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.

Reply 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENT

I. Subsistence pay is not compensation under W. Va. Code § 5-10-2(8).

The fundamental issue in this case is a simple one: Can an expense reimbursement be considered compensation for "personal services rendered?" The answer is equally simple: No. Payments made to reimburse employees for expenses like meals, dry cleaning and telephone services are not the same as payments made *for the personal services themselves*. The Legislature understood this when it defined compensation as "remuneration paid a member by a participating public employer **for personal services rendered**" and specifically created a subsistence allowance separate from and in addition to the salary paid to DNR officers for services rendered W. Va. Code § 5-10-2(8) (emphasis added). Furthermore, it is undisputed that DNR officers receive subsistence allowance even when they are on paid leave and not rendering any personal services. (J.A. at 50, ¶ 23). Therefore, the subsistence pay could not possibly be "remuneration . . . for personal services rendered."

West Virginia Code § 20-7-1 specifically provides that the subsistence allowance is for DNR officers' "required telephone service, dry cleaning or required uniforms, and meal expenses while performing their regular duties in their area of primary assignment." Respondents insinuate that the subsistence allowance is not truly an expense reimbursement because DNR officers are not required to provide "specific receipts." (Respondents' Brief at 5). However, it is clear from the historical progression of the statute that the decision to replace *ad hoc* expense reimbursements with a subsistence allowance was done for practical reasons—DNR officers incur these types of expenses regularly in the performance of their normal duties and an allowance is more efficient than after-the-fact reimbursements for both the employer and employee. DNR officers may still seek reimbursement for extraordinary expenses incurred while working *outside*

of their area of primary assignment, but presumably these expenses are not as predictable or regular and therefore providing preemptive reimbursement via statutory allowance is not practical for extraordinary expenses.

West Virginia Code § 29A-5-4(g) states that a trial court may not reverse, vacate or modify an order or decision of an agency unless

> the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (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.

As explained in the Brief of Petitioner, the West Virginia Consolidated Public Retirement Board ("Petitioner's Brief"), the trial court did not state under which subsection of West Virginia Code § 29A-5-4 the trial court reversed Petitioner's final ruling. Despite Respondents' baseless assertion, CPRB's finding that subsistence allowance is not "compensation" under the PERS statutes cannot be "in violation of constitutional or statutory provisions" under subsection (1) because there is no statutory provision that includes subsistence allowance in the definition of "compensation." Furthermore, the trial court erroneously found that CPRB's decision was not entitled to deference because questions of law are reviewed *de novo*. However, "absent clear legislative intent to the contrary," this Court affords deference to "a reasonable and permissible construction of [a] statute by [an administrative agency] having policy making authority relating to the statute." *See Sniffen v. Cline*, 193 W. Va. 370, 456 S.E.2d 451 (1995). Consistently, this

Court has held that "[i]nterpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight, and such an agency's construction of these statutes must be given ***substantial deference***." *Ringel-Williams v. State of West Virginia Consol. Public Retirement Bd.*, No. 11-AA-28, 2015 WL 10372372, at *1 (W.Va. Cir. Ct. Feb. 27, 2015) (citing *Sniffen v. Cline*, 193 W. Va. 370, 456 S.E.2d 451 (1995) (emphasis added); *W.Va. Dept. of Health v. Blankenship*, 189 W.Va. 342, 431 S.E.2d 681 (1993); *W.Va. Nonintoxicating Beer Commr. v. A & H Tavern*, 181 W.Va. 364, 382 S.E.2d 558 (1989); *Dillon v. Board of Educ.*, 171 W.Va. 631, 301 S.E.2d 588 (1983); *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

The trial court also gave undue weight to the fact that subsistence allowance was not specifically *excluded* from the definition of compensation under West Virginia Code § 5-10-2(8). However, the statute provides that "[a]ny 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 a member's final average salary." The Legislature included an explicitly non-exhaustive list of examples of payments that do not constitute regular salary or wage payments. "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 trial court incorrectly and unnecessarily applied the doctrine of statutory construction known as *ejusdem generis* to the Legislature's list of examples of payments that do not constitute regular salary or wage payments. Under the doctrine of *ejusdem generis*, general words will be "construed as applicable only to persons or things of the same general nature or class as those enumerated." Syl. Pt. 2, *Parkins v. Londeree*, 146 W. Va. 1051, 124 S.E.2d 471 (1962).

Based upon this doctrine of construction, Respondents argue that subsistence payments are dissimilar from the specific types of payments identified as not constituting regular salary or wage payments under the statute and therefore must be included in the definition of compensation. (Respondents' Brief at 14).

Application of this doctrine is nonsensical. First, the statute explicitly states that the exclusions to regular salary or wage payments are not limited to the examples listed. Furthermore, the Legislature expressly provided in the definition of "compensation" that CPRB "shall have final power to decide whether the payments shall be considered compensation for purposes of this article." Respondent argues that CPRB's determination is not entitled to deference because it is subject to judicial review. However, "where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous." *West Virginia Consolidated Public Retirement Bd. v. Wood*, 233 W. Va. 222, 228, 757 S.E.2d 752, 758 (2014) (internal citations omitted). Contrary to this clear precedent, the trial court's order specifically rejected giving deference to CPRB's decision. (J.A. at 628).

In *Wood*, a similar issue arose where the Legislature provided a non-exhaustive list of periods of armed conflict for which members were entitled to PERS military service credit. *Id.* (defining "period of armed conflict" as "the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War and **any other period of armed conflict by the United States, <u>including, but not limited to</u>**, those periods sanctioned by a declaration of war by the United States Congress or by executive or other order of

the President") (emphasis added). Like the case at hand, the statute at issue in *Wood* also provided that, "in any case of doubt . . . the [CPRB has] final power to determine the period." *Id.*

The *Wood* Court stated that "the primary object in construing a[n] [ambiguous] statute is to ascertain and give effect to the intent of the Legislature." *Id.* at 229, 759. Because the statute included the catch-all language, "any other period of armed conflict by the United States, including but not limited to, . . . " the Court held that the Legislature could not have intended to limit the periods of armed conflict to the non-exhaustive list provided. The Court found that the definition necessarily "includes other periods of armed conflict in which the United State has engaged, *as the credible evidence presented in each individual case may dictate*." *Id.* at 230, 760 (emphasis added). Here, the credible evidence presented dictates that payments excluded from the definition of "compensation" also include other types of payments outside of those exclusions specifically enumerated in the statute.[1]

In their attempt to discredit CPRB's determination that subsistence pay does not fall within the statutory definition of "compensation," Respondents also state that the way other states have handled similar issues in their own retirement systems is "not very helpful or instructive." Although application of precedent from other states is not mandatory, it can certainly be instructive and has often been considered by this Court. The cases presented by CPRB in

[1] In this case, the plain language of W. Va. Code § 20-7-1 shows that the Legislature intended to create subsistence allowance to reimburse DNR officers for typical expenses regularly incurred by them in the normal course of business. The fact that the Legislature listed the types of expenses that the subsistence allowance is meant to reimburse is clear evidence that the Legislature did not intend for the subsistence allowance to be treated as "remuneration . . . for *personal services* rendered" but as reimbursement for expenses incurred. The fact that the Legislature did not simply increase the DNR officers' wages in W. Va. Code § 20-7-1c is further evidence that the Legislature did not intend for the subsistence allowance to be treated as compensation, regular salary, or wage payments, but as an expense reimbursement. As the evidence in this case makes clear, the subsistence allowance payments fall under the types of payments that are not considered "compensation" for the purpose of calculating PERS contributions or benefits.

Petitioner's Brief deal with similar issues of statutory interpretation of terms like "compensation" in statutory schemes similar to that of PERS. The cases involve similar public retirement systems, and the analysis is much the same. Therefore, these cases are important for the Court to consider.

Furthermore, Respondents state in this section that "Respondents specifically were mandated by the Legislature to receive a subsistence pay as part of their wages." (Respondents' Brief at 16). This is blatantly false. The Legislature did not "mandate" that the DNR officers receive their subsistence pay as part of their wages. In fact, the statute authorizing the subsistence allowance is entirely separate from the statute that provides for DNR officers' salaries, and it explicitly states that the subsistence payment is "in addition to their base pay salary." W. Va. Code § 20-7-1. Nowhere does the Legislature state that the subsistence allowance is a "part of" regular wages. If the Legislature had intended to make subsistence pay part of DNR officers' wages, it could have simply increased Respondents' salaries under (and as required by) West Virginia Code § 7-20-1c.[2]

[2] In footnote 8 of Respondents' Brief, Respondents attempt to summarily disregard the cases and secondary sources cited by Petitioner in support of the fact that the DNR officers' subsistence allowance and salaries are distinct under existing law. Respondents are correct that the 1977 Attorney General opinion addresses budgetary processes and constitutional restrictions on how budget line items are funded. However, the broader discussion does make clear that a subsistence allowance and a salary increase are distinct from one another, and legislative intent matters in this case. Furthermore, even though *Campbell v. Kelly*, 157 W.Va. 453, 202 S.E.2d 369 (1974) deals with legislator members of PERS rather than DNR officer members, it supports the idea that expense allowances or reimbursements should not be considered "compensation" under PERS. Respondents also mischaracterize the relevant holding of *State v. Koerner*, 550 F.2d 1362 (4th Cir.1977), which deals with more than just the taxability of subsistence pay paid to State Troopers. In *Koerner*, the U.S. Court of Appeals for the Fourth Circuit held that subsistence allowance is "not considered income by the state of West Virginia in determining the retirement pay of the members and are not intended to represent additional compensation." Finally, the holding in *W. Va. Consol. Pub. Ret. Bd. v. Carter*, 219 W.Va. 392, 633 S.E.2d 521 (2006) is more broadly applicable than Respondents present. The *Carter* Court held that the term "final average salary" "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." Although the *Carter* case dealt with payments for unused leave, the holding related to the definition is still instructive.

Respondents also argue that the fact that the subsistence pay was provided on a regular monthly basis rather than a lump sum paid on an irregular basis is evidence that it is "compensation" under W. Va. Code § 5-10-2(8). However, the statute provides that "[a]ny lump sum ***or other payments*** paid to members that do not constitute regular salary or wage payments are not considered compensation." (emphasis added). The statute does not in any way classify the timing of the payment as a basis for determining whether it is compensation. Any type of payment outside regular salary or wage payments is not considered compensation, and the timing for when the payments are made does not change that.

Respondents also assert that the large number of retired Respondents whose pensions will be affected by this case is somehow a consideration upon which this case should be decided. (J.A. at 17). The number of retirees affected by DNR's error in calculating PERS contributions and benefits is likewise irrelevant in this determination. Administrative agencies such as CPRB must carry out the statutes as they are written, no matter how many people are affected and without regard to equitable considerations. Equity considerations are not proper in administrative appeals, and CPRB is without any power to supplant its views of fairness and equity in place of the will and intent of the Legislature. *Appalachian Regional Healthcare, Inc. v. WV Human Rights Commission,* 180 W.Va. 303, 376 S.E.2d 317 (1988) (an administrative agency's power is solely a creature of statute and thus it must arrive any authority claimed from legislative enactment. It has no common law power but only that power conferred by law, expressly or by implication); *State Human Rights Commission v. Pauley,* 158 W.Va. 459, 212 S.E.2d 77 (1975) (an administrative agency can exert only such powers as those granted by the legislature and if it exceeds its statutory power its actions may be nullified by a court); 2 Am.Jur. 2d *Administrative*

Law §77 (an agency cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power).

Therefore, because the Legislature did not include the subsistence allowance in the definition of "compensation," CPRB is not permitted to include the subsistence allowance in the calculation or PERS contributions or benefits. CPRB does not have the authority to permit a PERS employer continue making contributions or to award PERS benefits based upon subsistence allowance payments, regardless of how many members this may affect. Furthermore, as explained below, CPRB has a statutory and fiduciary duty to correct employer errors such as the error at issue in this case.

II. CPRB had a statutory and fiduciary duty under W. Va. Code § 5-10-44 to correct DNR's error in including the subsistence allowance when it submitted salary reports to CPRB.

Respondents attempt to characterize CPRB as "taking away" the pension benefits rightly earned by Respondents by changing the way "compensation" and PERS contributions and benefits are calculated. This characterization could not be further from the truth. CPRB is simply a state agency with a statutory and fiduciary duty to correct errors when discovered. CPRB is "without any power to supplant its view of fairness and equity in place of the will and intent of the Legislature." *Ringel-Williams v. State of West Virginia Consol. Public Retirement Bd.*, No. 11-AA-28, 2015 WL 10372372, at *4 (W.Va. Cir. Ct. Feb. 27, 2015) (citing *Appalachian Regional Healthcare, Inc. v. WV Human Rights Commission*, 180 W. Va. 303, 376 S.E.2d 317 (1988)). Upon discovering DNR's error, CPRB timely directed DNR to cease including subsistence allowance when calculating PERS contributions and created an objective plan for correcting the error, which included refunding erroneous contributions back to DNR officers and recovering the erroneous benefits paid by PERS. (J.A. at 55).

Respondents provide an example on page 7 of Respondents' Brief suggesting that correcting this error will cause financial hardship for Respondents. As mentioned above, CPRB is "without any power to supplant its view of fairness and equity in place of the will and intent of the Legislature." *Id.* Therefore, CPRB is not permitted to take such factors into consideration; CPRB is statutorily required to correct the error made by DNR. Respondent states that correcting the pension benefit payments will "cause this [example] pensioner to lose $3,369.60 in pension benefits on an annual basis." First, the $3,369.60 calculation is not part of the record as it was not in the original example provided in the Joint Stipulation of Facts, and Petitioner cannot determine how this calculation was made. Nevertheless, the pensioner in the example will not be "losing" pension benefits. The pensioner will simply stop receiving the pension benefits to which the pensioner was never entitled and begin receiving the correct monthly benefit amount.

Furthermore, Respondents attempt to make correction of the error appear unfair by stating that the pensioner's benefits would be reduced from $3,314.94 to $2,715.62. The pensioner's *correct* monthly benefit is $3,042.64, and this $3,042.64 would be temporarily reduced to $2,715.62 for a period of sixty months while the erroneous benefit is being repaid to PERS. Thereafter, the pensioner would begin receiving the correct monthly benefit of $3,042.64 again. Regardless, the amount of pension benefits received by Respondents is irrelevant. As explained above, CPRB is statutorily required to correct the error without regard to equitable considerations.

In Respondents' Brief, Respondents argue that the error correction statute, West Virginia Code § 5-10-44, does not apply because "deliberate acts" by an employer are excluded from the definition of "employer error." In support of this assertion, Respondents point to two memoranda issued by DNR to its officers in February 1997 explaining that the "method of payment and reporting for subsistence will change" because of an IRS determination as to the taxability of

such subsistence pay. (J.A. at 59-61). Up until that point, DNR had paid the subsistence allowance to DNR officers in a monthly lump sum, separate from their regular wages and had been reported to the officers by DNR on a Form 1099 rather than a W-2. (J.A. at 48, ¶ 12).

Clearly, DNR had understood that the subsistence allowance is distinct in nature from the DNR officers' regular wages because the payments were initially made and reported separately. The factual finding made by the Hearing Officer in his Recommended Decision was that DNR's decision to combine the subsistence allowance with the DNR officers' regular wages was not a deliberate act related to retirement calculations, but rather an employer error likely brought about by the IRS taxability determination and DNR's efforts to comply with the IRS determination. (J.A. at 472, ¶ 20).[3]

Factual findings made by a hearing officer should be given substantial deference and should not be reversed by a trial court unless "clearly wrong" or "arbitrary and capricious." *Ringel-Williams v. State of West Virginia Consol. Public Retirement Board* at 1 (citing *Healy v. West Virginia Bd. of Medicine*, 506 S.E.2d 89, 92 (W. Va. 1998)). "Under the arbitrary and capricious standard, a circuit court which is reviewing the factual findings of an administrative agency must 'not substitute its judgment for that of the hearing examiner.'" *Id.* (citing *Woo v. Putnam County Board of Education*, 504 S.E.2d 644, 646 (W. Va. 1998)). Here, the trial court failed to follow this longstanding jurisprudence and instead did substitute its judgment for that of

[3] It is undisputed that the taxability of subsistence payments is not determinative of whether the subsistence payments are "compensation" for the purpose of calculating PERS pension contributions and benefits. (Respondents' Brief, footnote 8). Nevertheless, in an apparent attempt to illustrate that subsistence pay *should* be considered "compensation" for equity reasons, Respondents frequently reiterate throughout Respondents' Brief that subsistence payments are included in the calculation of federal income, Social Security, and Medicare taxes, as well as PEIA premiums assessed. As noted, just because a payment is taxable does not mean it is pensionable.

the hearing examiner in concluding that the decision to treat subsistence pay as compensation was a deliberate act rather than employer error.

The trial court's decision is not supported by the record; Respondents have not shown that DNR's deliberately decided to view subsistence allowance as pensionable compensation under the PERS statute. West Virginia Code § 5-10-2 does not define "deliberate act." "[W]ords that are not defined in the relevant statutory provisions are typically interpreted as taking their ordinary, contemporary, common meaning." *Johnson v. Zimmer*, 686 F.3d 224, 232 (4th Cir. 2012) (internal citations omitted). The Merriam-Webster Dictionary defines "deliberate" as "characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences." *Deliberate, Merriam-Webster Dictionary Online*, https://www.merriam-webster.com/dictionary/deliberate (last visited October 20, 2020). Here, there is absolutely no evidence that DNR carefully or thoroughly considered the PERS statutory definition of compensation when DNR decided to include subsistence allowance in wages. Indeed, there is no evidence that DNR considered the PERS statutory definition of compensation at all.

Respondents cite to two memoranda as proof of DNR's "deliberate" decision to include subsistence allowance as wages. (J.A. at 59-61). Neither of the memoranda contain <u>any</u> mention of the PERS statutes, the PERS statutory definition of compensation or even the word "compensation." Significantly, the memoranda do not even mention retirement or contain any discussion about whether and/or how this decision might impact a member's retirement. The memoranda do not allude to any consultation with CPRB regarding DNR's change of view. Indeed, it is undisputed that DNR did not consult with CPRB before DNR decided to erroneously view subsistence allowance as compensation. The memoranda also do not include <u>any discussion</u> of the rationale for concluding that the subsistence allowance should now be considered "wages."

Although it is certainly not definitive, one sentence may be interpreted as a possible reason: "The Internal Revenue Service has determined that subsistence is a non-accountable expense reimbursement and, as such, is subject to . . . taxes." As the Hearing Officer concluded, it is clear that the DNR's decision to stop paying the subsistence allowance in a single monthly check separate and apart from wages and begin adding it to the DNR officers' bi-monthly wages was simply an administrative decision made for the sake of simplifying DNR's responsibility to withhold federal taxes from both payments. (J.A. at 501). DNR did not make any thoughtful or deliberate determination to treat subsistence allowance as pensionable compensation under PERS, as evidenced by its total lack of mention in the memoranda. Thus, the deliberate act exception to the definition of a PERS employer error does not apply.

Importantly, this Court should avoid the slippery slope advocated by Respondents. A holding from this Court that such dubious assertions of deliberateness overcome CPRB's statutory duty to correct errors, would significantly compromise the error corrections provision and render it virtually meaningless. Respondents argue that DNR's two memorandum meet the standard for proving that DNR deliberately decided that subsistence allowance is pensionable compensation, even though both memorandum fail to mention the PERS definition of compensation or indicate that DNR gave any consideration to that definition, and fail to mention how DNR's decision could impact the member's retirement and fail to mention retirement ***at all***. If this Court adopted Respondents' argument that the deliberate act exception applied, then any employer in the future could just simply assert that their erroneous decision was deliberate and the employer could then avoid application of CPRB's statutory error correction obligation. This defies logic and is contrary to the clear Legislative intent.

Finally, despite Respondents' assertion on page 19 of Respondents' Brief, nowhere in the statutes does the Legislature provide that an employer's error in calculating PERS contributions and benefits is entitled to deference, regardless of how long the employer continued to perpetrate the error.[4] *See, e.g., Curry v. W.Va. Consol. Public Retirement Bd.*, 236 W.C. 188, 778 S.E. 637 (2015) (even though employer submitted contributions erroneously to PERS on employee's behalf for approximately 21 years, CPRB properly corrected the error); *W.Va. Consol. Public Retirement Bd. v. Jones*, 233 W.Va. 681, 760 S.E.2d 495 (2014) (CPRB properly corrected error regarding PERS employer contributions that were made for almost 9 years). It is clear that DNR did not notify CPRB of its decision to include subsistence payments in the total amounts shown on the salary reports that DNR provided to CPRB. Within just a few weeks of CPRB first becoming aware[5] of DNR's error, CPRB notified DNR of the error and CPRB began steps to correct the error. (J.A. at 52-53). Thus, the Circuit Court's finding that CPRB failed to timely correct DNR's error is inaccurate.

---

[4] Contrary to Respondents' assertion in footnote 2 of Respondents' Brief, the *Bland v. State of West Virginia et al.*, 230 W. Va. 263, 737 S.E.2d 291 (2012) case is relevant here. In the *Bland* case, the employer (West Virginia State Troopers) also made erroneous representations to employees regarding pension benefits. The employees believed that they should be in an entirely different retirement system through no fault of their own because of the erroneous representations of the employer. Regardless, CPRB was required to correct the employer error and place the employees in the correct retirement system.

[5] DNR perpetrated the error for several years before CPRB discovered the error. Respondents argue that CPRB failed to timely correct DNR's error even though it is undisputed that CPRB did not have knowledge DNR was including subsistence allowance in the total amount of its members' salaries in the Retirement Deduction Reports submitted by DNR to CPRB. As shown on page 22 of the Brief of Petitioner, DNR included the totals, but the statements do not contain a separate line item for subsistence allowance and do not mention subsistence allowance at all. DNR's argument that CPRB should have known DNR was including subsistence allowance is not supported by any facts or law.

III. Respondents have no vested right in their erroneously calculated pension benefits because the statutory definition of "compensation" has never included the subsistence allowance.

The trial court improperly found, and Respondents continue to assert, that *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1994) is implicated in this case because Respondents somehow have a vested interest in DNR's inclusion of subsistence pay in the calculation of their PERS pension benefits—despite the fact that no such statutory promise has ever been made to them. (J.A. at 473, ¶ 3). This Court's precedent on *Booth* is well-established: to implicate *Booth* and its progeny, there must be detrimental reliance on a statutory promise, as well as a legislative attempt to renege on that promise. No matter what the trial court's rulings were, *Booth* cannot be implicated here because 1) subsistence pay was never explicitly *included* in the statutory definition of compensation, so there was no statutory promise on which to rely, and 2) there was no attempt by the Legislature to change any benefits promised to Respondents.

As explained in CPRB's Petition, the trial court wrongly expanded *Booth* to *any* action "to restrict and limit an employee's pension." Respondents cited this block quote of the trial court's order on page 23 of Respondents' Brief. However, this wrongful expansion of *Booth* is not even supported by the law cited in Respondents' own brief. *See Wagoner v. Gainer*, 167 W. Va. 139, 279 S.E.2d 636 (1981) (dealing with a legislative amendment); *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) (related to a statute that would reduce pension benefits); *Adams v. Ireland*, 207 W. Va. 1, 528 S.E.2d 197 (1999) (involving a statute that authorized certain types of leave to be added to retirement credit).

Furthermore, even if there had been a Legislative attempt to amend the PERS statutes to clarify that subsistence pay is excluded from the definition of compensation, as stated

above, subsistence pay was never explicitly *included* in the statutory definition of compensation, so there was no statutory promise upon which Respondents could rely. The trial court's expansion of the scope of *Booth* is unprecedented and erroneous. *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).

CONCLUSION

The Circuit Court's Final Order is plain, reversible error and as shown in CPRB's Petition for Appeal and this Reply, the Final Order 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 the PERS statutory definition.

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 23rd day of October 2020, she served the foregoing ***Reply 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