IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROBERT CLARK, *ET AL.*,

Petitioners,

v.

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

WEST VIRGINIA CONSOLIDATED RETIREMENT BOARD,

Respondent.

FINAL ORDER

Pending before the Court are the petitions for appeal filed by the Petitioners, Robert Clark, *et al.* ("Petitioners").[1] Petitioners have sought an appeal of the order ("Final Order") of the West Virginia Consolidated Public Retirement Board ("the Board"), dated December 21, 2017.[2]

Although titled, *Petition for Appeal on All Issues of Fact and Law*, the petition's allegations of error concern only the meaning, interpretation, and application of certain statutes as they relate to the Petitioners' retirement annuities. Further, the record reveals that the parties submitted a Joint Stipulation of Facts.[3] As the questions before the Court concern only the application of law and not errors in findings of fact, the Court finds that oral argument would not aid in its decision. After due and proper review and consideration of the certified record and briefs by the parties, this Court does hereby find and conclude as follows:

[1] Petitioners are current and former West Virginia Division of Natural Resources ("DNR") law enforcement officers. By order entered February 5, 2018, this Court consolidated the administrative appeals filed by approximately 160 DNR law enforcement officers into the above-styled case. All consolidated appeals are based on the same factual record and challenge the same final order of the CPRB regarding subsistence pay. By consolidating the appeals, one record was created that is applicable to all officers pursuing an appeal.

[2] The decision adopted and fully incorporated the Recommended Decision of Hearing Officer dated November 17, 2017.

[3] See Administrative Record, Ex. 1

FINDINGS OF FACT

1. Petitioners, who are all active and retired law enforcement officers presently or formerly employed by the West Virginia Division of Natural Resources ("DNR"), filed administrative appeals before Respondent, the Board, challenging the Board's decision retroactively to exclude the statutory subsistence pay they earned from their final average salaries in calculating their retirement benefits in the Public Employees Retirement System ("PERS"). In this appeal of a declaratory judgment addressed by the Board, the following issues will need to be resolved by the Court:

   A. Whether the subsistence allowance paid to Petitioners, pursuant to W.Va.Code §20-7-1, from 1996 to November, 2015, must be included in the compensation earned by them for purposes of calculating their final average salaries?

   B. Whether the DNR's deliberate act to include subsistence pay as part of the wages earned by Petitioners constitutes an "error" under W.Va.Code §5-10-2(12)?

   C. Whether the Board's decision retroactively to exclude subsistence pay from the calculation of final average salaries violates Petitioners' contractual and constitutional rights?

2. Pursuant to the 1996 version of W.Va. Code §20-7-1, the Legislature mandated that all law enforcement officers employed by the DNR received $130 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 Public Employees Insurance Agency ("PEIA") premiums assessed, and the employee contributions paid into the PERS. (JOINT STIPULATION OF FACTS, ¶¶20, 33-35). Thus, when these officers retired, subsistence pay was included in the calculation of their total compensation in determining the amount of retirement benefits to be paid under PERS.

3. In November, 2015, the Board determined that subsistence pay no longer should

be included in calculating the compensation paid to these officers for retirement purposes. Petitioners challenged this decision and sought a declaratory judgment on whether or not this subsistence pay should continue to be included as part of the compensation earned by these officers for retirement purposes. The parties largely agreed on the relevant facts and presented in the record a JOINT STIPULATION OF FACTS supported by several exhibits.

4. Following a hearing and the filing of briefs, the Administrative Law Judge ("ALJ") issued a RECOMMENDED DECISION OF HEARING OFFICER holding that subsistence pay should not be included in the calculation of compensation for retirement purposes. The Board adopted this recommendation in an order entered December 21, 2017.

5. The findings of fact made by the ALJ largely track the language accepted by the parties in the JOINT STIPULATION OF FACTS. From 1996, when W.Va. Code §20-7-1, was amended to provide that a $130 monthly subsistence allowance was statutorily mandated to be a part of the wages earned by Applicants, to November 1, 2015, the DNR made employer contributions and Petitioners made employee contributions to PERS based upon the total amount of wages earned by Petitioners, including the statutorily mandated subsistence allowance. (JOINT STIPULATION OF FACTS ¶¶ 9 and 58). 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 allowance.

6. In the 1996 amendment of W.Va. Code §20-7-1, the Legislature authorized subsistence allowance, 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).

7. From the research conducted by the parties, DNR officers are the only State employees who are authorized by statute to receive a subsistence allowance as a part of the wages they earn. The Court finds the fact that the Legislature authorized DNR officers to earn as a part of their wages a subsistence allowance and to be reimbursed for certain expenses, depending on the facts, is significant. The subsistence allowance is an explanation for increasing the wages earned by DNR officers, which simply is incorporated into their annual salary, while the reimbursement for expenses is authorized when certain expenses are incurred by a DNR officer assigned to work outside of his or her area of primary residence. The reimbursement of expenses is separate and apart from the wages earned by the DNR officer and would be paid only when the DNR officer incurred certain expenses when working outside of his or her area of primary residence.

8. The statute mandating the payment of this subsistence allowance did not require Petitioners to provide any receipts or other documentation explaining how this allowance was spent nor were Petitioners required to reimburse the DNR for any money not spent on work-related items. When Petitioners first started receiving the subsistence allowance in 1996, the DNR paid it to Petitioners in a single monthly check that was separate and apart from their wage check. The subsistence allowance was reported to the IRS on a Form 1099. (JOINT STIPULATIONS OF FACT, ¶¶ 12-13).

9. However, it later was determined that the manner in which the subsistence allowance was reported to the IRS was incorrect. In a February 7, 1997 memorandum, the DNR informed Petitioners that the subsistence allowance would be reported on a Form W-2, added to the wages earned, retroactive to June 6, 1996. For calendar year 1996, the DNR issued Forms

W-2c, including what it referred to as "all wages paid ... by the [DNR]," including subsistence allowance. (JOINT STIPULATIONS OF FACT, ¶¶ 14-15). Petitioners were advised to file amended income tax returns to reflect this change. (February 7, 1997 memorandum).

10. In a February 19, 1997 memorandum, the DNR further explained that the method of payment and reporting was changing because the IRS had determined that "subsistence is a non-accountable expense reimbursement and, as such, is subject to federal Social Security and Medicare taxes." (JOINT STIPULATIONS OF FACT, ¶ 17). 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.

11. Beginning with the March 1997 paycheck, Petitioners received each month's subsistence allowance divided equally between their bimonthly paychecks, "minus the regular payroll withholding taxes," Social Security and Medicare taxes. The DNR further clarified in that memorandum that "receipts for allowable expenses could be used to reduce the tax liability on your subsistence." While theoretically, the February 19, 1997 Memorandum told Petitioners it was possible certain allowable expenses could be reported and deducted from their income to offset some or all of the subsistence allowance, as a practical matter, counsel are not aware of any Petitioners taking anything other than the standard deduction available to them, rather than itemizing expenses. Once this change was implemented, Petitioners used this subsistence allowance 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. (JOINT STIPULATIONS OF FACT, ¶ 26). Petitioners' State income tax and PEIA premiums were calculated based on including this subsistence allowance, Petitioners were not required to submit any documentation or receipts regarding expenses in order to receive this subsistence allowance, and the subsistence allowance was paid to Petitioners on paid annual, sick, or military leave, but was not paid to Petitioners on unpaid leave. (JOINT STIPULATIONS OF FACT, ¶¶ 20-24).

12. Effective March 1997, the DNR began treating the subsistence allowance made to Petitioners 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 Petitioners' contributions to PERS took subsistence allowance into account. The DNR regularly reported the gross salary received by Petitioners to the Board, which salary included the subsistence allowance. Petitioners received from the Board statements showing the wages reported to the Board and upon which their pensions would be based. (JOINT STIPULATIONS OF FACT, ¶¶ 32-33, and 35).

13. Thus, the following facts are not disputed:

A. Petitioners' 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 Petitioners 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 Petitioners were receiving wages, whether they were working or on paid sick, annual or, military leave, they received the subsistence allowance. However, if Petitioners were not providing any services and were not otherwise being paid, they were not paid the subsistence allowance;

D. All of Petitioners' wages earned from 1996 forward were reported to the IRS in W-2 forms provided to Petitioners, which made no

distinction between wages earned and the subsistence allowance;

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

F. The DNR and Petitioners 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 the Board the total wages earned by Petitioners on a regular basis, based upon the total income reported in Petitioners' W-2 forms; and

H. The Board provided to Petitioners on a regular basis statements showing Petitioners the total amount of wages earned, upon which their pension would be based.

14. The present litigation was triggered by the Board when it decided that subsistence pay should not be included in the calculation of final average salaries for retirement purposes. Effective November 1, 2015, at the Board's direction, the DNR ceased making employer and employee contributions to PERS based on subsistence allowance. For all service prior to that date, employer and employee contributions to PERS based on the Petitioners' subsistence allowance were made; therefore, if Petitioners prevail, all such periods of service are already statutorily funded. Furthermore, if Petitioners prevail, make-up employer and employee contributions to PERS would have to be made, based on Petitioners' receipt of subsistence allowance after November 1, 2015.

15. In an effort to provide the Court with an example of how the Board's proposed change in the manner in which the subsistence allowance is treated, the parties included the following example, based upon certain assumptions subject to a variety of caveats, involving the actual wages received by an anonymous Petitioner:

> Assumptions: Effective retirement date of November 1, 2000; Straight Life Annuity; 40.5 years of service; Final Average Salary of $46.636.11; Subsistence allowance of $130 treated as subject to PERS salary for each month from July

1996 through October 2000; Current monthly annuity of $3,314.94; Correction made effective August 1, 2016, using a 60 month repayment period
Result: Overpaid employee contributions are $280.80; Corrected monthly annuity amount is $3,042.64; Net overpayment from PERS to retiree after offset of $280.80 is $19,620.90 for monthly repayment over 60 months of $372.02; Monthly annuity during 60 month correction period of $2,715.62.

16. For this anonymous Petitioner, he or she will lose $3,369.60 in pension benefits on an annual basis. If this Petitioner already had retired, then according to the Board's analysis, which again is based upon certain assumptions subject to a variety of caveats, this Petitioner would have to pay back to PERS $19,620.90. In this scenario, this alleged overpayment would be paid back by reducing this Petitioner's monthly pension from $3,314.94 to $2,715.62 for a period of 60 months.

CONCLUSIONS OF LAW

A. The subsistence allowance is "compensation" under W.Va.Code §5-10-2(8)

The Board accepted the ALJ's conclusion that subsistence allowance "is an expense reimbursement" and that W.Va.Code §20-7-1, is clear and unambiguous, thus there was no need to apply any rules of statutory construction. (RECOMMENDED DECISION OF HEARING OFFICER, Conclusion of law nos. 7 and 8). The Court concludes that the ALJ and the Board incorrectly interpreted and applied W.Va.Code §20-7-1, and W.Va.Code §5-10-2(8) and (13). In fact, the ALJ failed to address the statutory arguments Petitioners presented going to the core issue raised in this litigation–the definition of "compensation," as defined in W.Va.Code §5-10-2(8). These statutes do require some reliance on rules of statutory construction to ensure the Legislature's intent is carried out.

For any public employee participating in the PERS program, pension benefits are calculated based upon the employee's "final average salary," as defined in W.Va.Code §5-10-2(13). The most critical aspect in calculating a public employee's "final average salary" is to

determine the amount of "compensation" the employee received. Under W.Va.Code §5-10-2(8), "compensation" is defined as follows:

> "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).

In *State ex rel. Discover Financial Services, Inc. v. Nibert*, 231 W.Va. 227, 233, 744 S.E.2d 625, 631 (2013), the West Virginia Supreme Court explained that clear and unambiguous statutes must be applied as written to give full effect to the intent of the Legislature:

> Our rules of statutory construction are well established. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951). In other words, "[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed." *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519S.E.2d 622, 632 (1999) (citations omitted). "Only when such language is ambiguous may we interpret and construe a statutory provision." *Webster Cnty. Comm'n v. Clayton*, 206 W.Va. 107, 112, 522 S.E.2d 201, 206 (1999).

The subsistence allowance paid to Petitioners clearly falls within this broad definition of "compensation." As long as Petitioners were paid their wages, whether they were working or on paid annual, sick, or military leave, they also were paid the subsistence allowance. When

Petitioners were not working or were not working due to any of these paid leave situations, they were not paid the subsistence allowance. If Petitioners 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 Petitioners were paid their wages, such payments fall within the definition of "compensation."

The subsistence allowance also does not fit within the general definition of payments made to public employees, but which must be excluded from compensation. Specifically, W.Va.Code §5-10-2(8), provides, "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."

For example, in *Myers v. West Virginia Consolidated Public Retirement Board*, 226 W.Va. 738, 704 S.E.2d 738 (2010), the Legislature had adopted a statute in 1988 requiring the lump sum payment to public employees for their unused sick leave specifically to be included in the calculation of their "final average salary," even though no contributions were made to PERS based upon this lump sum amount. This provision was eliminated by the Legislature in 1989. Two employees who retired several years later sought to have their lump sum payments included in calculating their pensions. The West Virginia Supreme Court rejected their arguments, finding no error with the Board's conclusion that these two employees had failed to show any detrimental reliance on this statute, which was in existence for one year.

The subsistence allowance is not paid in a "lump sum" or on an irregular basis, but rather is paid on a *regular* bimonthly basis combined with the regular wages paid to Petitioners, and Petitioners did make payments into PERS, based upon the total of their wages earned, including the subsistence allowance. Thus, the subsistence allowance in the present case is far different than the lump sum payment for unused sick leave addressed in *Myers*.

Another common sense reason why the subsistence allowance was intended by the Legislature to be included in the calculation of Petitioners final average salary is the undisputed fact that the Legislature did not include any language excluding the subsistence allowance from the pension calculation. The Legislature has made it explicitly clear when it has decided a particular payment to a public employee should not be included in the final average salary. 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.") Clearly, if the Legislature had intended for the subsistence allowance to be excluded from the calculation of an employee's final average salary, it could have said so in W.Va.Code §20-7-1, but the Legislature chose not to do so. In fact, after authorizing this subsistence allowance in 1996 and after many Petitioners retired with their pensions based, in part, on this allowance, the Legislature has to this day kept this statute in place and has never amended W.Va.Code §20-7-1, to exclude the subsistence allowance from the calculation of an employee's final average salary.

In identifying the types of irregular payments made to public employees that should not be included in compensation, the Legislature did not specifically include subsistence allowances or subsistence pay. Under the rules of statutory construction, when the Legislature identifies a general class followed by specific examples of that class, the doctrine known as *ejusdem generis* 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.

In *Murray v. State Farm Fire and Casualty Co.*, 203 W.Va. 477, 485, 509 S.E.2d 1, 9 (1998), the West Virginia Supreme 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 allowance paid to Petitioners. Therefore, under this *ejusdem generis* and *noscitur a sociis* rules of statutory construction, the subsistence allowance at issue in this litigation is completely dissimilar from the specific payments identified and, therefore, must be included under the definition of compensation.

The Court rejects the Board's argument based upon cases holding that generally, an administrative agency's construction of a statute should be given substantial deference, unless clearly erroneous. While, as a general rule, the Court recognizes the West Virginia Supreme Court has repeated this assertion, ultimately it is up to this Court and the West Virginia Supreme Court to interpret statutes. For example, in *West Virginia Consolidated Public Retirement Board v. Wood*, 233 W.Va. 222, 757 S.E.2d 752 (2014), the Board made this same argument. However, the West Virginia Supreme Court held that it had the final authority to interpret statutes and concluded the Board incorrectly had applied the statute in question in several different military service credit cases. The same conclusion must be reached in the present case, where the Board simply has not applied the statutes correctly.

Based upon the applicable statutes and the foregoing analysis, the Court concludes 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), and, therefore, the Board's

decision on this issue is contrary to the applicable law.

B. The Board 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."

The Board accepted the ALJ's conclusion that the Board had the authority to correct what they deemed to be an "error" in this case, under W.Va.Code §5-10-44(a), which 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." The Board also accepted the ALJ's conclusion that the differences between the 2011 and 2015 versions of W.Va.Code §5-10-44, are irrelevant and make no difference as applied in this case. (RECOMMENDED DECISION OF HEARING OFFICER, Conclusions of law nos. 21-22).

Petitioners do not challenge the Board's authority to "correct errors." However, before this authority can be exercised, first there has to be a determination that an "error" has occurred. Based upon the foregoing arguments, the Court concludes the Legislature fully intended for Petitioners to have their statutorily mandated subsistence allowance included in the calculation of their final average salary for pension purposes. Thus, there is no error to correct in the present case.

The Legislature has defined "employer error" in W.Va.Code §5-10-2(12), 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. The West Virginia Supreme Court has not issued any decision interpreting this "deliberate act" provision in W.Va.Code §5-10-2(12). Giving this provision a common sense reading, the Legislature is saying when an employer examines the applicable law, applies it to the facts, and makes a deliberate decision impacting the retirement rights of its employees, such deliberate acts cannot be "corrected" by the Board because that deliberate decision does not constitute an "employer error."

As applied in this case, in 1996, when the Legislature mandated subsistence pay, the DNR initially separated the wages earned from the subsistence pay by issuing separate checks and noting the payments on W-2 and 1099 forms respectively. (JOINT STIPULATION OF FACTS Nos. 12 and 13). In 1997, as reflected in the February 7, 1997 memorandum, the DNR decided to include the subsistence pay in the same check as the other wages earned and authorized the filing of corrected tax documents to make this change retroactive to the first date in 1996, when Petitioners first received subsistence pay. (JOINT STIPULATION OF FACTS Nos. 14 through 18).

It is not clear from the existing record what prompted the DNR to make this change nor is there any evidence about whether or not the Board was consulted. The two February, 1997 memos included in the JOINT STIPULATION OF FACTS make reference to information from the Internal Revenue Service (IRS) as the basis for making the change from issuing two separate checks to issuing one check inclusive of wages and subsistence pay. 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.

Thus, the inclusion of the statutorily mandated subsistence pay in the calculation of the total compensation paid to Petitioners was not "an omission, misrepresentation or violation of" state law, but rather was a "deliberate act" thoughtfully 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. 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 Legislative sought to create when an employer has made a deliberate decision regarding the State pension system.

It is well established that an administrative agency only has the authority conveyed to it 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), the West Virginia Supreme 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).

As applied in the present case, the Legislature specifically limited the authority of the Board to correct an "employer error." This type of error was defined by the Legislature as excluding a "deliberate act" committed by the employer. There is no dispute that from 1996

through November, 2015, the DNR deliberately included the statutory subsistence allowed paid to its officers in calculating their total compensation for retirement purposes. Clearly, the DNR did not make any clerical error through an accident or negligence, which the Board would have the authority to correct, but rather the DNR thoughtfully, based upon its understanding of the applicable statutes, deliberately included the subsistence allowance in the total compensation earned by its officers. The correctness of the DNR's decision is further supported by the fact that from 1996 through November, 2015, The Board implicitly agreed with this deliberate decision and included the subsistence allowance in the compensation earned by these officers for retirement purposes.

Even if the ALJ and the courts ignore this "deliberate act" language and determine that somehow the DNR committed an "error," the ALJ brought to the parties' attention that there are some significant differences between the 2011 and 2015 versions of W.Va.§5-10-44. The 2011 version of W.Va.§5-10-44(a), provides:

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

This 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, the Board "shall adjust the payment of the benefit in a manner that the actuarial equivalent of the benefit to which the retirant was correctly entitled." Under this version, the Board does not have any statutory authority to go back and attempt to recover any prior alleged overpayments already received by the retirant.

The 2015 version of W.Va.§5-10-44(a), eliminates the provision bolded above in the 2011 version and provides:

> (a) 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. (Emphasis added).

The 2015 version of W.Va.§5-10-44(e), provides, for the first time, authority to the Board to require retirants, who received overpaid benefits, to recover such overpayments:

> (e) Overpayments from the retirement system: If any error results in any member, retirant, beneficiary, entity or other individual receiving from the system more than he would have been entitled to receive had the error not occurred, the board shall correct the error *in a timely manner.* If correction of the error occurs after annuity payments to a retirant or beneficiary have commenced, the board shall prospectively adjust the payment of the benefit to the correct amount. *In addition, the member, retirant, beneficiary, entity or other person who received the overpayment from the retirement system shall repay the amount of any overpayment to the retirement system in any manner permitted by the board.* Interest shall not accumulate on any corrective payment made to the retirement system pursuant to this subsection. (Emphasis added).

The parties have not found any decisions by the West Virginia Supreme Court explaining what action triggers the application of W.Va.§5-10-44, which then would impact whether the 2011 or 2015 version is applicable. As noted above, in the JOINT STIPULATION OF FACTS, Petitioners and the Board agreed that allegedly the first time the Board "discovered" this "error" was in 2014, in connection with the retirement application of Petitioner Jon Cogar. Although the Board held off on taking any action at that time, clearly that is the first time the Board learned of this alleged "error."

The Court finds that because the Board discovered this alleged "error" in 2014, the 2011 version of W.Va.§5-10-44, is applicable. This ruling is critical because under the 2011 version, the Board does not have any authority to recover any alleged overpayment made to retirants.

The Board should not be permitted to wait until this significant change was made in 2015 to W.Va.Code §5-10-44, so that through this delay in taking action, the Board now has the apparent statutory authority, subject to the contractual and constitutional rights of Petitioners, to take money back from retirants.

In the event the ALJ and the courts find there was an "error" committed by the DNR and that the 2015 version of W.Va.Code §5-10-44, applies, another legal issue that will have to be decided is what the Legislature meant when it provided in W.Va.Code §5-10-44(a) and (e), that the Board "shall correct the error in a timely manner." These words emphasized by the Legislature must be given some meaning.

As applied to the facts in the present case, from 1996 through 2014, the DNR and Petitioners followed the same deliberate procedure: wages, including subsistence pay, were paid to employees in one check; employees paid state and federal income tax on all wages earned, including subsistence pay; employees also paid certain benefits based upon all wages earned, including subsistence pay; and the DNR and Petitioners paid into PERS their respective contributions, based upon all wages earned, including subsistence pay. Many Petitioners already retired during this same time period and have received retirement benefits based upon all wages earned, including subsistence pay. The Petitioners who presently are still employed have paid contributions into PERS, based upon all wages earned, including subsistence pay, and have been provided statements from the Board annually explaining what their future retirement benefits will be, again including subsistence pay in the calculation of compensation.

It is well established that, "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).

As applied in the present case, the Board was on constructive notice since 1996, when the Legislature amended W.Va.Code §20-7-1, to include a subsistence allowance as part of a DNR law enforcement officer's compensation. From that point forward, every time a DNR officer went to the Board seeking to retire under PERS, the Board's employees investigated the facts, conducted an audit, and provided information to the employee regarding the service credits earned and the final average salary based upon the compensation received.

The Board seeks to persuade the Court that, despite this constructive knowledge of the law, the Board never figured out that subsistence pay was a part of the compensation earned by DNR officers until 2015. At a minimum, when the Board was asked by a DNR officer about his or her retirement, the Board was obligated, in light of its constructive knowledge of the law, to make an inquiry about the statutorily mandated subsistence pay. Thus, the substantial delay in the Board "discovering" that DNR officers received subsistence pay was not done so in a timely manner. By failing to meet this timeliness element, the Board lost its authority to take any retroactive action regarding subsistence pay, even if the 2015 version of W.Va.Code §5-10-44, were applicable in the present case.

Under these facts, this belated attempt by the Board to "correct" this "error" has not been accomplished "in a timely manner." The Board's action seeks to undo and unwind more than eighteen years of the DNR and Petitioners including subsistence pay in their wages. In light of these facts, the Court concludes there was no "error" because the DNR, as the employer, deliberately acted to include subsistence pay as part of the wages earned by Petitioners; if there is an "error," the 2011 version of W.Va.Code §5-10-44 is applicable, which does not give the Board any authority to recover any alleged overpayments made to retirants; and if there was an

"error" and the 2015 version of W.Va.Code §5-10-44, is found to be applicable, the Board failed to correct this "error" in a timely manner.

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

The Board accepted the ALJ's conclusion that Petitioners had no detrimental reliance or vested interest in having their subsistence pay included in the calculation of their retirement because, according to the ALJ and the Board, "there is no statutory authority for doing so." (RECOMMENDED DECISION OF HEARING OFFICER, Conclusions of law nos. 14 through 16). One of the most detailed and definitive decisions in this area of the law is *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1994). In *Booth*, the West Virginia Supreme 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, the West Virginia Supreme Court 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.

In *Booth*, several State troopers filed a mandamus action challenging the constitutionality of three amendments, which impacted their pension rights. The first amendment required the troopers to increase the amount of money they were required to contribute toward their retirement. The West Virginia Supreme Court concluded this amendment was constitutional

because at the same time, these troopers were given a salary increase that offset the amount of the additional contribution.

The second amendment precluded troopers from using unused annual and sick leave to initially become eligible for retirement, but such leave could be used after a trooper became eligible for retirement to receive additional benefits. The West Virginia Supreme Court held this amendment was constitutional because it merely restated what was the existing practice at that time and did nothing to impair the pension rights of troopers.

The third amendment reduced a retired trooper's cost of living adjustment from 3.25% to 2%. The West Virginia Supreme Court held this amendment clearly impaired the contractual and constitutional rights these troopers had in their pensions and therefore, this amendment was unconstitutional and in invalid.

In reaching its decision, the West Virginia Supreme Court made a detailed analysis of a public employee's contractual and constitutional rights to a State pension. In Syllabus Points 3, 5, 11, 12, 18, and 19 of *Booth*, the West Virginia Supreme Court held:

> 3. When considering the constitutionality of legislative amendments to pension plans, an employee's eligibility for a pension does not determine whether he or she has vested contract rights. The determination of an employee's vested contract rights concerns whether the employee has sufficient years of service in the system that he or she can be considered to have relied substantially to his or her detriment on the existing pension benefits and contribution schedules.
>
> 5. In public employee pension cases, what often concerns the court is not the technical concept of "vesting," but rather the conditions under which public employees have a property right protected under the contract clauses because of substantial detrimental reliance on the existing pension system.
>
> 11 If the State (or its political subdivisions) promise to defer salary until a person's retirement from state or local employment and to pay that deferred salary in the form of a pension, the State (or its political subdivisions) cannot eliminate this expectancy without just compensation once an employee has substantially relied to his or her detriment.

12. The cynosure of an employee's *W.Va. Const. art III, § 4* contract right to a pension is not the employee's or even the government's contribution to the fund; rather, it is the government's promise to pay.

18. Because *all* employees who contribute to a state pension fund and who have substantially relied to their detriment on specific contribution and benefits schedules have immediate legitimate expectations that rise to the level of constitutionally protected contract property rights, we overrule *Mullett v. City of Huntington Police Pension Board, 186 W.Va. 488, 413 S.E.2d 143 (1991)* and its test of reasonableness for determining the constitutionality of legislative amendments to a pension plan.

19. The pension rights of *all* current state pension plan members who have substantially relied to their detriment cannot be detrimentally altered at all, and any alterations to keep the trust fund solvent must be directed to the infusion of additional money. "Detrimentally alter" means the legislature cannot reduce the existing benefits (including such things as medical coverage) of the pension plan or raise the contribution level without giving the employee sufficient money to pay the higher contribution. Should the legislature seek to reduce certain advantages of a pension plan, it must offer equal benefits in their place as just compensation.

The fundamental principle that the State is prohibited from impairing the contractual and constitutional rights a public employee has in his or her pension was explained by the West Virginia Supreme Court in Syllabus Point 16 of *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988), "[r]etired 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."

In addition to *Booth* and *Dadisman*, the West Virginia Supreme Court routinely and consistently has held any reduction in a State employee's pension after the employee's contractually vested property rights are established is unconstitutional and unenforceable. 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).

Under the foregoing case law, clearly all Petitioners relied upon the public pension system in place from 1996 to the present. These Petitioners paid income taxes and insurance premiums based upon all money they earned, including the subsistence allowance. From 1996 to November 1, 2015, the Board provided annual statements to these Petitioners, explaining their future pension details, based upon all wages earned, including the subsistence allowance. At no point did the DNR ever advise Petitioners that the statutorily mandated subsistence allowance should not be included in the calculation of their final average salaries.

The retired Petitioners, who already were receiving monthly pension benefits based upon the inclusion of the subsistence allowance, are fully vested and detrimentally relied on receiving their full pension. The attempt by the Board to reduce the monthly pensions of retired Petitioners and, making it even worse, to require such retired Petitioners to pay back to the PERS system what the Board now deems as an alleged overpayment clearly impairs their contractual

and constitutional right to their pensions. Historically, as demonstrated conclusively by the above-cited cases, the West Virginia Supreme Court consistently has invalidated any attempt to reduce the amount of a public employee's pension, particularly when the employee already has retired and has begun receiving retirement benefits.

Similarly, the actively working Petitioners also have a vested interest in having the subsistence allowance they have received since 1996 included in the calculation of their final average salary for purposes of determining their pension benefits. The Board has been advising all active Petitioners since 1996, that their pensions are based upon their total salary, which included the subsistence allowance. The Board's attempt to reduce the pension received by the retired Petitioners and to be received by the actively working Petitioners clearly is similar to the Legislature's attempt in *Booth* and related decisions cited above where the West Virginia Supreme Court consistently invalidated attempts to reduce and impair the contractual and constitutional rights of public employees to their full pensions.

Unfortunately, the Board paid little or no attention to the foregoing case law and, consequently, trampled upon the statutory, vested, and constitutional rights of Petitioners.

For the foregoing reasons, and for the additional reasons provided previously, the Court holds.

1. The decision made by the Board, effective November 1, 2015, declaring that the pensions earned by Petitioners should no longer be calculated based, in part, on the subsistence allowance paid to them is hereby reversed and declared to be erroneous and contrary to the applicable law;

2. The subsistence allowance paid to DNR officers, pursuant to W.Va.Code §20-7-1, from 1996 to the present must be included in the compensation earned by DNR officers, under W.Va.Code §5-10-2(8), for purposes of calculating their final average salaries, as defined in W.Va.Code §5-10-2(13); and

3. The Board must take any and all actions necessary to undo the actions taken

by the Board effective November 1, 2015, and to restore the contractual and constitutional rights to a full pension based upon all compensation earned, including the subsistence allowance, to all Petitioners and all active and retired DNR officers.

Accordingly, the court hereby **GRANTS** the relief requested in the *Petition for Appeal on All Issues of Fact and Law*. It is hereby **ORDERED** that the above-styled action is **REVERSED**. The Respondent's objections and exceptions are noted and preserved for the record.

It is further **ORDERED** that the Clerk of this Court is directed to forward a certified copy of this Order to all counsel of record.

Entered this 18th day of March, 2020.

Judge Jennifer F. Bailey
Kanawha County Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20
DAY OF March, 2020
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA