply Brief in the administrative appeal, Respondents represented that "the State Police Superintendents through the years have relied upon the authority of W. VA. CODE § 15-2-10(f) to pay troopers an additional $130 a month to assist in covering various items needed for employment" and "this provision has been relied upon by the Superintendents to authorize what ***essentially is a monthly subsistence allowance***." (J.A. at 324.) The State Troopers' subsistence allowance has never been included in pensionable compensation. This is true even though those amounts have been treated as taxable income to the employees since the late 1970s. Like the

subsistence allowance paid to DNR officers, the State Trooper subsistence allowance is for items such as haircuts, uniform cleaning and other incidental business expenses and was received without having to submit reimbursement requests or receipts evidencing actual expenses occurred. Nonetheless, it is clear that these payments are, as the State Police characterized, simply "anticipatory reimbursement[s]" and not salary. (J.A. at 82-101.)

The record before the Circuit Court reflects that in 1997, two members of the State Police challenged CPRB's treatment of their subsistence allowance in Trooper Plan A. (J.A. at 52, ¶ 36.) The Hearing Officer Recommended and CPRB's Board of Trustees agreed that these amounts were not pensionable, as they were not a part of the Troopers' statutory salaries, and were intended as expense reimbursements.[10] The same logic applies here. The subsistence payments made to DNR officers are not part of their statutory salaries; they are established by a separate statute and not called "salary" because they are a form of expense reimbursement. There is no basis upon which to treat DNR officers differently than the State Police officers.

CPRB has also determined that subsistence allowance is paid to National Guard employees, but that those payments are not treated by the National Guard as compensation for purposes of PERS. (J.A. at 267.) Other similar payments are likewise excluded from PERS. For example, the Division of Highways pays a tool and clothing allowance, which is excluded from PERS. *Id.* Again, there is no basis upon which to treat DNR officers differently than these employees.

The fact that DNR officers' subsistence allowance is set forth in statute is of no matter. CPRB is required to look at whether its own statutes are met, and this requires a

[10] The Troopers appealed the decision to Circuit Court but withdrew their appeal before a decision was issued. (J.A. at 52, ¶ 37.)

consideration of the nature of the payments and what they are for. In this case, DNR officers receive the same payments for the same reason as the State Police, National Guard employees, and DOH employees—to reimburse for expenses—therefore the treatment of subsistence allowance paid to other employees is highly relevant to this appeal.

Further, federal regulations related to defining compensation in retirement plans require consistency. Indeed, "the same definition of compensation generally must be used consistently to define the compensation of all employees taken into account in determining whether a plan satisfies section 401(a)(4)." Reg. § 1.414(s). Thus, CPRB cannot accept DNR's subsistence allowance as pensionable compensation when the State Troopers' subsistence allowance and similar payments by other state agencies are not pensionable compensation. This rule of consistency ties to CPRB's fiduciary duty to all members and is most likely the reason behind the key language mentioned above in the statutory definition of compensation: "***The board shall have final power to decide whether the payments shall be considered compensation for purposes of this article.***" W. VA. CODE § 5-10-2(8).

II. The Circuit Court incorrectly failed to apply CPRB's fiduciary and statutory duty under West Virginia Code § 5-10-44 to correct errors in PERS.

There is no dispute that CPRB has a fiduciary and statutory duty to correct errors pursuant to W. VA. CODE § 5-10-44. When PERS was established, W. VA. CODE § 5-10-44 provided:

> Should any change or error in the records of any participating public employer or the retirement system result in any person receiving from the system more or less than he would have been entitled to receive had the records been correct, ***the board of trustees shall correct such error***, and as far as is practicable shall adjust the payment of the benefit in such manner that the actuarial equivalent of the benefit to which such person was correctly entitled shall be paid.

W. VA. CODE § 5-10-44 (emphasis added). Although the statute has been amended over the years to include more specific descriptions of the corrections required, W. VA. CODE § 5-10-44 continues to impose on CPRB an obligation to take action when an error is discovered, providing that "the board shall correct errors in the retirement system in a timely manner whether an individual, entity or board was at fault for the error with the intent of placing the affected individual, entity and retirement board in the position each would have been in had the error not occurred." W. VA. CODE § 5-10-44(a) (2016) (emphasis added).

The Circuit Court's Order contains the following incorrect conclusions regarding this statutory error corrections provision: (i) DNR's decision to include subsistence allowance in compensation was not an error; (ii) CPRB "implicitly agreed" with DNR's decision; (iii) a prior version of the statute applies and further incorrectly concludes that the prior version does not allow CPRB to seek repayment; and (iv) if an error did occur, CPRB did not timely correct the error. As explained in more detail below, all of the Circuit Court's conclusions are wrong and must be overturned.

A. DNR's decision to include subsistence allowance as compensation was clear employer error under West Virginia Code § 5-10-2(12) and the Circuit Court erred in concluding that DNR's decision is exempted as a "deliberate act."

For the many reasons set forth above, DNR's decision to include subsistence allowance as compensation for retirement contributions is an improper error[11] and CPRB is required by both its statutory and fiduciary duty to correct that error. The Circuit Court wrongly concluded that DNR's inclusion of subsistence allowance in the calculation of total

[11] West Virginia Code § 5-10-2(12) defines "employer error" as "an omission, misrepresentation or violation of relevant provisions of the West Virginia Code or of the West Virginia Code of State Regulations . . . by the participating employer that has resulted in an underpayment or overpayment of contributions required. . . [.]"

compensation was a "'deliberate act' thoughtfully made by the DNR" and therefore exempt from the errors correction provision by West Virginia Code § 5-10-2(12).[12] (J.A. at 631.) This conclusion is completely contrary to the Hearing Officer's Recommended Decision:

> There is no evidence that the actions of the DNR in including the subsistence allowance as compensation for purposes of making the required contributions to PERS was a deliberate act contrary to the West Virginia Public Employees Retirement Act, but was rather employer error perhaps brought about by the IRS determination that the subsistence allowance as paid by DNR is subject to Federal, Social Security, and Medicare taxes.

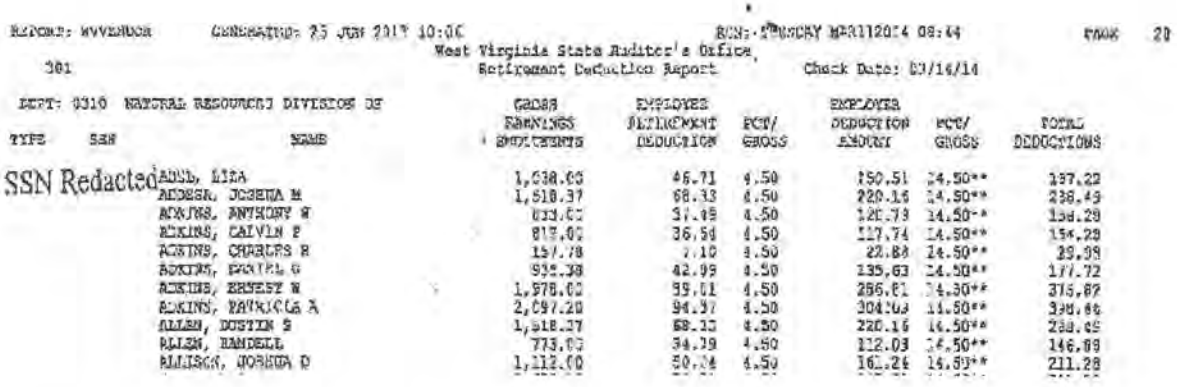
(J.A. at 472, ¶ 20.) There is no evidence in the record that the actions of DNR were deliberate; rather, the decision was clearly employer error seemingly brought about by a belief that subsistence allowance was subject to withholding taxes. In the absence of an error of law, factual findings by an administrative agency should be given great deference and should not be disturbed on appeal unless clearly wrong or "arbitrary and capricious." *See, e.g. Healy v. West Virginia Bd. of Medicine*, 506 S.E. 2d 89, 92 (W. Va. 1998). Here, the Circuit Court refused to apply this long-standing jurisprudence and instead improperly "reject[ed] the Board's argument based upon cases holding that generally, an administrative agency's construction of a statute should be given substantial deference, unless clearly erroneous." (J.A. at 628.) The Circuit Court's rejection of this Court's well-established deference to agency interpretation is improper and this Court should overturn the Circuit Court's Order.

B. The Circuit Court wrongly concluded that CPRB implicitly agreed with DNR's decision to include subsistence allowance as pensionable compensation and that this implicit agreement essentially estopped CPRB from correcting DNR's decision.

[12] In the definition of "employer error," a "deliberate act" of the employer is exempted. Specifically, the statute states that "[a] deliberate act contrary to the provisions of this section by a participating public employer does not constitute employer error." W. VA. CODE § 5-10-2(12).

While the Circuit Court rejected this Court's mandate of providing deference to an administrative agency's statutory construction, at the same time the Circuit Court without any legal basis instead granted deference to DNR's decision to include subsistence allowance in compensation and continue following that decision for close to twenty years. The Circuit Court then improperly imputes constructive knowledge of DNR's decision to CPRB despite the fact that the record reflects no basis for CPRB to know the actions taken by DNR. (J.A. at 635.) The Circuit Court cites no legal authority for such constructive knowledge.

Furthermore, the facts do not support a basis for constructive knowledge. Yes, the DNR did regularly submit Retirement Deduction Reports to CPRB and yes, those reports contain ***the gross salary*** received by Respondents. (*See* J.A. at 76-78.) However, the Circuit Court failed to take into account that the Retirement Compensation Report does not separately list subsistence allowance or mention subsistence allowance at all. *Id.* The Retirement Deduction Reports submitted by DNR to CPRB do not show that DNR included subsistence allowance. This is clear from the excerpt of the Retirement Deduction Reports (J.A. 78) below:



West Virginia State Auditor's Office
Retirement Deduction Report

Check Date: 03/16/14

TYPE	SSN	NAME	GROSS EARNINGS EMPLOYMENTS	EMPLOYEE RETIREMENT DEDUCTION	PCT/ GROSS	EMPLOYER DEDUCTION AMOUNT	PCT/ GROSS	TOTAL DEDUCTIONS
	SSN Redacted	ADDY, LISA	1,038.00	46.71	4.50	150.51	14.50**	197.22
		ADDESS, JOSHUA M	1,518.37	68.33	4.50	220.16	14.50**	288.49
		ADKINS, ANTHONY W	933.00	51.49	4.50	120.79	14.50**	158.28
		ADKINS, CALVIN F	813.00	36.58	4.50	117.74	14.50**	154.28
		ADKINS, CHARLES R	157.78	7.10	4.50	22.88	14.50**	29.98
		ADKINS, DANIEL G	935.38	42.09	4.50	135.63	14.50**	177.72
		ADKINS, ERNEST W	1,978.00	89.01	4.50	286.81	14.50**	375.82
		ADKINS, PATRICIA A	2,097.20	94.37	4.50	304.08	14.50**	398.44
		ALLEN, DUSTIN S	1,518.37	68.33	4.50	220.16	14.50**	288.49
		ALLEN, RANDELL	773.00	34.79	4.50	112.09	14.50**	146.88
		ALLISON, JOSHUA D	1,112.00	50.04	4.50	161.24	14.50**	211.28

Rather, the number for subsistence allowance is simply subsumed in the total gross salary number. There is no way a review of the Retirement Deduction Reports submitted by DNR to

CPRB could put anyone on notice that DNR included an amount paid for subsistence allowance in the total amounts for gross salary. Thus, the Circuit Court's conclusion that these reports establish constructive notice[13] is just plain wrong.

There is no basis for constructive knowledge and there is likewise no basis to impute the doctrine of estoppel. Like prior cases before this Court, the erroneous determination was not made by CPRB. It is undisputed that DNR, and not CPRB, took the actions that resulted in subsistence allowance being treated as PERS "compensation," and that CPRB had no knowledge that DNR was doing so in the "compensation" reported to CPRB from 1996 until 2014. It is also undisputed that CPRB never specifically advised any Respondents that subsistence allowance could or should be included in PERS "compensation." (J.A. at 51, ¶ 34.)

The Circuit Court imputing constructive knowledge on CPRB is tantamount to holding CPRB responsible for auditing each and every individual participating in the plan each month on an ongoing basis. With a staff of approximately 95, this would be an impossible task. Errors are inevitable with more than 800 participating employers throughout the state and over 109,000 members, but in enacting W. VA. CODE § 5-10-44, the Legislature made clear that CPRB must correct those errors, regardless of the equitable concerns, no matter how valid.

C. The Circuit Court improperly concluded that CPRB did not timely correct DNR's error.

The Circuit Court again relies on the application of "constructive knowledge" to reason that CPRB "implicitly knew" that DNR was including subsistence allowance in compensation. Her conclusion fails to consider the fact that DNR's records to CPRB did not

[13] On page 20 of the Final Order, the Circuit Court wrongly extends this improper application of constructive notice, by also placing an obligation on CPRB to "make an inquiry about the statutorily mandated subsistence pay." (J.A. 693.) The Order cites no statute, regulation, rule or even agency policy in support of such an unreasonable obligation and indeed, none exists. Rather, the statutory onus is on DNR as the employer to submit to CPRB "a detailed statement of all service rendered . . . by each of its employees." W. VA. CODE § 5-10-19.

separately show subsistence allowance in its calculation of compensation. Rather, the Circuit Court boldly states that "the Board was on constructive notice ***since 1996***" because that is when the Legislature amended W. VA. CODE 20-7-1, to provide subsistence allowance to DNR officers. (J.A. at 635.) (emphasis added). This is wrong on many levels. First, the Circuit Court's conclusion unfairly and without any legal basis places a duty on CPRB to analyze all Legislative amendments even when the amendment specifically pertains to other unrelated state agencies. This would be a herculean task; the West Virginia Legislature's website indicates that since 1996, the Legislature has passed 6,901 bills affecting 23,565 sections of the West Virginia Code. Neither this Court nor the Legislature has ever placed such a burden on CPRB and the Circuit Court's application of constructive notice in this context is reversible error.

Second, simply because the Legislature began in 1996 to allow DNR officers to received subsistence allowance does not mean that such payments are pensionable. As explained above in Section I, subsistence allowance does not meet the PERS definition of "compensation." Also, as explained in Section II.B, CPRB had no way to know that the DNR was including subsistence allowance in the Retirement Deduction Reports that it provided regularly to CPRB because the reports did not separately mention subsistence allowance, but simply listed the "gross salary." (J.A. at 76-78.)

Contrary to the Circuit Court's Order, CPRB acted timely in correcting the error. In the Spring of 2014, CPRB conducted a random audit of DNR officer Jon Cogar's file in preparation for a meeting to discuss his benefit estimates. Through this audit, CPRB first became aware DNR had been including subsistence allowance in compensation. CPRB immediately began an investigation and in less than 30 days from discovering DNR's error, CPRB concluded subsistence allowance is not compensation as defined by the statute and

directed DNR to stop. (J.A. at 53, ¶ 46.) The Circuit Court's Order fails to mention any of this, but instead without basis, wrongly concludes that CPRB did not act timely to correct the error.

D. Both the 2011 version and the 2015 version of the "error corrections provision" of West Virginia Code § 5-10-44 require CPRB to seek repayment and the Circuit Court wrongly concluded otherwise.

Before the Circuit Court, Respondents argued that an earlier version of the "errors correction provision" contained in West Virginia Code § 5-10-44 did not permit CPRB to seek repayment of errors. The Circuit Court incorrectly adopted Respondents' argument. Contrary to the Circuit Court's Order, all versions of West Virginia Code § 5-10-44—past or present—require CPRB to recover the overpayments; and, as a remedial statutory enactment, West Virginia Code § 5-10-44 (2015) is applied retroactively and undoubtedly requires the recovery of overpayments.

The Circuit Court found that "because the Board discovered this alleged 'error' in 2014, the 2011 version of West Virginia Code § 5-10-44, is applicable." (J.A. at 633.) The 2011 version states as follows:

> (a) General rule: If any change or employer error in the records of any participating public employer or the retirement system results in any member, retirant or beneficiary receiving from the system more or less than he or she would have been entitled to receive had the records been correct, **the board shall correct the error**. If correction of the error occurs after the effective retirement date of a retirant, and as far as is practicable, the board shall adjust the payment of the benefit in a manner that the actuarial equivalent of the benefit to which the retirant was correctly entitled shall be paid.

W. VA. CODE § 5-10-44 (2011) (emphasis added). Respondents argued and the Circuit Court incorrectly agreed that the above language does not give CPRB statutory authority to recover overpayments received by the retiree. Compare the 2011 version to the 2015 version, which states as follows:

> General rule: Upon learning of any errors, the board **shall correct errors** in the retirement system in a timely manner whether an individual, entity or board was at fault for the error with the intent of **placing the affected individual, entity and retirement board in the position each would have been in had the error not occurred.**

W. VA. CODE § 5-10-44 (2015) (emphasis added). The Circuit Court correctly interpreted the 2015 version as providing authority for CPRB to recover overpayments received by the retirees. However, the Circuit Court wrongly concluded that because the 2011 version of the statute does not contain the language in the 2015 version regarding repaying the amount of any overpayment, CPRB is precluded from requiring retirees to repay any overpayment.

Although the statute has been amended over the years to include more specific descriptions of the corrections required, West Virginia Code § 5-10-44 has always imposed upon CPRB an obligation to act when an error is discovered. The general rule contained in subsection (a) of both the 2011 and 2015 versions of West Virginia Code § 5-10-44 requires CPRB to correct any employer error that results in any member, retirant or beneficiary receiving from PERS more or less than he or she would have been entitled to receive had the records been correct. While the 2011 version does not contain the specific language about repayment as set forth in the 2015 version, the 2011 version nonetheless requires CPRB to "correct the error" resulting in a member receiving more than they are entitled to. By requiring CPRB to "correct the error," it is undoubtedly authorized to seek repayment of overpayments. As the Hearing Officer properly concluded: "If the Board could not seek repayment, [it] could not 'correct the error' as it is required to do." (J.A. at 472, ¶ 22.)

Indeed, the Supreme Court of Appeals of West Virginia has held that earlier versions of the statute permitted CPRB to retroactively revoke certain benefits. Specifically, in *Myers v. W. Va. Consol. Public Retirement Bd.*, 226 W. Va. 732, 704 S.E.2d 738 (2010), the

Court upheld CPRB's decision to remove two months of service credit improperly applied as a PERS contribution. The Court affirmed this decision and noted that "the Board is statutorily bound by West Virginia Code § 5-10-44 to correct errors in the calculation of PERS member's service credit." *Id.* The Court specifically relied upon the provision in West Virginia Code § 5-10-44 that states:

> If any change or employer error in the records of any participating public employer or Retirement System ***results in any person receiving from the system more or less than he or she would have been entitled to receive had the records been correct, the Board shall correct the error....***[14]

Id. (emphasis added).

The language contained in this 2005 version of West Virginia Code § 5-10-44 requires CPRB to correct an error that results in "***any person*** receiving from the system more . . . than he or she would have been entitled to." The use of the word "person" as opposed to "employee," "member" or "retirants" in the 2005 version is significant and encompasses ***all persons***. The Legislature could have chosen to limit the application of this provision and not include retirants, but by using the word "person," the Legislature included retirants that have also been overpaid based on a miscalculation of their pensionable compensation. If there was any doubt, the Legislature cleared this up in the 2011 version when it replaced the word "person" with "any member, retirant or beneficiary . . ." W. VA. CODE § 5-10-44 (2011). Other than more clearly defining "persons" who are subject to correction and adding the descriptive title "General rule," this provision of the 2011 version is identical to the 2005 version. Based on this provision in both the 2005 and 2011 versions, CPRB is required to correct overpayments to

[14] The language in this block quote from the 2005 version is identical to the original version from the establishment of PERS and this is the same language relied upon by the Board on page 17 of the Response brief.

retirees. The 2015 version simply clarifies how the overpayment will occur. It does not extend any new authority to CPRB, as the prior versions clearly provide CPRB with authority to require that retirees return any mistaken overpayments.

Furthermore, this interpretation makes sense. The only way CPRB can correct an overpayment of retiree distributions or benefits is to receive reimbursement for the full amount of the overpayment. The fiduciary duty CPRB owes to all its members, retirants and beneficiaries compels such a correction. Because all versions of the statute require corrections to all errors, this Court should find that the 2015 changes to West Virginia Code § 5-10-44 do not affect the interpretation of prior versions. Instead, this Court should uphold CPRB's common sense approach in interpreting and applying the statute over the years. *See Dale v. Knopp*, 231 W. Va. 88, 743 S.E.2d 899, syl. pt. 6 (2013) (when a government agency is charged with execution of a particular statute, the agency's contemporaneous construction of that statute is "entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.").

III. The Circuit Court improperly relied upon *Booth v Sims* and erred in expanding the scope of that decision.

The Circuit Court erred when she rejected the Hearing Officer's conclusion that Respondents had no vested interest in having their subsistence pay included in the calculation of their retirement because Respondents had not "established detrimental reliance on any statutory promise." (J.A. at 473, ¶ 3.) The Hearing Officer's decision is in accordance with this Court's prior decisions consistently ruling that an individual has no constitutional contract right to pension benefits erroneously awarded to him.

Here again, the Circuit Court rejected longstanding precedent and instead improperly expanded the scope of *Booth v. Sims*, 193 W. Va. 323, 456 S. E. 2d 167 (1994).

Booth did not address the type of error that DNR made here, but rather, *Booth* is considered the seminal case in West Virginia regarding constitutional protections afforded to public pension plan members against ***legislative amendments*** to benefits provided for by statute. In *Booth*, the Legislature amended the state troopers public pension plan and increased the percentage of salary state troopers were required to contribute, prohibited troopers from using accumulated leave as credit towards years of service in determining eligibility to begin receiving retirement benefits, and reduced a cost of living adjustment. The *Booth* Court held that even those who are not yet retired may have a constitutionally protected interest in a future pension, where the employee could establish detrimental reliance on the statutes in place. *Booth*, 456 S.E.2d at 181. Thus, the *Booth* Court placed some restrictions on the Legislature's ability to ***amend the statutes*** governing public pension plans with respect to current employees.

Here, the Circuit Court analyzed the case as if ***legislative amendments*** had altered a statutory promise—as was the case in *Booth*—when in fact subsistence allowance was never statutorily included in compensation. Respondents only generally claim to have detrimentally relied on the fact that neither the DNR nor the CPRB affirmatively informed them that subsistence allowance was not pensionable. In essence, Respondents are claiming reliance on an error—not reliance on a statutory promise. Neither they nor the Circuit Court identified any statutory amendment giving rise to their claims, and therefore Respondents have no claim under *Booth v. Sims*. Furthermore, CPRB's position on excluding the subsistence allowance from the calculation of contributions and final average salary is consistent with the interpretation of PERS statutes by both CPRB and DNR going back as far as 1976, and possibly further. Therefore, by finding that subsistence allowance is not included in "salary" for the purpose of determining

pension benefits, CPRB "merely clarified but did not change existing law . . . " *Booth*, 456 S.E.2d at 187.

Instead of identifying the "statutory promise" on which the Respondents have relied—as is required to invoke *Booth v. Sims*—the Circuit Court's Order characterizes CPRB as making a comparable promise in the form of retirement advice. Specifically, the Circuit Court erroneously concluded that Respondents relied upon CPRB's alleged advice that Respondents' pensions "are based on their total salary, which included the subsistence allowance." (J.A. at 640.) This conclusion by the Circuit Court is quite simply wrong for several reasons. First, there is absolutely no evidence in the record that CPRB ever provided such advice. Indeed, this conclusion is contrary to the parties' ***Joint*** Stipulation of Facts which states that CPRB ***never*** provided such advice. (J.A. at 51, ¶ 34.) Moreover, the Retirement Deduction Reports supplied by DNR to CPRB failed to designate that the total shown for each officer's salary also included an amount for subsistence allowance. Thus, CPRB had no way of knowing that DNR was including subsistence allowance in the total gross salary calculation. Because CPRB did not know that subsistence allowance was being included in salary calculations, it could not have explicitly or implicitly advised DNR officers that this calculation was correct. There is no evidence that supports the Circuit Court's conclusion.

In sum, the Circuit Court's application of *Booth* is wrong in this case because (i) Respondents have no vested interest in having their subsistence pay included in the calculation of their retirement; (ii) *Booth* requires reliance on a statutory promise and a legislative amendment that effectively reduces retirement benefits, and neither are present in this case; and (iii) instead of a statutory promise, which is required to invoke *Booth*, the Circuit Court deems the promise to come from CPRB in the form of advice—advice that never happened.

In several cases, this Court has specifically rejected similar arguments to implicate *Booth*. *See Summers v. W. Va. Consol. Pub. Ret. Bd.*, 217 W. Va. 399, 404-405, 618 S.E.2d 408, 413-414 (2005) (per curiam) (finding there was no detrimental reliance under *Booth* because there was no statutory "promise"); *Lanham v. W. Va. Consol. Pub. Ret. Bd.*, No. 11-0778 (March 9, 2012 Mem. D.) (finding there can be no detrimental reliance on an error because there was no statutory promise on which to rely); *Myers v. W. Va. Consol. Pub. Ret. Bd.*, 226 W. Va. 738, 704 S.E.2d 738 (2010) (per curiam) (finding that the petitioner could not claim reliance on erroneous service credit, despite the fact that it had appeared on every statement issued to the petitioner throughout his career, because CPRB is statutorily bound to correct errors and this requirement cannot be limited for equitable reasons). Therefore, the Circuit Court's application of *Booth v. Sims* in this case was wrong and this Court should overturn the Circuit Court's Order and affirm the decision of CPRB.

CONCLUSION

The Circuit Court's Final Order is plain, reversible error and as shown above contains several inaccurate conclusions of fact and improper applications of law. For these reasons, this Honorable Court should reverse the Final Order and reinstate CPRB's decision that DNR subsistence allowance is not pensionable compensation under PERS.

Respectfully Submitted

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD
By Counsel

Ronda L. Harvey, Esquire (WVSB 6326)
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Phone: (304) 347-1100
Facsimile: (304) 347-1746
E-mail: rharvey@bowlesrice.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0350

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Petitioner

v.

Appeal from the Circuit Court of Kanawha County (18-AA-9)

ROBERT CLARK, *ET AL.*,

Respondent.

Certificate of Service

The undersigned, counsel for Petitioner, hereby certifies that on the 17th day of August 2020, she served the foregoing ***Brief of Petitioner, the West Virginia Consolidated Public Retirement Board*** upon counsel of record by depositing the same in the United States Mail, postage prepaid, addressed to:

Lonnie C. Simmons, Esquire (WVSB # 3406)
DiPiero Simmons McGinley & Bastress, PLLC
604 Virginia Street, East
Post Office Box 1631
Charleston, West Virginia 25326-1631
Phone: (304) 342-0133
Facsimile: (304) 342-4605
E-mail: Lonnie.Simmons@dbdlawfirm.com

Ronda L. Harvey

Ronda L. Harvey, Esquire (WVSB 6326)
BOWLES RICE LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Phone: (304) 347-1100
Facsimile: (304) 347-1746
E-mail: rharvey@bowlesrice.com