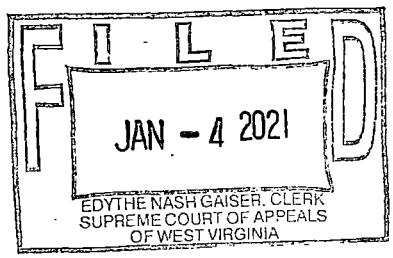
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 20-0747



LINDA BIRCHFIELD-MODAD,

Plaintiff Below/Petitioner,

v.

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Defendant Below, Respondent

PETITIONER'S APPEAL BRIEF

Appeal from the Circuit Court of Kanawha County, West Virginia

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I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

In addition to providing pension benefits for teachers in the West Virginia Teachers Retirement System (TRS), W.Va.Code §18-7A-1 *et seq,*, the Legislature also included in its definition of "teacher" some public employees who have nonteaching positions, but are eligible to receive retirement under TRS. Specifically included are public employees who either are employed in the administrative staff of a public school or in a nonteaching capacity for an employer governed by the board of regents. In 1981, when Petitioner Linda Birchfield-Modad first was employed as part of the administrative staff by the West Virginia College of Graduate Studies (COGS), she was

provided information that in her position and after working there for the required number of years, she would be eligible to retire under the TRS.

Unfortunately, in 2017, after continuing to work at the same administrative job and paying into the TRS for about thirty-six years, Petitioner was advised for the first time by Respondent West Virginia Consolidated Public Retirement Board that despite Petitioner's reliance on annual statements provided to her by Respondent calculating her retirement service credits, Respondent now had decided that the 9.264 years Petitioner had earned from 1982 through 1993, actually should have been calculated as 0.636 years of retirement service credit. As a result of this decision, Petitioner was not able to retire and she still is employed in the same administrative position today, although the identity of her State employer has changed through the years.

Petitioner timely challenged this ruling by Respondent and presented evidence in an administrative hearing held on May 30, 2017. (JA 27). The Administrative Law Judge (ALJ) issued an order rejecting Petitioner's arguments and Respondent accepted this recommendation in a final order entered November 17, 2017. (JA 256, 262). After timely appealing this decision to the Circuit Court of Kanawha County, on or about May 1, 2018, the trial court entered an order, based upon the joint motion of the parties, to remand this case to Respondent for "additional development of the record." Specifically, the reason for the remand was to make sure the record was fully developed on what Petitioner's job duties were. (JA 263, 281).

On June 5, 2018, a second administrative hearing was held where Petitioner provided more evidence on her administrative duties. (JA 283). On February 5, 2019, the ALJ again rejected Petitioner's arguments and Respondent adopted this recommended order on March 12, 2019. (JA 395, 402). This final decision was appealed to the Circuit Court of Kanawha County. Based upon

the briefs filed and without holding a hearing, on September 1, 2020, the Honorable Judge Carrie Webster entered a final order rejecting Petitioner's appeal and affirming Respondent's final order. Petitioner files this appeal from this final ruling.

II. Assignment of error

Whether the trial court erred in upholding Respondent's decision recognizing 0.636 years of TRS retirement service credit instead of the 9.264 years Petitioner claims she earned for the fiscal years 1982 through 1992, where:

1. **Pension provisions must be liberally construed and ambiguities resolved in favor of those to be benefitted;**

2. **Petitioner meets the definition of "teacher" under W.Va.Code §18-7A-3(1)(g) (1975)[1], based upon Petitioner being regularly employed for at least a half-time basis during her career as part of the administrative staff of the College of Graduate Studies (COGS);**

3. **Petitioner meets the definition of "teacher" under W.Va.Code §18-7A-3(1)(j) (1975), based upon Petitioner being employed for at least a half-time basis during her career in a nonteaching capacity by the COGS, which was governed by the West Virginia board of regents;**

4. **The provisions in W.Va.Code §18-7A-35, are inapplicable to Petitioner because she is included in the definition of "teacher" as set out in W.Va.Code §18-7A-3; and**

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[1]In the briefs and in the trial court's final order, the parties cited and quoted the 1975 version of W.Va.Code §18-7A-3(1), because that was the version of the statute in effect at the time Petitioner first was hired. (For purposes of this case, the 1980 version of this statute did not alter the particular language that is controlling in this case). The present version of this statute has been reorganized and amended through the years so that now the definition of "teacher" is found in W.Va.Code §18-7A-3(31). The present definition of "teacher" in this statute differs from the controlling definitions litigated in this case.

5. **Under W.Va.Code §18-7A-3(10), Respondent lacked jurisdiction to correct what it described as "employer error" because Petitioner's employer deliberately included Petitioner as a member of the TRS and therefore committed no employer error?**

III. Statement of the case

Although Petitioner is included in the definition of "teacher" as provided in W.Va.Code §18-7A-3(1) (1975), she is employed in an administrative nonteaching position. Thus, the critical issue raised in this case is whether Petitioner's employment in an administrative nonteaching position makes her eligible for a TRS pension under the provisions of W.Va.Code §18-7A-3(1) (1975). Before discussing the relevant facts, it is helpful to review the provisions upon which Petitioner is relying. Specifically, the Legislature in W.Va.Code §18-7A-3(1)(g) and (j) (1975), provides :

> "Teacher" shall include the following persons, if regularly employed for at least half-time service:
>
> * * *
>
> (g) members of the research, extension, administrative or library staffs of the public schools;
>
> * * *
>
> (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, the state department of education or the teachers retirement board, if such person was formerly employed as a teacher in the public schools....

Because Petitioner always has been regularly employed for at least a half-time basis during her career as part of the administrative staff of the COGS, she meets the definition of teacher under subsection (g) and is entitled to retirement under the TRS. Furthermore, because Petitioner was

employed for at least a half-time basis during her career in a nonteaching capacity by the COGS, which was governed by the West Virginia board of regents, she also meets the definition of teacher under subsection (j) and is entitled to retirement under the TRS. At the hearing held on June 5, 2018, Petitioner testified that during the critical time period from 1981 through some time in 1992, Petitioner was employed on a more than half-time basis. (JA 36). From 1992 through the present, Petitioner has been employed on a full-time basis. (JA 36-37). Under the version of W.Va.Code §18-7A-3(1), in effect at the time Petitioner was hired, more than half-time employment was sufficient to earn service credit under the TRS. The legal dispute presented is whether or not Petitioner meets the definition of "teacher," set out in W.Va.Code §18-7A-3(1), which definition specifically includes some nonteaching positions.

During this critical time period, Petitioner testified that she registered students, proctored examinations, coded and scored exams, assisted a professor in a study referred to as Project Challenge, registered students, went around to schools to promote the COGS, answered the telephone, sold books, made drawings for special education classes, set up equipment for the professors, typed for professors, performed clerical work, and reserved classrooms for professors. (JA 311-15). In the final recommended order, the ALJ chose not to cite any of Petitioner's testimony explaining what services she actually provided. (JA 395).

With respect to labeling her job, Petitioner always considered herself to be an **administrative assistant**. (JA 315). In the documents presented at the hearing, which reflect the records from when Marshall University took over the COGS, Petitioner is listed as an **Administrative Assistant** from 1998 to the present. Petitioner would assist up to seven professors. (JA 317). Regardless of the actual label used, whether it be secretary, administrative secretary, administrative staff, or

administrative assistant, Petitioner has performed the same duties throughout the entire time she has been employed, first by the COGS, and now by Marshall University, which took over the COGS. (JA 324).

At the end of the hearing, the ALJ asked counsel for Petitioner to locate any relevant documents identifying Petitioner's job. Petitioner provided the following documents, which are referenced by the ALJ in findings of fact nos. 10 through 21:

1. Letter from the COGS President James W. Rowley dated September 14, 1981, appointing Petitioner as "Part-Time Permanent Secretary."

2. Letter from the COGS President James W. Rowley dated June 30, 1983, noting Petitioner's appointment as Secretary II.

3. Classified Employee Appointment from the COGS President James W. Rowley, dated June 18, 1987, appointing Petitioner as Secretary II.

4. Classified Employee Appointment from the COGS President James W. Rowley, dated June 9, 1989, appointing Petitioner as Secretary II.

5. Personnel Action Reclassification from the COGS dated January 1, 1994, noting change in payroll title for Petitioner from Secretary II, to Administrative Secretary.

6. Undated Marshall University Human Resources Services document listing Petitioner's job title as Administrative Secretary.

7. Notice of Classified Employee Appointment from the COGS dated June 20, 1994, appointing Petitioner to position of Administrative Secretary in the Bluefield Office of Admissions and Records. (JA 377-83).

Every year, Respondent provided Petitioner with a total calculation of her service credit in TRS. (JA 4-21). In the calculation she received before making her 2017 inquiry about retiring, Respondent's document showed that Petitioner had earned 31.264 years of service credit. (JA 21).

After investigating her retirement options, Petitioner received a letter from Respondent telling her, for the first time and contrary to all other evidence, that instead of the service credit from

1982 through 1993 being 9.264 years, it actually was 0.636 years. (JA 22). This letter is what triggered Petitioner's initial administrative appeal.

IV. Summary of argument

Statutes governing retirement benefits must be liberally construed in favor of the employee seeking coverage.

Subsection (g) of W.Va.Code §18-7A-3(1) (1975), provides a "teacher" includes "members of the research, extension, administrative or library staffs of the public schools." Petitioner is employed in an administrative position for the COGS, which is a part of the public school system. As an administrative assistant or administrative secretary, Petitioner did provide some secretarial services as part of the overall duties required in her administrative position.

Respondent asserted and the trial court found that additional definitions included in W.Va.Code §18-7A-3, excluded secretaries. Apparently, this conclusion is based upon the definition of "'Members of the extension staff' of the public schools includes every agricultural agent, boys' and girls' club agent and every member of the agricultural extension staff whose work is not primarily stenographic, clerical or secretarial." However, both the trial court and Respondent failed to note that in W.Va.Code §18-7A-3 (1975), the Legislature defined "Members of the administrative staff of public schools" to mean "deans of instructions, deans of men, deans of women, and financial and **administrative secretaries**." (Emphasis added).

There is no statutory support for Respondent's assertion that "administrative secretaries" only refers to heads of a public school department. If the Legislature had intended to exclude an employee, who provides administrative and secretarial services, but is not the head of a public school department, it very easily could have done so, but it did not.

Subsection (j) of W.Va.Code §18-7A-3(1) (1975), provides a "teacher" includes "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 public schools." Petitioner is employed in a nonteaching capacity by the COGS, which was governed by the West Virginia board of regents, and therefore falls within this definition of "teacher."

The trial court misread subsection (j) by concluding the qualifying phrase at the end of subsection (j)–" if such person was formerly employed as a teacher in public schools"–applies to **all** of the nonteaching positions identified previously in this same subsection. Under the doctrine of the last preceding antecedent, the qualifying phrase only applies to "the state department of education or the teachers retirement board," which are the items immediately preceding the qualifying phrase.

The trial court erred in holding that Petitioner is barred under W.Va.Code §18-7A-35, from earning credit for working at least part-time, based upon the language of that statute. However, because Petitioner meets the definition of "teacher" under subsections (g) and/or (j) of W.Va.Code §18-7A-3(1) (1975), Petitioner then is a "teacher" for TRS purposes. Thus, when the Legislature in W.Va.Code §18-7A-35(a), specifically excluded "teachers," the Legislature necessarily excluded Petitioner from the application of this statute. In other words, there could be nonteaching employees, who are covered by TRS, but who otherwise do not meet the definitions of "teacher" set out in W.Va.Code §18-7A-3.

Another problem with the trial court's reliance on W.Va.Code §18-7A-35, is the language in subsection (b) asserting that nonteaching employees "shall be entitled to all the rights, privileges and benefits provided for teachers." If the trial court's conclusion on the application of this statute

were correct, then this holding denies Petitioner the same rights, privileges, and benefits provided for teachers, who earned a full year's retirement credit for being regularly employed on at least a half-time basis until 1986.

The trial court erred in its failure to recognize the significance of W.Va.Code §18-7A-3(10). In this statute, the Legislature defines "employer error" as "an omission, misrepresentation or violation of relevant provisions of the West Virginia Code or of the West Virginia Code of State Regulations or the relevant provisions of both 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). This bolded provision bears repeating: if an employer deliberately takes an action in connection with TRS that is "contrary to the provisions of this section," such a deliberate action "does not constitute employer error."

Petitioner's employer did not commit any error, but deliberately enrolled Petitioner in the TRS, based upon its understanding of subsections (g) and (j) discussed above. The Legislature has recognized an employer's application of the law, particularly here where the COGS followed this same procedure from the date Petitioner was hired in 1981, is entitled to some deference and, therefore, cannot be considered to be an error. To hold otherwise would require the courts to ignore this provision in W.Va.Code §18-7A-3(10), and would eliminate the deference the Legislative sought to create when an employer has made a deliberate decision regarding the State pension system.

Any reduction in Petitioner's retirement service credits implicates Petitioner's fundamental right to her TRS retirement. This Court has a long history of being very protective of a public employee's constitutional, contractual, and statutory right to his or her retirement benefits. This Court repeatedly has rejected attempts to reduce the retirement benefits owed to various public employees once the employee has a constitutional, contractual, and statutory right to such benefits.

V. Statement regarding oral argument and decision

Cases involving the application of our state retirement statutes can be very dense and confusing. Furthermore, the Court's resolution of the issues raised in this case necessarily will impact other state employees, who find themselves in the same position as Petitioner. Consequently, Petitioner respectfully submits this case deserves oral argument under either Rules 19 or 20 so that counsel can provide any clarifications or explanations sought by the Court. Because several of the specific issues raised in this case, at least one of which is raised in one other case pending before the Court,[2] a definitive ruling by the Court authored by one of the Justices would be appropriate.

VI. Argument

A. Trial court's rulings

In the final order, the trial court made several different conclusions of law, which Petitioner will address below. First, the trial court repeatedly refers to Petitioner as a secretary, rather than as an administrative assistant or administrative secretary. By using this label, the trial court concluded

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[2]The meaning and application of the similarly worded "error correction" statute incorporated into the Public Employees Retirement System is an issue raised in *West Virginia Consolidated Public Retirement Board v. Clark*, No. 20-0350. In that case, the trial court agreed with Petitioner's analysis of the "error correction" statute presented in this case. Respondent filed its appeal brief in that case on August 17, 2020. Now that all of the briefing has been completed, the parties are waiting for the Court to determine how to proceed with that appeal.

that W.Va.Code §18-7A-3(1)(g) (1975), was inapplicable because "subsection (G) is further defined in subsequent paragraphs as excluding secretaries." (JA 408). Second, the trial court concluded W.Va.Code §18-7A-3(1)(j) (1975), is inapplicable because "(J) is conditioned upon 'if such person was formerly employed as a teacher in the public schools.'" (*Id.*).

Third, the trial court relies upon W.Va.Code §18-7A-35, for the proposition that a nonteacher under the TRS must be "regularly employed for full-time service." Based upon its interpretation of this provision, the trial court concludes Petitioner did not meet the TRS eligibility requirements from 1981 through 1993. Finally, with respect to the error correction statute included in W.Va.Code §18-7A-3(10), the trial court held Respondent had exercised its authority properly under these facts. Petitioner respectfully submits the trial court's rulings on all of these issues are contrary to the applicable law and the decisions by this Court.

B. Retirement statutes must be liberally construed in favor of employee

The critical issue presented in this case is what is the total amount of service credits to which Petitioner is entitled to receive from 1982 through December 1993, during which time Petitioner was employed on a regular part-time basis. Prior to the February 22, 2017 letter, all of the records provided to Petitioner by Respondent and her employer established that Petitioner was entitled to a total of 9.264 years for the relevant time period. After Respondent got involved, prompted by an inquiry by Petitioner, who was considering retirement, Respondent sent a letter to Petitioner reducing her service credits for this time period to 0.636 years. This drastic reduction has rendered it impossible for Petitioner to retire any time soon.

The Legislature and this Court have recognized that statutes governing retirement benefits must be liberally construed in favor of the employee seeking coverage. "'[P]ension provisions

applicable to members of the police force [are to] be liberally construed and ambiguities resolved in favor of those to be benefited.'" *McNeely v. West Virginia Consolidated Public Retirement Board*, 226 W.Va. 553, 703 S.E.2d 524 (2010). In W.Va.Code §5-10-3a, which is part of the general statutes governing the Public Employee Retirement System (PERS), the Legislature specifically determined "the provisions of this article shall be liberally construed so as to provide a general retirement system for the employees of the state herein made eligible for such retirement." While there is no equivalent statute contained in the statutes establishing the TRS, there is no reason to believe that a liberal construction applies to statutes governing the retirement benefits of police officers and public employees, but not teachers.

C. Petitioner is a "teacher" under subsection (g)

Petitioner contends from the time she was first employed by the COGS, she met the definition of "teacher" under W.Va.Code §18-7A-3(1) (1975). In the record are copies of the 1975, 1980 and 1986 versions of this statute. (JA 209-55). These copies were provided because these versions of W.Va.Code §18-7A-3, were in effect when Petitioner initially was employed. Although these different versions of W.Va.Code §18-7A-3, were made a part of the record, for purposes of this appeal, the controlling definition of "teacher" did not change.[3]

Petitioner does fall within the definition of "teacher" under subsections (g) and (j). Subsection (g) provides a "teacher" includes "members of the research, extension, administrative

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[3]One of the most significant changes between these earlier versions of W.Va.Code §18-7A-3, and the present version is that these earlier versions rendered a "teacher" eligible under the TRS for rendering regular half-time employment whereas beginning in 1986, the Legislature amended this statute to require that teachers be engaged in full-time employment. The legal question raised by this change, discussed in Part VI(F), is whether this change in the law can be applied to an employee already enrolled in the TRS and receiving full service credits for being regularly employed for at least a half-time basis.

or library staffs of the public schools." Petitioner is employed in an administrative position for the COGS, which is a part of the public school system.[4] In the initial hearing, Petitioner testified that she provided "administrative services." (JA 35). Later in the hearing, Petitioner testified that she considered herself to be an "educational administrator." (JA 44). Following the remand, a second hearing was held and additional evidence was presented regarding Petitioner's duties, which are much akin to what an administrative secretary or assistant would provide, rather than simply secretarial or clerical work. Most importantly, subsection (g) includes nonteaching employees who are members of the administrative **"staff"** of a public school. This provision does not say it is limited to "administrators" only, but rather uses the broader phrase "administrative staff." All administrative staffs necessarily would include secretaries. Thus, while Petitioner did provide secretarial services, which are included in the duties of an administrative staff employee, her job duties also included a variety of administrative duties.

Respondent asserted and the trial court found that additional definitions included in W.Va.Code §18-7A-3, excluded secretaries. (JA 408). Apparently, this conclusion is based upon the definition of "'Members of the extension staff' of the public schools includes every agricultural agent, boys' and girls' club agent and every member of the agricultural extension staff whose work is not primarily stenographic, clerical or secretarial." However, both the trial court and Respondent

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[4]For Petitioner to meet the definition of "teacher" under subsection (g), she not only has to be employed as part of the administrative staff, which she clearly is, but also has to be employed by a public school. The earlier versions of W.Va.Code §18-7A-3, define "public schools" as "all publicly supported schools, including normal schools, colleges, and universities in this state." The ALJ and the trial court appeared to concede that the COGS falls within this definition of "public schools" because they focused exclusively on distinguishing between secretarial and administrative duties.

failed to note that in W.Va.Code §18-7A-3 (1975), the Legislature defined "Members of the administrative staff of public schools" to mean "deans of instructions, deans of men, deans of women, and financial and **administrative secretaries.**" (Emphasis added). Other than using the words "administrative secretaries," the Legislature does not define who should be included in that job category. Furthermore, whether the Legislature intended this definition to apply to subsection (g), which is much broader and references "members of the **research, extension**, administrative or **library** staffs of the public schools," is not clear.

In the briefs below, Respondent suggested that "administrative secretaries" in this context refers to the head of a department, as opposed to the usual and ordinary meaning given to these words. This assertion is refuted by the actual language used by the Legislature, which does not in any way limit what it meant by "administrative secretaries." If the Legislature had intended to exclude an employee, who provides administrative and secretarial services, but is not the head of a public school department, it very easily could have done so, but it did not. The trial court's conclusion placing great weight on some distinction between secretarial and administrative duties not only ignored Petitioner's testimony regarding her being an administrative employee of the COGS, but also ignores the common sense understanding that a person performing secretarial duties necessarily is a part of the administrative staff. In fact, most secretaries correctly are referred to as administrative assistants. For these reasons, the trial court erred in failing to recognize that Petitioner is covered by the TRS under W.Va.Code §18-7A-3(1)(g) (1975).

D. Petitioner is a "teacher" under subsection (j)

Subsection (j) provides a "teacher" includes "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 public schools." Petitioner is employed in a nonteaching capacity by the COGS, which was governed by the West Virginia board of regents, and therefore falls within this definition of "teacher." The trial court rejected the application of subsection (j) because "(J) is conditioned upon `if such person was formerly employed as a teacher in the public schools.'" (JA 408).

Petitioner respectfully submits the trial court completely misread subsection (j) by concluding the qualifying phrase at the end of subsection (j)–" if such person was formerly employed as a teacher in public schools"–applies to **all** of the nonteaching positions identified previously in this same subsection. Under these circumstances, courts apply what is called the doctrine of the last preceding antecedent. In other words, the qualifying phrase only applies to the last preceding word or phrase being modified. *See generally Appalachian Power Co. v. Public Service Commission*, 162 W.Va. 839, 253 S.E.2d 377 (1979)(Footnote 3); *Blue v. Poling*, 68 W.Va. 547, 549, 70 S.E. 279, 281 (1911); *see also Lockhart v. United States*, ___ U.S. ___, 136 S.Ct. 958, 194 L.Ed.2d 49 (2016); *Barnhart v. Thomas*, 540 U.S. 20, 124 S.Ct. 376, 157 L.Ed.2d 333(2003).

This issue often arises when courts are asked to interpret and apply a statute, which places a qualifying clause at the end of the sentence that is preceded by multiple items. These provisions necessarily raise the issue as to whether the qualifying phrase applies to every item preceding it or only to the item immediately preceding the qualifying phrase. Although the trial court concluded subsection (j) was not ambiguous and therefore chose not to apply rules of statutory construction, in reality, the trial court's conclusion that the qualifying phrase applied to all of the preceding items is a form of statutory interpretation that is contrary to the rules of grammar and construction.

Under the doctrine of the last preceding antecedent, the qualifying phrase "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," which are the items immediately preceding the qualifying phrase. With this interpretation, Petitioner also clearly falls with the definition of "teacher" under subsection (j) because although Petitioner was never formerly employed as a teacher in public schools, she is not required to meet that element because she works in a nonteaching position for the COGS, which was governed by the West Virginia board of regents. When read correctly, the requirement to be formerly employed as a teacher in public schools only applies to a person employed in either the state department of education or the teachers retirement board.

There is an exception to the doctrine of the last preceding antecedent, where all of the foregoing words or phrases are separated by commas. When all of the preceding words or phrases are separated by commas, then the statute can be interpreted as the modifying phrase applying to all of the antecedents, and not simply the last preceding antecedent. *See generally* "Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers," http://www.journallegalwritinginstitute.org/archives/1996/lec.pdf.

This exception to the doctrine of the last preceding antecedent is inapplicable here because although subsection (j) does use commas to separate several of the employers identified, there is no comma between "the state department of education or the teachers retirement board." The lack of a comma between "the state department of education" and "the teachers retirement board" renders this exception to this general rule inapplicable and provides further evidence that the modifying phrase only applies to these two specific employers.

Once Petitioner became a participant in the TRS, she met the definition of "teacher" under W.Va.Code §18-7A-3(1)(j) (1975), made contributions into the TRS, along with her employer the COGS, beginning in 1982, and relied upon the State's promise to pay her a pension, based upon the service credits she had earned and which were reported to her annually by Respondent. Under subsections (g) and (j), Petitioner is entitled to the full 9.264 years of service credit for the years 1982 through 1993.

E. W.Va.Code §18-7A-35, is inapplicable to Petitioner

The trial court cites W.Va.Code §18-7A-35, for the proposition that only those nonteaching employees who were regularly employed for full-time service are entitled to TRS benefits. Based upon this holding, the trial court concluded Petitioner was not entitled to TRS service credits from 1981 through 1992, when she was employed regularly on at least a half-time basis.

As noted previously, teachers earned TRS service credit for being employed on at least a half-time basis until 1986, when the Legislature amended W.Va.Code §18-7A-3, to require full-time employment. It is not clear how the definitions in and amendments to W.Va.Code §18-7A-3, are to be read in conjunction with W.Va.Code §18-7A-35. This statute, which was amended in 1975 and then in 1984,[5] provides in subsection (a),"Nonteaching employees shall mean all persons, **except teachers**, regularly employed for full-time service by the following educational agencies:...(c) the West Virginia board of regents." (Emphasis added). Subsection (b) provides, "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."

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[5]These versions of this statute are included in the record. (JA 80-85).

The challenge here is how should this Court construe these two statutes together. Once Petitioner meets the definition of "teacher" under subsections (g) and/or (j) of W.Va.Code §18-7A-3(1) (1975), Petitioner then is a "teacher" for TRS purposes. Thus, when the Legislature in W.Va.Code §18-7A-35(a), excluded "teachers," the Legislature necessarily excluded Petitioner from the application of this statute. In other words, there could be nonteaching employees, who are covered by TRS, but who otherwise do not meet the definitions of "teacher" set out in W.Va.Code §18-7A-3.

Another problem with the trial court's reliance on W.Va.Code §18-7A-35, is the language in subsection (b) asserting that nonteaching employees "shall be entitled to all the rights, privileges and benefits provided for teachers." If the trial court's conclusion on the application of this statute were correct, then this holding denies Petitioner the same rights, privileges, and benefits provided for teachers, who earned a full year's retirement credit for being regularly employed on at least a half-time basis until 1986. Petitioner respectfully submits the fact that she is covered by subsections (g) and (j) of W.Va.Code §18-7A-3(1) (1975), W.Va.Code §18-7A-35, simply does not apply to her because she meets the definition of "teacher" and W.Va.Code §18-7A-35, excludes "teachers" from its application.[6]

F. Respondent acted contrary to its limited authority under error correction statute and violated Petitioner's constitutional, contractual, and statutory right to her TRS retirement

The trial court summarily and without much discussion rejected Petitioner's arguments that the actions taken by Respondent exceeded its authority under the "error correction" statute,

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[6]Also, as noted in Part VI(F) of this brief, the application of a statute that attempts to reduce the retirement benefits of a public employee violates the employee's constitutional, contractual, and statutory rights.

W.Va.Code §18-7A-3(10), by holding, "[T]he 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." (JA 412-13). In support of this conclusion, the trial court does not cite any statute or case law.

In W.Va.Code §18-7A-3(10), the Legislature defines "employer error" as "an omission, misrepresentation or violation of relevant provisions of the West Virginia Code or of the West Virginia Code of State Regulations or the relevant provisions of both 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). This bolded provision bears repeating: if an employer deliberately takes an action in connection with TRS that is "contrary to the provisions of this section," such a deliberate action "does not constitute employer error." *See also* W.Va.Code §18-7A-14c (Also addresses the ability of Respondent to correct errors as defined in the TRS).[7]

Petitioner's employer did not commit any error, but deliberately enrolled Petitioner in the TRS, based upon its understanding of subsections (g) and (j) discussed above. Thus, as a deliberate act, Petitioner's employer did not commit any "error" and, therefore, Respondent had no authority to correct this deliberate act of her employer.

This Court has never addressed what "deliberate act" means in W.Va.Code §18-7A-3(10), or in W.Va.Code §5-10-2(12), which is the equivalent error correction statute contained in PERS. The decision by Petitioner's employer to include her in the TRS by making contributions as an

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[7]In the TRS, the only type of "error" defined is "employer error." Therefore, Petitioner respectfully submits the Legislature's very specific definition of "employer error" must be read in conjunction with the provisions of W.Va.Code §18-7A-14c.

employer into TRS and further making contributions from Petitioner into TRS was not "an omission, misrepresentation or violation of" state law, but rather was a "deliberate act" thoughtfully made by the COGS. In this respect, the Legislature has recognized an employer's application of the law, particularly here where the COGS followed this same procedure from the date Petitioner was hired in 1981, is entitled to some deference and, therefore, cannot be considered to be an error. To hold otherwise would require the courts to ignore this provision in W.Va.Code §18-7A-3(10), and would eliminate the deference the Legislative sought to create when an employer has made a deliberate decision regarding the State pension system.

Not only would an affirmance of the trial court's ruling that this "error correction" statute is inapplicable be inconsistent with the clear and unambiguous language used by the Legislature, but such a reduction in Petitioner's retirement service credits implicates Petitioner's fundamental right to her TRS retirement. This Court has a long history of being very protective of a public employee's constitutional, contractual, and statutory right to his or her retirement benefits. *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1994); *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988); *Wagoner v. Gainer*, 167 W.Va. 139, 279 S.E.2d 636 (1981). Any reduction in those benefits repeatedly has been rejected by this Court in favor of the public employee's rights.

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

> We granted a rule to show cause to set the law in clear and unambiguous terms concerning the pension rights of thousands of West Virginia public employees who have given their lives to government service and now rely for their future health, welfare and

> security upon the promises made to them by their fellow citizens through the elected legislature. For the reasons given below, legitimate expectations of government servants cannot be confounded after those servants have partially performed their part of the bargain with the people, relied to their detriment, and foreclosed other career options.

The end result is this Court in *Booth* adopted multiple new syllabus points recognizing the contractual and constitutional interests public employees have in their retirement system. These interests make it very difficult for the system to be changed after the fact. *See also* Syllabus Point 16 of *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988)("Retired and active PERS plan participants have contractually vested property rights created by the pension statute, and such property rights are enforceable **and cannot be impaired or diminished by the State.**" (Emphasis added)).

This Court has decided a number of cases where any reduction in a State employee's pension after the employee's contractually vested property rights are established is unconstitutional and unenforceable. For example, in *Wagoner*, this 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)(Public employee 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).

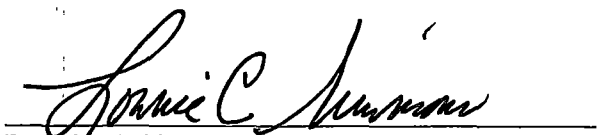
When these holdings are applied to Petitioner, it is clear that the trial court's decision to affirm the reduction of Petitioner's TRS service credits from 9.264 years to 0.636 years, either through its misinterpretation of subsections (g) and (j) of W.Va.Code §18-7A-3(1) (1975), or its application of W.Va.Code §18-7A-35, or its rejection of the error correction statute in W.Va.Code §18-7A-3(10), is a violation of Petitioner's constitutional, contractual, and statutory rights to her TRS retirement. Consequently, Petitioner respectfully submits the trial court's final order is contrary to the applicable law and must be reversed.

VII. Conclusion

For the foregoing reasons, Petitioner Linda Birchfield-Modad respectfully moves the Court to grant oral argument and thereafter to issue a decision authored by one of the Justices reversing the final order of the trial court, restoring the 9.264 years of retirement service credit Petitioner earned from 1981 through 1993, and remanding this matter to Respondent to take whatever actions are necessary to carry out this decision. Furthermore, Petitioner seeks such additional relief the Court deems to be appropriate.

LINDA BIRCHFIELD-MODAD, Petitioner,

–By Counsel–



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 20-0747

LINDA BIRCHFIELD-MODAD,

Plaintiff Below/Petitioner,

v.

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Defendant Below, Respondent

PETITIONER'S APPEAL BRIEF

Appeal from the Circuit Court of Kanawha County, West Virginia

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CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITIONER'S APPEAL BRIEF** was served on counsel of record on January 4, 2021, by email and mail, to the following:

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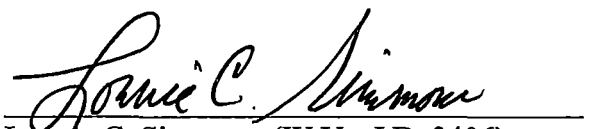

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