

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 REPLY BRIEF**

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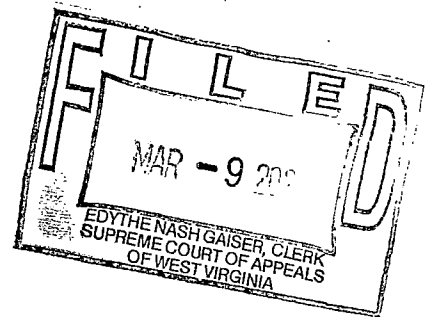
*Appeal from the Circuit Court of Kanawha County, West Virginia*

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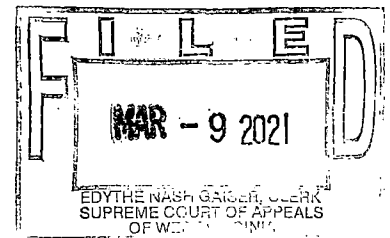
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**I. The generally agreed upon facts support three possible resolutions**

*To the Honorable Justices of the*

*West Virginia Supreme Court of Appeals:*

As the Court can see from the briefs filed, Petitioner Linda Birchfield-Modad and Respondent West Virginia Consolidated Public Retirement Board largely are in agreement as to the controlling facts in this case. Although there are some disagreements as to the label to place on the position Petitioner has had with the West Virginia College of Graduate Studies (COGS) and its successors—secretary, administrative assistant, administrative secretary, administrative staff, etc.—there really is no dispute as to the actual administrative duties Petitioner has carried out. Specifically, with respect to her actual duties, Respondent never presented any evidence to contradict

either Petitioner's testimony on the work she performs as an administrative assistant or on the documents she presented in support of her claim. For purposes of this appeal, the determinative facts should be Petitioner's actual administrative duties as opposed to any labels placed on her position.

Both parties agree that Petitioner is a member of the TRS. Both parties agree that from the date in 1992, when Petitioner became employed on a full-time basis, to the present, she correctly has earned retirement credits under the TRS. Thus, the focus in this case is on what retirement credits, if any, did Petitioner earn from 1981 through 1992, when she was employed on a regular half-time basis.

There are two different legal theories that would support Petitioner's assertion that she earned full TRS retirement credits for her regular half-time employment. First, this Court could conclude that during this critical time period, Petitioner met the definition of "teacher" spelled out in W.Va.Code §§18-7A-3(1)(g) and/or (j)(1975). This is true because from 1981 through 1986, the Legislature had defined "teacher" for TRS purposes as requiring at least regular half-time employment. In 1986, the Legislature amended the definition of "teacher" in W.Va.Code §18-7A-3, to require "full-time service."

Second, this Court could conclude that under the "employer error" correction statute, W.Va.Code §18-7A-3(10), Respondent lacked the authority to "correct" the deliberate actions of Petitioner's employer, which actions do not meet the definition of "employer error." It should be noted that the very similar "employer error" statute contained in the Public Employers Retirement System (PERS) W.Va.Code §5-10-44, and W.Va.Code §5-10-2(12), will be addressed by this Court in *West Virginia Consolidated Public Retirement Board v. Clark*, No. 20-0350, which is scheduled for Rule 20 oral argument **on April 13, 2021**.

A compromise position that would be consistent with the law and the facts is Petitioner earned TRS retirement credits from the date she was hired in 1981 to the date in 1986 when the Legislature amended W.Va.Code §18-7A-3, to require teachers to be employed regularly on a full-time basis. Such a holding would treat teachers and nonteaching employees covered by TRS the same, as mandated by W.Va.Code §18-7A-35(b).

Petitioner claims she met the definition of “teacher” under both W.Va.Code §§18-7A-3(1)(g) and (j) (1975). Respondent disagrees and asserts Petitioner has never met either definition of “teacher,” but Petitioner is a member of the TRS as a nonteaching employee of COGS, under W.Va.Code §18-7A-35. Because this statute always required full-time employment for covered nonteaching employees, Respondent asserts Petitioner never earned any TRS retirement credits during the time she was employed on a regular half-time basis.

Under these facts, the Court could reach three different conclusions:

1. Petitioner is entitled to the full 9.264 years of TRS retirement credit during this time period when she was regularly employed on a half-time basis. This holding would be based either on the Court finding that Petitioner met the definition of “teacher” or upon this Court’s interpretation of the “employer error” statute, W.Va.Code §18-7A-3(10). In both instances, this Court’s case law recognizing a public employee’s constitutional, contractual, and statutory right to his or her retirement benefits, which cannot be reduced, would justify awarding the full 9.264 years of TRS retirement credit to be consistent with *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), and *Wagoner v. Gainer*, 167 W.Va. 139, 279 S.E.2d 636 (1981);
2. Petitioner earned TRS retirement credits from the date she was hired in 1981 through the date in 1986, when the Legislature amended W.Va.Code §18-7A-3, to require teachers to be regularly employed on a full-time basis. This holding would be consistent with the mandatory language in W.Va.Code §18-7A-35(b), requiring nonteaching employees covered by TRS to be subject to the “same terms and conditions as are herein prescribed for teachers.” The parties would need to get the precise dates to determine the specific number of years credit earned by Petitioner during this period. Again, this Court’s public employee retirement case law would be applicable to justify this result; or

3. Petitioner did not earn any TRS retirement credits when she was employed regularly on a half-time basis because she never met the definition of “teacher,” Respondent correctly applied the “employer error” statute, and this Court’s decisions addressing a public employee’s constitutional, contractual, and statutory right to his or her retirement benefits somehow is inapplicable.

## II. *De novo* review of the meaning and application of statutes

Petitioner and Respondent are in agreement that the legal issues regarding the interpretation and application of W.Va.Code §18-7A-3(1) (1975), W.Va.Code §18-7A-35, and W.Va.Code §18-7A-3(10), are subject to *de novo* review by this Court. While this Court can give some deference to the agency’s interpretation of these statutes, the Court is not bound by the agency’s decisions regarding the meaning of these statutes.

For example, this Court rejected Respondent’s interpretation of the military service credit statute in *West Virginia Consolidated Public Retirement Board v. Wood*, 233 W.Va. 222, 228, 757 S.E.2d 752, 758 (2014), where this Court held that “While this Court agrees with the proposition that the Board’s interpretation is entitled to deference, it is imperative that a reviewing Court also consider the possibility, as the Circuit Court did in the present case, that the Board’s interpretation is erroneous.” In footnote 9 of *Wood*, the Court also rejected Respondent’s statutory analysis by citing Justice Antonin Scalia’s concurring opinion in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991), “[D]eference is not abdication and it requires us to accept only those agency interpretations that are reasonable and right of the principles of construction Courts normally employ.”

Thus, in this appeal, this Court is not bound by Respondent’s legal analysis of these statutes and will need to apply the standard set out in Syllabus Point 8 of *Wood*:

“ ‘In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to

accomplish the general purpose of the legislation.’ Syl. Pt. 2, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).” Syl. Pt. 3, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984).

### **III. The Court will decide whether Petitioner met the definition of “teacher”**

Both parties have presented their arguments on whether or not Petitioner met the definition of “teacher,” as defined in W.Va.Code §§18-7A-3(1)(g) and (j) (1975), during the critical time period. Subsection (g) 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. 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 relies upon the arguments presented in her initial brief on this issue, which need not be repeated in this reply brief.

### **IV. Respondent fails to address critical language in W.Va.Code §18-7A-35(b)**

Both parties have discussed their views on the application of W.Va.Code §18-7A-35(a), to the facts of this case. Because subsection (a) excludes “teacher,” Petitioner asserts this statute is inapplicable to her because she meets the definition of “teacher.” Respondent’s view is Petitioner never met the definition of “teacher,” and, therefore, under this subsection, which requires full-time service, Petitioner did not earn any TRS retirement credits during the time she regularly was employed on a half-time basis. All of these arguments have been set out in the respective briefs and need not be repeated herein.



Respondent's discussion of W.Va.Code §18-7A-35(b), is limited to one sentence, which does not really address this provision in any substantive way. 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.**" (Emphasis added). From 1981 through the date in 1986, when the Legislature amended W.Va.Code §18-7A-3, to require "teachers" to be employed on a full-time basis, "teachers" earned TRS retirement credits for being regularly employed on a half-time basis. Thus, during this time period, part of the terms and conditions for teachers is that they earned TRS retirement credits even though they were regularly employed on a half-time basis.

For subsection (b) to be given its plain meaning, then nonteaching employees similarly are entitled to earn TRS service credits for being regularly employed on a half-time basis. The suggestion by Respondent that during this time period, this statute permitted teachers during to earn TRS retirement credits for regular half-time employment while denying the same for nonteaching employees covered by TRS cannot be squared with the plain language of the statute.

**V. W.Va.Code §18-7A-3(10), must be applied as written**

In addressing the "employer error" statute, W.Va.Code §18-7A-3(10), Respondent broadly chooses to ignore the actual language mandated by the Legislature in this provision and, instead, seeks to find its own "error correction" authority elsewhere. The problem with this approach is it fails to note the Legislature's specific directive that **"A deliberate act contrary to the provisions of this section by a participating public employer does not constitute employer error."** (Emphasis added).

Year after year, Petitioner's employer made payments into TRS, based upon its determination that Petitioner was eligible for TRS retirement credits when she regularly was employed on a half-time basis. For these same years, Petitioner made her employee contributions into TRS based upon the same conclusion. Petitioner's public employer deliberately, intentionally, and regularly treated Petitioner as a covered TRS employee during the entire time she worked regularly on a half-time basis.

In going through the statute, Petitioner's employer had every right and justification for reaching this conclusion, based upon the definitions of "teacher" in W.Va.Code §§18-7A-3(1)(g) and (j) (1975). For Respondent to prevail on this legal issue, the Court would have to ignore completely the language from the Legislature making it clear that a deliberate decision made by a public employer does not constitute employer error. The Court must presume the Legislature had a reason for incorporating this language in the "employer error" statute and under the governing case law, must give this language its full effect and meaning.

Respondent asserts interpreting the plain language of this statute as suggested by Petitioner, which interpretation of the PERS equivalent statute was accepted by the trial court in the pending *Clark* case set to be argued on April 13, would create a world of troubles for the State's retirement system. Petitioner can imagine clerical errors committed by a public employer, such as transposing numbers, which would be the type of error that is correctable because that type of mistake is not a deliberate act. However, when a public employer makes a deliberate decision that one of its employees is covered by TRS and then proceeds for the next ten or so years to make contributions into TRS based upon the employee's regular half-time service, that decision cannot be altered under the provisions of W.Va.Code §18-7A-3(10).

Neither Respondent nor this Court has the authority to ignore the specific language chosen by the Legislature in W.Va.Code §18-7A-3(10). Petitioner respectfully submits that the analysis of this statute contained in her initial brief is proper and is the only interpretation that would provide the plain meaning of this statute intended by the Legislature.

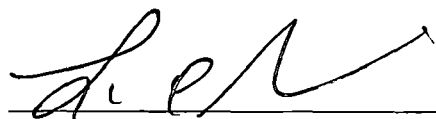
## **VII. Conclusion**

Petitioner Linda Birchfield-Modad would welcome the opportunity from this Court to address the factual and legal issues raised in this appeal in oral argument. Public employee retirement cases can be complex and this case raises several statutory claims never before addressed by this Court. Finally, the fact that this Court has scheduled Rule 20 argument in the *Clark* case, which includes an issue also raised herein, is yet another reason for granting oral argument.

Regardless of whether or not the Court grants oral argument, Petitioner respectfully submits that she has worked for the State very hard for decades to earn a well-deserved retirement, a retirement plan that she relied upon from the first day she was hired. Petitioner hopes the Court will see the merits in her arguments and will issue a final decision restoring some or all of the TRS retirement credits taken away by Respondent.

**LINDA BIRCHFIELD-MODAD**, Petitioner,

–By Counsel–



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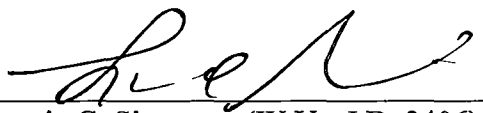
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**CERTIFICATE OF SERVICE**

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITIONER'S REPLY BRIEF** was served on counsel of record on March 9, 2021, by email and mail, to the following:

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