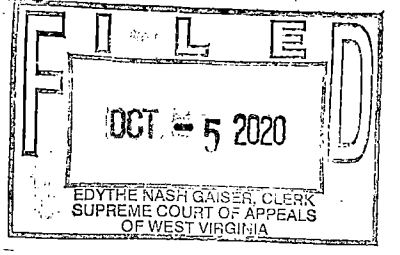
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



NO. 20-0350

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Respondent below/Petitioner,

v.

ROBERT CLARK, *ET AL.*,

Petitioners below/Respondents.

Appeal from the Circuit Court of Kanawha County, West Virginia

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RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

In 1996, law enforcement officers employed by the West Virginia Division of Natural Resources (DNR) began receiving subsistence pay, pursuant to W.Va.Code §20-7-1, in addition to their base pay.[1] (JA 48-49, 59, 621). Beginning with the February 28, 1997 paycheck, the DNR explained to its officers that this subsistence pay would be included as part of the total compensation paid to them. The DNR, as the employer, and each officer paid the required premiums into the

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[1]The critical facts in this case are not disputed and were agreed to in a **JOINT STIPULATION OF FACTS** filed below, which also had attached to it supporting exhibits. (JA 46).

Public Employers Retirement System (PERS) including this subsistence pay. (*Id.*). Combining this subsistence pay with their base pay caused the actively employed officers and the DNR, as the employer, to pay higher contributions into PERS than they would have if subsistence pay had been excluded. The DNR officers who retired after 1997, received a higher monthly pension benefit than they would have received if this subsistence pay had not been included. Thus, from the end of February, 1997, through November 1, 2015, DNR law enforcement officers regularly contributed to PERS including subsistence pay as part of their compensation and DNR law enforcement officers who retired during this time period received PERS benefits calculated based upon their total compensation, including subsistence pay.

Effective November 1, 2015, without there being any change in the law by the Legislature, Petitioner West Virginia Consolidated Public Retirement Board decided that the PERS contributions made by presently employed DNR officers no longer would be calculated by including subsistence pay as part of their total compensation and the pension benefits paid to retired DNR officers not only were reduced, but Petitioner also demanded that these retired DNR officers would have to pay money back to PERS for the pension benefits previously received. Approximately 160 DNR officers filed administrative appeals from this ruling seeking a declaration that their statutory subsistence pay must be included in their total compensation for purposes of calculating their PERS' contributions.

After their separate appeals were consolidated at the agency level, where Petitioner ruled against them, Respondents appealed this final ruling to the Circuit Court of Kanawha County, where again their separate appeals were consolidated into one case. In this joint appeal, Respondents challenged Petitioner's decision and sought declaratory relief. In an order entered March 18, 2020, the Honorable Judge Jennifer F. Bailey held:

1. **Subsistence pay is compensation under PERS:** The subsistence pay received by DNR officers, pursuant to W.Va.Code §20-7-1, is included in the definition of "compensation," as defined in W.Va.Code §5-10-2(8);

2. **Petitioner cannot rely on the "error"[2] correction statute for taking this action:** Petitioner justified its action to undo and unwind more than eighteen years of the DNR and Respondents including subsistence pay in their wages based upon W.Va.Code §5-10-44. The trial court found there was no "error" because the DNR, as the employer, deliberately acted to include subsistence pay as part of the wages earned by Respondents and Petitioner's actions were untimely; and

3. **Respondents have a contractual and constitutional right to their full PERS pensions:** Respondents relied upon the public pension system in place from 1996 to the present and paid income taxes and insurance premiums based upon all money they earned, including the subsistence pay. From 1996 to November 1, 2015, Petitioner provided annual statements to Respondents explaining their future pension details, based upon all wages earned, including the subsistence pay, and never advised Respondents that the statutorily mandated subsistence pay should not be included in the calculation of their final average salaries for PERS. Petitioner's attempt to reduce the retirement owed to Respondents under PERS constituted a violation of Respondents' contractual and constitutional rights to their full PERS pension. (JA 628-29, 635-36, 639-40).

Petitioner appeals these rulings, which were fully supported by the facts and the applicable law. Respondents respectfully submit the final order issued in this case should be affirmed and the arguments raised by Petitioner rejected.

II. Statement of the case

This case is different from most administrative appeals because the parties agreed to the facts and sought a declaration of rights under the statutes in question. (JA 46). The trial court recognized this distinction by noting the parties in this case sought declaratory relief addressing the meaning,

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[2]Petitioner suggests this Court's decision in *Bland v. State of West Virginia*, 230 W.Va. 263, 737 S.E.2d 291 (2012), somehow is relevant to the error issue. *Bland* does not involve statutory subsistence pay, but rather involves some complex litigation engaged in by various State Troopers, raising issues that have nothing to do with the present case.

interpretation, and application of certain statutes relating to Respondents' retirement under PERS.[3] (JA 616). However, some critical facts should be noted.

Beginning with the 1996 amendment of W.Va.Code §20-7-1,[4] the Legislature mandated that Respondents would receive additional compensation each month, referred to as subsistence pay. This subsistence pay earned by these officers was included in the calculation of their income taxes, the amount of PEIA premiums assessed, and the employer and employee contributions paid into PERS. (JA 49, 51). Thus, when these officers retired, subsistence pay was included in the calculation of their total compensation for PERS. All DNR law enforcement officers whose retirement occurred from 1996 through November 1, 2015, had their PERS' pensions calculated based upon the total amount of wages they earned, including the subsistence pay.

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[3]Because this Court will be issuing a decision declaring the rights of all DNR law enforcement officers under the statutes in question, Petitioner's suggestion that the ruling in this case only applies to the specific Respondents is not correct. Once this Court declares how these statutes must be applied, this ruling will govern the rights of all present and retired DNR law enforcement officers and not simply to Respondents.

[4]In the 1996 amendment of W.Va.Code §20-7-1, the Legislature authorized subsistence pay, in addition to the reimbursement of actual expenses incurred when an officer worked outside of the officer's area of primary assignment:

> **Conservation officers shall receive, in addition to their base pay salary, a minimum monthly subsistence allowance for their required telephone service, dry cleaning or required uniforms, and meal expenses while performing their regular duties in their area of primary assignment in the amount of one hundred thirty dollars each month.** This subsistence allowance does not apply to special emergency conservation officers appointed under this section. (Emphasis added).

DNR officers are the only State employees who are authorized by statute to receive subsistence pay as a part of the wages they earn.[5] Although the stated purpose for this pay was to cover the cost of dry cleaning their uniforms, telephone service, and meals, DNR officers received this pay automatically without being required to provide specific receipts, which would be required for any expense reimbursement. (JA 50). As noted in W.Va.Code §20-7-1, and as stipulated by the parties, in addition to subsistence pay, DNR officers can seek reimbursements for expenses incurred when the officer is assigned to work outside of his or her area of primary residence. (JA 50).

Beginning with the February 28, 1997 paycheck, the DNR explained to its officers in a February 19, 1997 memorandum, "[Y]ou will receive the full amount of subsistence for the month of February, minus deductions for federal and state income taxes, Medicare and Social Security taxes, and retirement."[6] (JA 59). Once this change was implemented, Respondents used this subsistence pay for other expenses, including the items referenced in W. Va. Code §20-7-1(h) (required telephone service, dry cleaning, required uniforms, and meal expenses) as well as for additional weapons, and body armor. (JA 50). Respondents' State income tax and PEIA premiums

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[5]In its brief, Petitioner challenges this assertion, but fails to provide an example of any other State employee who, by statute, specifically is entitled to received on a regular basis subsistence pay, as opposed being provided money to purchase items, based upon a general statute.

[6]Petitioner relies, in part, on the comment in the February 19, 1997 memorandum, which states the IRS requires subsistence pay to be subject to Social Security and Medicare taxes as a non-accountable expense reimbursement. (**PETITIONER'S BRIEF** at 7; JA 4). According to the IRS, an employer's accountable expenses reimbursement plan requires the employee to incur business-related expenses, to make an accounting of such expenses to the employer within a reasonable period of time, and to return any excess reimbursement to the employer within a reasonable period of time. A nonaccountable expense reimbursement plan simply is one that fails to meet one or more of the three rules required for an accountable expense reimbursement plan. Thus, this label placed on subsistence pay by the IRS is not controlling on the question as to whether such payments are included in the definition of compensation under PERS.

were calculated based on including this subsistence pay, and the subsistence pay was provided to Respondents who were on paid annual, sick, or military leave, but was not paid to Respondents on unpaid leave. (JA 49-50).

Effective the end of February, 1997, the DNR began treating the subsistence pay made to Respondent as subject to PERS, and calculated the required employee and employer contributions to PERS on that basis. Thus, beginning that date, both the DNR's and Respondents' contributions to PERS took subsistence pay into account. The DNR regularly reported the gross salary received by Respondents to Petitioner, which salary included the subsistence pay. Respondents received from Petitioner regular statements showing the wages reported to Petitioner and upon which their pensions would be based. (JA 51).

The trial court found the following critical facts were not disputed:

> A. [Respondents'] employer, the DNR, decided the subsistence pay provided by the 1996 amendment to W.Va.Code §20-7-1, would be included in the wages paid to [Respondents] in their twice a month paychecks;
>
> B. The subsistence allowance was paid on a regular bimonthly basis combined with the other wages earned, rather than being paid once annually in a lump sum;
>
> C. As long as [Respondents] were receiving wages, whether they were working or on paid sick, annual or, military leave, they received the subsistence allowance. However, if [Respondents] were not providing any services and were not otherwise being paid, they were not paid the subsistence allowance;
>
> D. All of [Respondents'] wages earned from 1996 forward were reported to the IRS in W-2 forms provided to Respondents, which made no distinction between wages earned and the subsistence allowance;

E. [Respondents] paid federal and State income taxes on all wages earned, as reflected in the W-2 forms;

F. The DNR and [Respondents] made their respective contributions into the PERS' plan based upon the total amount of wages earned, including this subsistence allowance.

G. The DNR reported to [Petitioner] the total wages earned by [Respondents] on a regular basis, based upon the total income reported in [Respondents'] W-2 forms; and

H. [Petitioner] provided to [Respondents] on a regular basis statements showing [Respondents] the total amount of wages earned, upon which their pension would be based. (JA 578).

Effective November 1, 2015, at the direction of Petitioner, the DNR ceased making employer and employee contributions to PERS based on subsistence pay. For all service prior to that date, employer and employee contributions to PERS based on the Respondents' subsistence pay were made; therefore, if Respondents prevail, all such periods of service are already statutorily funded. Furthermore, if Respondents prevail, make-up employer and employee contributions to PERS would have to be made, based on Respondents' receipt of subsistence pay after November 1, 2015. (JA 579).

To demonstrate the impact Petitioner's attempted change would have on Respondents, the parties selected an anonymous retired DNR employee. For this employee, Petitioner's attempted change would cause this pensioner to lose **$3,369.60** in pension benefits on an annual basis and this pensioner would have to pay back to PERS **$19,620.90**. In this scenario, the alleged overpayment would be paid back by reducing this pensioner's monthly benefits from **$3,314.94** to **$2,715.62** for a period of 60 months. (JA 579-80).

III. Summary of argument

The trial court correctly exercised its authority under W.Va.Code §29A-5-4(1), to reverse Petitioner's final ruling because Petitioner's final ruling was contrary to the statutes at issue. Based upon a review of all of the related statutes, the trial court correctly concluded that the subsistence pay under W.Va.Code §20-7-1, meets the definition of "compensation" as defined in W.Va.Code §5-10-2(8). This conclusion is supported by an examination of all of the related statutes, where various lump sum and irregular payments specifically are excluded from being included in the calculation of compensation under PERS and because the Legislature has never excluded subsistence pay.

For services rendered, subsistence pay is provided on a regular bimonthly basis combined with the regular wages paid to Respondents, rather than being paid as a lump sum on an irregular basis. When a DNR officer is paid, either because the officer is working or is on paid leave of some kind, the severance pay is earned as well. When a DNR officer is not rendering any services and is not paid, such as when an officer is on an unpaid leave of absence, the severance pay is not provided. Thus, the statutory subsistence pay in this case easily is distinguishable from the types of irregular lump sum payments the Legislature specifically excluded from its definition of compensation.

Petitioner did not have any authority under W.Va.Code §5-10-44, the "error" correction statute, because the definition of "employer error" excludes "deliberate acts" by the employer. The undisputed record in this case fully supports the conclusion that the manner in which the DNR treated subsistence pay was very deliberate and considered as opposed to a thoughtless clerical error made in an instant. The two February, 1997 memoranda issued by the DNR to its officers shows the considerations and concerns the DNR considered in deciding how to process this subsistence pay. (JA 59-60). As the trial court noted, "These memos demonstrate the DNR thoughtfully considered

how to treat the subsistence pay and ultimately concluded such pay was a part of each employee's compensation. As a result, from 1996 until the Board's most recent action triggering this appeal, the DNR issued one check to its law enforcement officers, which included subsistence pay, the officers paid income taxes and other benefits based upon the total wages earned, including subsistence pay, and both the DNR and the employees made contributions into PERS based upon the total wages earned, including subsistence pay." (JA 630-31).

The decision by the DNR, as the employer, to include the statutorily mandated subsistence pay in the calculation of the total compensation paid to Respondents was not "an omission, misrepresentation or violation of" state law, but rather was a "deliberate act" made by the DNR. Therefore, Petitioner, which only has the authority provided to it by the Legislature, had no authority to correct any alleged "error" in this case because the DNR acted deliberately.

The trial court's discussion of *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1994), and its progeny must be read in the context of the trial court's earlier rulings that subsistence pay must be included in compensation for PERS purposes and that the DNR committed a deliberate act in the way this pay was treated, and, therefore, Petitioner has no authority to "correct" anything. In light of these rulings, the attempt by Petitioner to reduce Respondents' pensions clearly implicates this Court's holdings in *Booth* and related cases.

This Court has a long history of being very protective of a public employee's right to his or her retirement benefits and has held public employees have a contractual and constitutional interest in their pension. As applied here, where the trial court already had determined that the DNR acted correctly in including subsistence pay in calculating its employees PERS compensation, any attempt to reduce the pensions of active and retired DNR officers, and to seek overpayments from the retired

officers, would violate their contractual and constitutional rights and would be prohibited by this Court's cases.

IV. Statement of oral argument and decision

Respondents respectfully submit the Court may benefit from either Rule 19 or 20 oral argument in this case to address any questions about the facts or the application of the law. Questions involving the retirement system can be somewhat dense, so having counsel for the parties attempt to clarify any of these matters could be helpful. Because the Court has never addressed the specific statutes at issue and all DNR officers will be impacted by this ruling, a decision authored by one of the Justices would be appropriate.

V. Argument

A. Subsistence pay is "compensation" under W.Va.Code §5-10-2(8)

Petitioner presents several different arguments challenging the trial court's conclusion that subsistence pay received by DNR officers, pursuant to W.Va.Code §20-7-1, is included in the definition of "compensation," as defined in W.Va.Code §5-10-2(8). First, Petitioner asserts the trial court failed to cite the provision of the West Virginia Administrative Procedures Act supporting the reversal of Petitioner's final order. While there is no requirement in our case law for a trial court to specifically state which provision in W.Va.Code §29A-5-4, is the basis for reversing the agency's decision, because this litigation focused on the application of statutes, the trial court had the authority to conduct its own *de novo* review of the statutes and to reverse Petitioner's final ruling under the initial subsection of W.Va.Code §29A-5-4, because Petitioner's ruling was "(1) In violation of ...statutory provisions." The suggestion by Petitioner that the trial court was required to apply a more deferential standard of review, as opposed to addressing the application of these statutes *de novo*, is incorrect.

Second, Petitioner claims the trial court erred in finding the subsistence pay met the definition of "compensation" as defined in W.Va.Code §5-10-2(8):

> **"Compensation" means the remuneration paid a member by a participating public employer for personal services rendered by the member to the participating public employer.** In the event a member's remuneration is not all paid in money, his or her participating public employer shall fix the value of the portion of the remuneration which is not paid in money: *Provided,* That members hired in a position for the first time on or after July 1, 2014, who receive nonmonetary remuneration shall not have nonmonetary remuneration included in compensation for retirement purposes and nonmonetary remuneration may not be used in calculating a member's final average salary. **Any lump sum or other payments paid to members that do not constitute regular salary or wage payments are not considered compensation for the purpose of withholding contributions for the system or for the purpose of calculating a member's final average salary. These payments include, but are not limited to, attendance or performance bonuses, one-time flat fee or lump sum payments, payments paid as a result of excess budget, or employee recognition payments. The board shall have final power to decide whether the payments shall be considered compensation for purposes of this article.** (Emphasis added).

Petitioner asserts, as it does throughout its brief, that subsistence pay is expense reimbursement rather than wages paid for services rendered. The trial court rejected this argument by explaining:

> The subsistence allowance paid to [Respondents] clearly falls within this broad definition of "compensation." **As long as [Respondents] were paid their wages, whether they were working or on paid annual, sick, or military leave, they also were paid the subsistence allowance. When [Respondents] were not working or were not working due to any of these paid leave situations, they were not paid the subsistence allowance. If [Respondents] were paid the subsistence allowance regardless of whether they were working or otherwise receiving other wages, then an argument could be made the subsistence allowance was not compensation.** However, because the subsistence allowance was paid only when [Respondents] were paid their wages, such payments fall within the definition of "compensation." (Emphasis added). (JA 582).

In reaching this conclusion, the trial court noted that subsistence pay did not fall within any of the payments made to employees that the Legislature specifically excluded from the definition of compensation. In W.Va.Code §5-10-2(8), the Legislature excluded the following from its definition of compensation: "Any lump sum or other payments paid to members that **do not constitute regular salary or wage payments** are not considered compensation for the purpose of withholding contributions for the system or for the purpose of calculating a member's final average salary. These payments include, but are not limited to, attendance or performance bonuses, one-time flat fee or lump sum payments, payments paid as a result of excess budget, or employee recognition payments." (Emphasis added).

For services rendered, subsistence pay is provided on a **regular** bimonthly basis combined with the regular wages paid to Respondents, rather than being paid as a lump sum on an irregular basis. When a DNR officer is paid, either because the officer is working or is on paid leave of some kind, the severance pay is earned as well. When a DNR officer is not rendering any services and is not paid, such as when an officer is on an unpaid leave of absence, the severance pay is not provided. Thus, the statutory subsistence pay in this case easily is distinguishable from the types of irregular lump sum payments the Legislature specifically excluded from its definition of compensation.

The trial court also observed that the Legislature never adopted any language excluding subsistence pay from the calculation of an employee's total compensation in PERS. While the Legislature has enacted several statutes listing payments made to employees that are excluded from compensation under PERS, the Legislature has never excluded subsistence pay. For example, under W.Va.Code §5-10-2(8), the Legislature specifically excluded nonmonetary remuneration from the calculation of an employee's pension: "*Provided,* That members hired in a position for the first time on or after July 1, 2014, who receive nonmonetary remuneration shall not have nonmonetary

remuneration included in compensation for retirement purposes and nonmonetary remuneration may not be used in calculating a member's final average salary." *See also* W.Va.Code §5-5-6(c)(3)("Any payment for unused sick leave may not be a part of final average salary computation."); W.Va.Code §5-10-22(a)("Provided, That the final average salary used in this calculation does not include any lump sum payment for unused, accrued leave of any kind or character. The credited service used for this calculation may not include any period of limited credited service."); W.Va.Code §5-5-3 ("however, lump sum payment for unused, accrued leave of any kind or character may not be a part of final average salary computation; and where any deduction of employee contribution may have been made previously, a refund of the amount deducted shall be granted the former employee and made by the head of the respective former employer spending unit.").

After noting the lack of any statute from the Legislature excluding subsistence pay from the calculation of PERS compensation, the trial court relied upon rules of statutory construction. When the Legislature identifies a general class followed by specific examples of that class, the doctrine known as *ejusdem generis*[7] is applicable, as explained in Syllabus Point 2 of *Parkins v. Londeree*, 146 W.Va. 1051, 124 S.E.2d 471 (1962):

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

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[7]Petitioner objected to the application of this doctrine because, according to Petitioner, the definition of compensation is clear and not subject to interpretation. Respondents respectfully submit that the five years the parties have spent litigating over the meaning of this word is some indication that the definition is not quite as clear as Petitioner asserts. While the specific definition of compensation may appear at first blush to be straightforward, the issue becomes more complicated because the entire statutory definition has to be considered, including the listed payments that are not to be included, as well as the many related statutes where the Legislature specifically excluded certain payments from the definition of compensation.

In *Murray v. State Farm Fire and Casualty Co.*, 203 W.Va. 477, 485, 509 S.E.2d 1, 9 (1998), this Court explained the application of the doctrine of *ejusdem generis* and the doctrine of *noscitur a sociis*:

> Under 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." Syllabus Point 4, *Jones v. Island Creek Coal Co.*, 79 W.Va. 532, 91 S.E. 391 (1917). The phrase *noscitur a sociis* literally means "it is known from its associates," and the doctrine implies that the meaning of a general word is or may be known from the meaning of accompanying specific words. *See* Syllabus Point 4, *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975). The doctrines are similar in nature, and their application holds that in an ambiguous phrase mixing general words with specific words, the general words are not construed broadly but are restricted to a sense analogous to the specific words.

The general class identified in W.Va.Code §5-10-2(8)–payments excluded from compensation–is followed by the specific list-- attendance or performance bonuses, one-time flat fee or lump sum payments, payments paid as a result of excess budget, or employee recognition payments. None of the specific irregular payments listed is even remotely similar to the regular bimonthly subsistence pay provided to Respondents. Therefore, under the *ejusdem generis* and *noscitur a sociis* rules of statutory construction, the subsistence pay at issue in this litigation is completely dissimilar from the specific payments identified and, therefore, must be included under the definition of compensation.[8]

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[8]Petitioner cites various sources and cases in support of its arguments, but a review of them reveals they are not on point. Petitioner cites an Attorney General's opinion, 57 W.Va.Op.Atty.Gen. 188 (1977), in support of its arguments, but this opinion simply addresses the budgetary process and the constitutional restrictions on how certain line items can be funded. *Campbell v. Kelly*, 157 W.Va. 453, 202 S.E.2d 369 (1974), is cited by Petitioner, but the quote simply is from a resolution adopted by a group addressing legislative pensions, and does not address the statutory subsistence pay provided to Respondents. *State v. Koerner*, 550 F.2d 1362 (4th Cir. 1977), involves whether subsistence pay provided to State Troopers is taxable and, according to this decision, it is. Respondents have never argued the taxability of subsistence pay somehow is determinative of the

Petitioner relies upon the language in W.Va.Code §5-10-2(8), that it "shall have final power to decide whether the payments shall be considered compensation for purposes of this article." While Petitioner has the power to make a determination about whether or not payments should be considered compensation under PERS, that decision still is subject to judicial review. Otherwise, this litigation would have ended five years ago.

Petitioner made a similar argument in *West Virginia Consolidated Public Retirement Board v. Wood*, 233 W.Va. 222, 228 n.9, 757 S.E.2d 752, 758 n.9 (2014), where Petitioner had the authority to determine when "military service credits" were earned and available:

> When the agency's position has been articulated as a litigation position, as in the present case, this Court has declined to accord deference to the agency's interpretation. *See West Virginia Health Care Cost Review Authority v. Boone Memorial Hosp.*, 196 W.Va. 326, 334, 472 S.E.2d 411, 419 (1996) (observing that "courts customarily withhold *Chevron* deference from agencies litigating positions.... We see no reason to take a different tack in this instance."); *In re Snuffer*, 193 W.Va. 412, 417, 456 S.E.2d 493, 498 (1995) (Cleckley, J., concurring) ("The policy underlying our grant of special deference to agency decisions and similar official agency pronouncements does not extend to every agency action. For example, it would not extend to *ad hoc* representations on behalf of an agency, such as litigation arguments.").

Because Petitioner had erred in its application of military service credits, this Court reversed the Petitioner's final ruling and declared how these credits were to be determined. Respondents respectfully submit that a similar holding applies in the present case.

Petitioner cites a number of cases from other jurisdictions addressing their own retirement systems and whether or not certain payments to employees should be included in calculating their

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issues presented to this Court. While *W. Va. Consolidated Public Retirement Board v. Carter*, 219 W.Va. 392, 633 S.E.2d 521 (2006), does hold that lump sum payments of unused vacation pay cannot be included in calculating the final average salary, that holding is consistent with the exceptions in the definition of compensation and is far different than the subsistence pay at issue.

final salary for pension purposes. (**PETITIONER'S BRIEF** at 15-17). Every state has its own retirement system with its own definitions and case law. Respondents respectfully submit that in this type of case, where the Court is being asked to interpret and apply two separate West Virginia statutes–W.Va.Code §20-7-1, and §5-10-2(8)–as well as the Legislature's overall statutory scheme relevant to PERS, including the statutes excluding certain payments from the definition of compensation, trying to apply another state's decisions involving its own retirement system is not very helpful or instructive.

In its final argument on this issue, Petitioner attempts to compare the way expense reimbursements to other State employees are treated. No matter what Petitioner asserts, DNR law enforcement officers are the only State employees who statutorily are entitled to regular subsistence pay. The State Police example provided simply is not relevant because the Legislature never adopted a statute for the State Police that is the equivalent of W.Va.Code §20-7-1.

In contrast with the examples cited by Petitioner, Respondents specifically were mandated by the Legislature to receive a subsistence pay as part of their wages, Respondents paid taxes on all income earned, including the subsistence pay, Respondents paid contributions into PERS based upon their total compensation, including the subsistence pay, and Respondents also have the statutory right to seek reimbursement for certain expenses incurred when such Respondents work outside of their area of primary assignment. Thus, the attempt to confuse the record by comparing the statutory subsistence pay received by Respondents to the additional monies paid to some other State employees, who received such funds without the benefit of any specific statute, ultimately is not helpful in resolving the specific issues presented in this case.

Respondents respectfully submit the trial court's conclusion that the subsistence pay received by DNR officers, pursuant to W.Va.Code §20-7-1, is included in the definition of "compensation," as defined in W.Va.Code §5-10-2(8), is correct based upon:

1. The language used in these statutes, when viewed in light of all of the statutes specifically excluding certain payments from the definition of compensation under PERS, supports this holding, particularly because the Legislature has never excluded subsistence pay from being factored into compensation under PERS;

2. The extensive and undisputed history surrounding how the DNR handled the subsistence pay;

3. The consistent payment of pension contributions based upon all wages earned, including the subsistence pay;

4. The fact that the subsistence pay was provided on a regular monthly basis rather than a lump sum paid on an irregular basis;

5. Respondents only received the subsistence pay as long as they were providing services and receiving wages or some type of paid leave;

6. The subsistence pay was reported on a W-2 form, showing Respondents paid state and federal income taxes on all wages, including the subsistence pay;

7. The DNR consistently reported to PERS the total compensation paid to Respondents, including the subsistence pay earned;

8. Each year PERS provided to Respondents reports showing what compensation Respondents had been paid, including the subsistence pay, upon which their pensions would be based; and

9. The large number of retired Respondents whose pensions were based upon their total compensation, including the subsistence pay.

For all of these reasons, Respondents respectfully ask the Court to affirm the trial court's decision holding that the subsistence pay must be included in the calculation of the total compensation earned by DNR law enforcement officers for purposes of PERS.

B. Petitioner had no authority to correct any "error" under W.Va.Code §5-10-44(a), because the DNR's actions in including subsistence pay as part of the officers' total compensation was not an "error"

Petitioner disagrees with the trial court's analysis of W.Va.Code §5-10-44, which sometimes is referred to as the error correction statute. Administrative agencies only have the authority conveyed to them by the Legislature. In Syllabus Point 4 of *McDaniel v. West Virginia Division of Labor*, 214 W.Va. 719, 591 S.E.2d 277 (2003), this Court explained:

> "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syllabus point 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W.Va. 766, 197 S.E.2d 111 (1973).

Thus, the authority of Petitioner to correct any errors only comes from the power given to Petitioner by the Legislature. Therefore, the language used in the error correction statute is controlling.

West Virginia Code §5-10-44(a), provides, "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." Respondents have never questioned the general authority of Petitioner to correct "errors." However, if there was no error in the first place, Petitioner had no authority to take any action.

In W.Va.Code §5-10-2(12), "employer error" is defined as "an omission, misrepresentation or violation of relevant provisions of the West Virginia Code or of the West Virginia Code of State Regulations or the relevant provisions of the West Virginia Code and of the West Virginia Code of

State Regulations by the participating public employer that has resulted in an underpayment or overpayment of contributions required. **A deliberate act contrary to the provisions of this section by a participating public employer does not constitute employer error.**" (Emphasis added).

The language emphasized above in W.Va.Code §5-10-2(12), has been included in this statute as far back as the 2005 version of this statute and this Court has never issued any decision explaining what is meant by "deliberate act." The undisputed record in this case fully supports the conclusion that the manner in which the DNR treated subsistence pay was very deliberate and considered as opposed to a thoughtless clerical error made in an instant. The two February, 1997 memoranda issued by the DNR to its officers shows the considerations and concerns the DNR considered in deciding how to process this subsistence pay. (JA 59-60). As the trial court noted, "These memos demonstrate the DNR thoughtfully considered how to treat the subsistence pay and ultimately concluded such pay was a part of each employee's compensation. As a result, from 1996 until the Board's most recent action triggering this appeal, the DNR issued one check to its law enforcement officers, which included subsistence pay, the officers paid income taxes and other benefits based upon the total wages earned, including subsistence pay, and both the DNR and the employees made contributions into PERS based upon the total wages earned, including subsistence pay." (JA 630-31).

The decision by the DNR, as the employer, to include the statutorily mandated subsistence pay in the calculation of the total compensation paid to Respondents was not "an omission, misrepresentation or violation of" state law, but rather was a "deliberate act" made by the DNR. In this respect, the Legislature has recognized an employer's application of the law, particularly here where the DNR followed this same procedure *for close to twenty years*, is entitled to some deference

and, therefore, cannot be considered to be an error. The trial court further concluded, "To hold otherwise would require the ALJ and the courts to ignore this provision in W.Va.Code §5-10-2(12), and would eliminate the deference the Legislature sought to create when an employer has made a deliberate decision regarding the State pension system." (JA 631).

Petitioner disagrees with the trial court's conclusion that the DNR deliberately made the decision to treat subsistence pay as part of the compensation earned by its officers. While Petitioner may disagree with this conclusion, the actual record clearly shows the DNR did not make this decision by some accident. Petitioner also disagrees with the trial court's conclusion that Petitioner had constructive knowledge that DNR officers received subsistence pay, so when a DNR officer met with Petitioner to discuss retirement, questions should have been asked at that time about how the subsistence pay was treated by the DNR. (JA 635). "All persons are presumed to know the law. Ignorance thereof is no excuse for its violation." *State v. McCoy*, 107 W.Va. 163, 172, 148 S.E. 127, 130 (1929). *See also*, *Merrill v. West Virginia Dept. of Health and Human Resources*, 219 W.Va. 151, 157, 632 S.E.2d 307, 313 (2006). So, while Petitioner may not have had constructive knowledge about whether subsistence pay already had been added to the DNR employee's total compensation, at a minimum, Petitioner had constructive knowledge of the subsistence pay statute and should have inquired about how it was treated by the DNR.

Even Petitioner explains that it discovered subsistence pay was included in the compensation paid to DNR officers when it consulted with DNR office Jon Cogar, who had met with Petitioner to discuss his upcoming retirement. Thus, it was not until 2014 that Petitioner had actual knowledge about how this subsistence pay deliberately was treated by the DNR. The Cogar example shows how negligent Petitioner was in not discovering how the DNR treated subsistence pay earlier.

After ignoring the "deliberate act" language discussed, Petitioner then goes on to examine the 2011 and 2015 versions of W.Va.Code §5-10-44. The 2011 version of the correction statute makes a distinction between an error corrected **before** and **after** the effective date the public employee retired. If the correction is made **after** the public employee already has retired, Petitioner "shall adjust the payment of the benefit in a manner that the actuarial equivalent of the benefit to which the retirant was correctly entitled." Under this version, Petitioner **does not have any statutory authority** to go back and attempt to recover any prior alleged overpayments already received by the retired officer.

The 2015 version of W.Va.§5-10-44(a), adds language requiring Petitioner to correct errors "in a timely manner" and permits Petitioner to recover alleged overpayments from retired employees. The trial court held that because Petitioner discovered this "error" in 2014, the 2011 version of W.Va.§5-10-44, is applicable and, in any event, Petitioner did not seek to correct this error in a timely manner.[9]

Finally, with respect to its obligation to correct errors, Petitioner discusses its fiduciary duty owed to all public employees who participate in the various retirement systems. Respondents do not disagree with this general assertion, but Respondents note Petitioner also must exercise its authority consistent with the duties and obligations specified by the Legislature and that in this case, because the DNR deliberately treated subsistence pay as part of its officer's total compensation for PERS, Petitioner had no legal authority to reverse that deliberate act.

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[9]Petitioner cites *Myers v. West Virginia Consolidated Public Retirement Board*, 226 W.Va. 738, 704 S.E.2d 738 (2010), in support of its argument that Petitioner can "retroactively revoke certain benefits." (**PETITIONER'S BRIEF** at 26). The actual holding in *Myers*, where the Legislature had provided a benefit in 1988, but eliminated that benefit the next year, is that the plaintiffs had failed to show any detrimental reliance on the 1988 statute. *Myers* is not relevant to any issues in this case.

C. Excluding subsistence pay from the calculation of retirement benefits is contrary to the applicable statutes and a violation of the Respondents' contractually vested property right in their pensions, which became constitutional obligations of the State that cannot be impaired or reduced

Petitioner's final argument addresses the holdings by the trial court addressing the contractual and constitutional rights Respondents have in their pensions.[10] The trial court's discussion of *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1994), must be read in the context of the trial court's earlier rulings that subsistence pay must be included in compensation for PERS purposes and that the DNR committed a deliberate act in the way this pay was treated, and, therefore, Petitioner has no authority to "correct" anything. In light of these rulings, the attempt by Petitioner to reduce Respondents' pensions clearly implicates this Court's holdings in *Booth* and related cases.

This Court has a long history of being very protective of a public employee's right to his or her retirement benefits. In *Booth*, this Court addressed at length the rights of employees, who accepted employment with the State based, in part, on the promise of one day receiving a pension. In accepting this mandamus action filed on behalf of several State troopers, whose pension system had been subjected to several attempted changes, this Court focused on the legitimate expectations of public employees to their promised pensions and explained, 193 W.Va. at 329, 456 S.E.2d at 173:

> 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.

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[10]If the Court affirms the trial court's holding that the DNR properly included subsistence pay in calculating the compensation of its officers for purposes of PERS, the Court may not need to address this final issue.

The end result is this Court in *Booth* adopted multiple new syllabus points recognizing the contractual and constitutional interests public employees have in their retirement system. These interests make it very difficult for the system to be changed after the fact. *See also* Syllabus Point 16 of *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988)("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.").

This Court has decided a number of cases where any reduction in a State employee's pension after the employee's contractually vested property rights are established is unconstitutional and unenforceable. The trial court gave the following summary:

> For example, in *Wagoner v. Gainer*, 167 W.Va. 139, 279 S.E.2d 636 (1981), the West Virginia Supreme Court held an amendment by the Legislature eliminating the increase in the pension of retired judges based upon a salary increase given to active judges was an unconstitutional impairment of their contractual rights. As a result, retired judges were entitled to receive an increase in their monthly pensions based upon the increase in the salaries paid to active judges. *See also The Board of Trustees of the Police Officers and Relief Fund of the City of Wheeling v. Carenbauer*, 211 W.Va. 602, 567 S.E.2d 612 (2002)(Retired police officer proved his contractual and constitutional rights were impaired by a statute seeking to reduce his pension based upon income earned after his disability); *West Virginia Education Association v. Caperton*, 194 W.Va. 501, 460 S.E.2d 747 (1995)(Failure to fund adequately the Teachers Retirement System impaired contractual and constitutional rights, but issue mooted by subsequent legislation); *Adams v. Ireland*, 207 W.Va. 1, 528 S.E.2d 197 (1999)(Petitioner eligible for early retirement stated a valid contractual right to increasing his pension based upon a statute authorizing unused annual and sick leave to be added to retirement credit). (JA 638-39).

Petitioner claims the trial court's discussion of *Booth*, *Dadisman*, and their progeny somehow expanded their holdings. To the contrary, the trial court merely was noting the special nature afforded to public employee pension systems, which trigger contractual and constitutional issues when an action is taken to restrict and limit an employee's pension, particularly when the employee

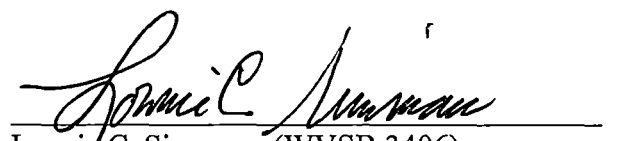
already is retired and has been receiving such benefits. As applied here, where the trial court already had determined that the DNR acted correctly in including subsistence pay in calculating its employees PERS compensation, any attempt to reduce the pensions of active and retired DNR officers, and to seek overpayments from the retired officers, would violate their contractual and constitutional rights and would be prohibited by this Court's cases.

VI. Conclusion

For the foregoing reasons, Respondents Robert Clark, *et al.*, on behalf of all active and retired DNR law enforcement officers, respectfully move the Court to affirm the final ruling issued by the trial court in its March 18, 2020 order. Furthermore, Respondents seek such other relief as the Court deems appropriate.

ROBERT CLARK, *ET AL.* (ACTIVE AND RETIRED DNR LAW ENFORCEMENT OFFICERS), Respondents,

–By Counsel–



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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROBERT CLARK, *ET AL.*,

Petitioners,

v.

Case No.: 18-AA-9
Judge: Bailey

WEST VIRGINIA CONSOLIDATED RETIREMENT BOARD,

Respondent.

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify a copy of the foregoing **RESPONDENTS' BRIEF** was mailed to counsel of record on October 5, 2020, through the United States Postal Service, postage prepaid, to the following:

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