

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LINDA BIRCHFIELD-MODAD,
Petitioner,

v.

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Respondent.

2021 SEP - 1 PM 12:36

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Case No.: 19-AA-24

CARRIE WEBSTER, JUDGE

2020 SEP - 1 PM 1:16
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

FILED

**FINAL ORDER AFFIRMING WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD'S FINAL ORDER**

Before the Court is an appeal by Linda Birchfield-Modad, a member of the West Virginia Teachers Retirement System (TRS), of a decision by the West Virginia Consolidated Public Retirement Board (hereinafter "Board") to reduce her service credit during the years of 1982-1993 from 9.264 years to .636 years. The Board found that the Petitioner's service credit had been erroneously reported to the Board by her employer and that she was not entitled to the credit because she was a part-time employee during this time period in which the applicable law required non-teaching employees to work full-time to be eligible to participate in the Teachers Retirement System. On November 17, 2017, the Respondent Board issued a Final Order denying Petitioner's appeal. The Final Order adopted the findings of fact and conclusions of law contained in the Second Amended Recommended Decision of Hearing Officer Gary Pullin dated October 12, 2017.

On December 11, 2017, Petitioner filed an appeal in the Circuit Court of Kanawha County. On May 1, 2018, this Court issued an Order remanding the case for consideration of additional evidence. By Final Order entered on March 12, 2019, the Respondent Board adopted

Hearing Officer Gary Pullin's Supplemental Recommended Decision and again denied Petitioner's appeal. On March 21, 2019, Petitioner filed this appeal.

STATEMENT OF FACTS

The Respondent, West Virginia Consolidated Public Retirement Board, is the statutory administrator of nine separate and distinct West Virginia public pension plans. Pursuant to West Virginia Code §5-10D-1, the Respondent is charged with administering the Teachers Retirement System (TRS) as established in article seven-A [§ 18-7A-1 et seq.], chapter eighteen of the code.

Petitioner, Linda Birchfield-Modad, was first employed with the College of Graduate Studies (COGS) on July 13, 1981 as a secretary. She was hired as a permanent, part-time employee. All of her duties were secretarial in nature and she did not perform any educational instructional work. She worked twenty four hours per week, Monday - Thursday, from 1 p.m. to 7 p.m. In December 1992, she became a full-time employee.

In September of 1981, Petitioner's employer erroneously told her that she was eligible for retirement benefits because she was a permanent part-time employee, and thereafter enrolled her in the Teachers Retirement System. During this time, there were no representations by anyone from the Respondent Board to Petitioner or her employer that Petitioner was eligible to participate in Teachers Retirement System.

By letter dated February 22, 2017, the Board informed Petitioner that there had been an error in the years of service credit reported by her employer to the Board, and that to correct the error, the Board was reducing her service credit during the years of 1982-93 from 9.264 years to .636 years. By letter dated February 29, 2017, Petitioner requested an administrative appeal of the decision.

On November 17, 2017, the Respondent Board issued a Final Order denying Petitioner's appeal and adopting the Second Amended Recommended Decision of Hearing Officer Gary Pullin dated October 12, 2017. On December 11, 2017, Petitioner filed an appeal to this honorable Court.

On May 1, 2018, this Court issued an Order remanding the case for consideration of additional evidence. By Final Order entered on March 12, 2019, the Respondent Board adopted Hearing Officer Gary Pullin's Supplemental Recommended Decision and again denied Petitioner's appeal. On March 21, 2019, Petitioner filed this appeal.

ISSUE

The issue pending before this Court is whether the Respondent Board erred in finding that Petitioner was not statutorily eligible to participate in the Teachers Retirement System during the years of 1982-1993 because she was a non-teaching employee who was not working full-time. The parties agree that the relevant statutes are those that were in effect in 1981, and that during the time at issue, 1982-1993, Petitioner was "regularly employed on at least a half-time basis." Petitioner contends that the Respondent Board erred in finding that she was a "non-teaching" rather than "teaching" member of TRS.

STANDARD OF REVIEW

The West Virginia Administrative Procedures Act governs the review of contested administrative decisions and issues by a circuit court and specifically provides that:

(g) The Court may affirm the ... decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the...decision of the agency if the substantial rights of the petitioner...have been prejudiced because the administrative ... decisions are:

- (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 procedure; 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.

West Virginia Code §29A-5-4.

DISCUSSION AND CONCLUSIONS OF LAW

It is undisputed that during the period of time in question, 1982-1993, Petitioner was employed on a permanent part-time basis as a secretary for the College of Graduate Studies (COGS). The issue is whether she meets the definition of "teacher" or "non-teaching member" for eligibility to participate in TRS. In 1981, "teaching" members were eligible to participate if they were employed on a half-time basis; whereas, "non-teaching" members had to be employed on a full time basis to be eligible. Since 1986, both groups must be employed on a full time basis to be eligible.

From its inception in 1941, the Teachers Retirement System (TRS) has been comprised of two types of employees - "teachers" and "nonteaching" employees. Until 1986, "teacher" employees were eligible to participate in TRS if they were "regularly employed for at least half-time service". W.V. Code §18-7A-3 (prior to 1986). Coverage for "nonteaching" employees has always required the employee to be "regularly employed for full-time service". W.V. Code §18-7A-35. Beginning in 1986 through the present both teaching and nonteaching employees must be "regularly employed for full-time service" to be eligible to participate in TRS. W.V. Code §18-7A-3 & §18-7A-35 (current version).

Since Petitioner was employed on a part-time basis during the period of time at issue, then Petitioner is only eligible to participate in TRS if she meets the definition of "teacher." West Virginia Code §18-7A-3, in effect in 1981, defined "teacher" as follows:

§18-7A-3. Definitions.

"Teacher" includes the following persons, if regularly employed for at least half-time service: (A) Any person employed for instructional service in the public schools of West Virginia; (B) principals; (C) public school librarians; (D) superintendents of schools and assistant county superintendents of schools; (E) any county school attendance director holding a West Virginia teacher's certificate; (F) the executive secretary of the retirement board; (G) members of the research, extension, administrative or library staffs of the public schools; (H) the state superintendent of schools, heads and assistant heads of the divisions under his supervision, or any other employee thereunder performing services of an educational nature; (I) employees of the state board of education who are performing services of an educational nature; (J) any person employed in a nonteaching capacity by the state board of education, the West Virginia board of regents, any county board of education, the state department of education or the teachers retirement board, if such person was formerly employed as a teacher in the public schools; (K) all classroom teachers, principals and educational administrators in schools under the supervision of the state commissioner of public institutions; and (L) employees of the state board of school finance if such person was formerly employed as a teacher in the public schools.

"Members of the administrative staff of the public school" includes deans of instruction, deans of men, deans of women, and financial and administrative secretaries.

"Members of the extension staff" of the public schools includes every agriculture agent, boys' and girls' club agent, and every member of the agricultural extension staff whose work is not primarily stenographic, clerical or secretarial.

"Retirement system" means the state teachers retirement system provided for in this article.

Petitioner first began public employment in July of 1981 as a secretary for the College of Graduate Studies (COGS) at the campus of Concord College. She worked four days per week, six hours per day, twenty four hours per week in a permanent part-time position until December of 1992 at which time she became a full-time employee. All her work was secretarial in nature.

Petitioner contends that she meets the definition of "teacher" and thus was eligible to participate in TRS pursuant to subsections (G) and (J).

However, subsection (G) is further defined in subsequent paragraphs as excluding secretaries and (J) is conditioned upon “if such person was formerly employed as a teacher in the public schools.” Subsection (G) - “members of the research, extension, administrative or library staffs of the public schools” refers to cabinet level secretaries or those who have the power to make or implement policy decisions. This is evident from the subsequent paragraph which further defines administrative staff as including deans and “financial and administrative secretaries”. The following paragraph further clarifies that those who perform secretarial work are not included.

Subsection (J) - “any person employed in a nonteaching capacity by the state board of education, the West Virginia board of regents, any county board of education, the state department of education or the teachers retirement board, if such person was formerly employed as a teacher in the public schools” is clearly conditioned upon Petitioner having formerly been employed as a teacher. No evidence was presented that she had ever been employed as a teacher.

All the criteria listed in subsections (A) - (L) describe professional, supervisory, or high level positions of authority. Petitioner’s position as a part-time secretary does not meet any of the criteria delineated above, but rather is more aptly categorized as a “nonteaching” position for which eligibility for participation has always required employment on a full-time basis. W.V. §18-7A-35.

West Virginia Code §18-7A-35, 1975 *through present*, states as follows:

“(a) Nonteaching employees shall mean all persons, except teachers, regularly employed for full-time service by the following educational agencies:
(a) Any county board of education, (b) the State Board of Education, (c) the West Virginia Board of Regents, and (d) the Teachers Retirement Board.

(b) Such nonteaching employees shall be entitled to all the rights, privileges and benefits provided for teachers by this article, upon the same terms and conditions as are herein prescribed for teachers.....”

Petitioner’s secretarial work is/was a “nonteaching” position, and as such she was required to be regularly employed on a full-time basis rather than a part-time basis. From 1981-1992, she was employed on a part-time basis, working twenty-four hours per week, and thus did not meet the statutory eligibility requirements for that period of time.

This position is reinforced by the legislative rules that were in effect in 1981. Ms. Miller, Deputy Director CPRB, testified regarding the 1978 and 1983 legislative rules that pursuant to those rules, the burden is upon the employer to certify to the Board that the member meets the eligibility requirements for “teacher” or “nonteaching”, and that nonteaching members must be employed on a full-time basis to be eligible to participate. Full-time service is an employee who works a twelve month contract for two hundred and forty or two hundred and sixty-one days. Ms. Birchfield-Modad worked one hundred and fifty four days during the years in question. Therefore, she was a “nonteaching” member and was not eligible to participate during the years of 1981-92 while she was employed on a part-time basis.

The Respondent Board and Hearing Officer found that Petitioner’s employment as a part-time secretary did not meet the statutory definition of “teacher.” This is a factual finding which is afforded substantial deference by this Court. 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). 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.” *Woo v. Putnam County Board of Education*, 504 S.E. 2d 644, 646 (W.Va. 1998).

As to judicial review of an administrative agency’s interpretations of the statutes and regulations which it administers, and notwithstanding the general rule of *de novo* review of issues of law, the Court has held that “absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of [a] statute by [an administrative agency]” having policy making authority relating to the statute. See, e.g., *Sniffen v. Cline*, 193 W. Va. 370, 456 S. E. 2d 451 (1995). Interpretations 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. *Sniffen*, citing *WV Department of Health v. Blankenship*, 189 W. Va. 342, 431 S. E. 2d 681 (1993); *WV Non-Intoxicating 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).

While it is true that pension statutes should be liberally construed to benefit the members, the Court will not confer retirement benefits for employment where the legislature has not so authorized. See *Cain v. PERS*, 197 W.Va. 514, 476 S.E.2d 185 (1996). The rule of statutory construction to liberally construe a remedial statute to the benefit of the beneficiaries of the statute does not operate to confer a benefit where none is intended. *Id.*

As for the additional evidence that was submitted after remand by this Court, Hearing Officer Gary Pullin correctly concluded:

“None of the additional documents submitted by Appellant to further develop the record confirm or prove that during the period July 1981 through December 1992 Appellant was an “Administrative Secretary” or a member of an “Administrative Staff” that would include her under the definition of teacher so as

to make her eligible for benefits as a non-teaching employee working less than full-time.

The additional evidence submitted by Appellant confirm and prove that during the period July 1981 through December 1992 Appellant was consistently classified as a Secretary II performing duties that were clerical in nature.

The Appellant was not classified as an Administrative Secretary until after 1992.

The term "Administrative Secretary" is not defined in W. Va. Code § 18-7A-3, and there is no legal basis to conclude Appellant was an "Administrative Secretary" between July 1981 through December 1992, especially in light of her consistent classification during this period as "Secretary II."

Appellant's evidence that she was employed in the President's office does not prove that she was a member of an Administrative Staff as required by W.Va. Code§ 18-7-3.

Based on all of the evidence which has now been submitted, Appellant does not meet the definition of "Teacher" under W. Va. Code § 18-7A-3 because there is no evidence that she was an Administrative Secretary or a member of an Administrative Staff during her less than full-time employment between July 1981 and December 1992."

Additionally, opposing counsel's rule of statutory construction involving the "doctrine of last preceding antecedent" is not applicable because the statute is not ambiguous. The Supreme Court recently held that "although the TRS definitions are not as explicit as those contained in the PERS statute at issue in Curry, we decline to find that they create ambiguity about Petitioner's eligibility for retirement. With regard to statutory interpretation, the Court has stated: "To ascertain the Legislature's intent, '[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.'" *Hammons v. W. Va. Office of Ins. Comm'r*, 235 W.Va. 577, 584, 775 S.E.2d 458, 465 (2015) (quoting *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995)). As is well-established, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the

rules of interpretation.” Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). See *Ringel-Williams v. W. Va. Consol. Pub. Ret. Bd.*, 237 W.Va. 669, 790 S.E.2d 806 (W.Va., 2016).

With respect to this argument Hearing Officer Gary Pullin correctly concluded as follows:

“The language in W.Va. Code§ 18-7A-3(J) is plain, clear and unambiguous. As such, Appellant’s advocacy of the doctrine of the last preceding antecedent is not applicable.

Appellant’s argument that the qualifying phrase in W.Va. Code§ 18-7A-3(J) “if such person was formerly employed as a teacher in public schools” only applies to “The State Department of Education or The Teachers’ Retirement Board is illogical when the subsection is read in its entirety.

Whether or not to use a comma between the last two items in a list of things is generally a stylistic choice and optional on the part of the writer. See Oxford comma.

The omission of a comma between “The State Department of Education or The Teachers’ Retirement Board” does not lead to the conclusion that the qualifying phrase “If such person was formerly employed as a teacher in the public schools” only applies to the last two employers listed. The qualifying phrase applies to all employers listed in subsection (J).

For a non-teaching employee to meet the definition of “Teacher” under W. Va. Code § 18-7A-31(J), the non-teaching employee must have been formerly employed as a teacher in the public schools.

Appellant does not meet the definition of Teacher under W. Va. Code § 18-7A-31(J) because she has not been formerly employed as a teacher.”

Therefore, it is clear that Petitioner was and currently is a “nonteaching” member of TRS, and as such she was not eligible for service credit during the period of time in which she worked part time.

Additionally, the Court rejects Petitioner’s argument that the Board acted contrary to its limited authority under the error correction statute. Whether the employer’s action was a “deliberate act” or a simple “employer error”, the Board as a fiduciary to the retirement plans it

administers has a duty to correct any errors which are contrary to statutory pension plan provisions.

The error correction statutes denote the manner in which the Board will correct errors, more specifically who is responsible for correcting the error by making additional contributions or refunds with or without interest. The only authority conferred in these error correction statutes is the authority conferred upon the Board to correct the errors; no authority is conferred upon the employers to commit the errors.

Even without these error correction statutes, it is axiomatic that the Board as a fiduciary to the trust funds has the authority and responsibility to correct any errors and to administer the plans in a manner consistent with all statutory plan provisions. Pension plans are trust funds which must be administered and maintained for the exclusive benefit of the members consistent with the statutory provisions establishing and funding them or otherwise they risk plan disqualification by the Internal Revenue Service or worse, the depletion of the funds necessary to support the retirements.

With respect to the error correction statute in the Public Employees Retirement System (PERS), which is the same or similar to the statutes in all of the other plans, the Supreme Court stated as follows:

“While Mr. Myers may have relied on the Board's erroneous representation that he would receive service credit for those two months, the Board is statutorily bound by West Virginia Code §5-10-44 to correct errors in the calculation of a PERS member's service credit. *Id.* (“If any change or employer error in the records of any participating public employer or the 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....”). The statute does not limit this requirement for equitable reasons. Thus, the circuit court correctly upheld the Board's decision in this regard.”

The retirement funds would be exposed to tremendous liability if an employer's ultra vires promise to an employee was deemed to be binding. Public rather than private money is at stake. Unlike the private sector, there is no insurance money to cover the numerous mistakes made by employers, and the Legislature has appropriated funds which cover only that which is statutorily authorized. The error correction statutes do not authorize or give employers the discretion to act contrary to statutory pension plan provisions. They simply provide the Respondent Board the statutory authority to correct errors.

The Court finds that because Petitioner does not meet the statutory eligibility requirements for participation in TRS during the years of 1981-92, her appeal was correctly denied by the Board.

RULING

The Court hereby **FINDS** that the Respondent Board correctly concluded that Petitioner was not eligible for service credit in the Teachers Retirement System for the years of 1981-1992 when she was employed in a nonteaching part-time capacity.

Additionally, the Court **FINDS** that the Respondent Board's final administrative order dated March 12, 2019 was not:

- (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 procedure; 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. West Virginia Code §29A-5-4.

For the reasons set forth herein, the Court hereby **ORDERS** that the Respondent's, West Virginia Consolidated Public Retirement Board's, Final Order entered on March 12, 2019 denying Petitioner's appeal for the reasons set forth in the Hearing Officer's Supplemental

Recommended Decision is hereby **AFFIRMED** and that this action is **DISMISSED** and stricken from the open docket of this Court.

The objection of any party aggrieved by the entry of this Order is hereby noted and preserved.

The Clerk is directed to send a certified copy of this Order to counsel of record as follows:

Lonnie C. Simmons, Esq.
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J. Jeaneen Legato, Esq.
West Virginia Consolidated Public Retirement Board
4101 MacCorkle Ave. S.E.
Charleston, West Virginia 25304

ENTERED this 1st day of September, 2020.

Carrie Webster

Carrie Webster, Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID COUNTY DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF September 2020
Cathy S. Gatson
CLERK OF CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA