IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0747

LINDA BIRCHFIELD-MODAD,
Petitioner,

v.

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,
Respondent.

(Kanawha County Circuit Court)
(Civil Action No. 19-AA-24)

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

A. Procedural History

This is an appeal by Petitioner Linda Birchfield-Modad, a member of the West Virginia Teachers Retirement System (TRS), of a decision by the Respondent West Virginia Consolidated Public Retirement Board (hereinafter "Board") to reduce her service credit during the years of 1982-1993 from 9.264 years to .636 years. The Board found that the Petitioner's service credit had been erroneously reported to the Board by her employer and that she was not entitled to the credit because she was a part-time employee during this time period in which the applicable law required non-teaching employees to work full-time to be eligible to participate in the Teachers Retirement System. On November 17, 2017, the Respondent Board issued a *Final Order* denying Petitioner's appeal. JA 262. The *Final Order* adopted the findings of fact and conclusions of law contained in the *Second Amended Recommended Decision* of Hearing Officer Gary Pullin dated October 12, 2017. JA 256.

On December 11, 2017, Petitioner filed an appeal in the Circuit Court of Kanawha County. On May 1, 2018, the Circuit Court issued an Agreed Order remanding the case for consideration of additional evidence. JA 281. By *Final Order* entered on March 12, 2019, the Respondent Board adopted Hearing Officer Gary Pullin's *Supplemental Recommended Decision* and again denied Petitioner's appeal. JA 400, 394. On March 21, 2019, Petitioner appealed to the Circuit Court of Kanawha County. On September 1, 2020, the Circuit Court entered a *Final Order Affirming West Virginia Consolidated Public Retirement Board's Final Order.* JA 401-413.

On September 25, 2020, Petitioner filed a petition for appeal with this honorable Court. JA 414.

B. Statement of Facts

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

Petitioner, Linda Birchfield-Modad, was first employed with the College of Graduate Studies (COGS) on July 13, 1981 as a secretary. She was hired as a permanent, part-time employee. All of her duties were secretarial in nature and she did not perform any educational or instructional work. She worked twenty four hours per week, Monday - Thursday, from 1 p.m. to 7 p.m. In December 1992, she became a full-time employee. JA 36,50.

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

Until 1986, "teacher" employees were eligible to participate in TRS if they were "regularly employed for at least half-time service". *W.V. Code §18-7A-3 (prior to 1986).* Coverage for "nonteaching" employees has always required the employee to be "regularly employed for full-time service". *W.V. Code §18-7A-35.* Beginning in 1986 through the present both teaching and nonteaching employees must be "regularly employed for full-time service" to be eligible to participate in the TRS. *W.V. Code §18-7A-3 & §18-7A-35* (current version).

The Respondent Board determined that Petitioner was a non-teaching employee who was not

eligible to participate in the TRS during the years she was employed on a part-time basis. By letter dated February 22, 2017, the Board informed Petitioner that there had been an error in the years of service credit reported by her employer to the Board, and that to correct the error, the Board was reducing her service credit during the years of 1982-93 from 9.264 years to .636 years.[1]

Petitioner contends that she was eligible to participate during the years at issue because she meets the criteria to be deemed a "teacher" member and that the statutes in effect at that time permitted "teacher" members to participate if they were employed on at least a half-time basis.

The parties agree that the relevant statutes are those that were in effect in 1981, and that during the time at issue, 1982-1993, Petitioner was "regularly employed on at least a half-time basis." Petitioner contends that the Respondent Board erred in finding that she was a "non-teaching" rather than "teaching" member of the TRS.

II. SUMMARY OF ARGUMENT

During the relevant time period, Petitioner was employed as a part time secretary and performed work of a clerical/secretarial nature for the College of Graduate Studies (COGS). She was not an administrator, Secretary of a department, or hold any other title that would have statutorily qualified her to participate in the TRS as a "teaching" rather than "non-teaching" member. This is common sense and a factual finding by Respondent Board which should be given substantial deference by this Court.

During the years of 1981-1992, Petitioner did not meet the definition of "teacher" as defined

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[1]On page 2 of his brief opposing counsel asserts that as a result of the Board's decision Petitioner "was not able to retire." To clarify it should be noted, the Board's decision did not affect or delay her eligibility to retire; however, the decision did result in a reduction in the amount of her annuity when she *chooses* to retire.

in the 1975 or the 1984 version of W.V. Code §18-7A-3. West Virginia Code §18-7A-35 has always required "non-teaching" employees to be regularly employed on a full-time basis to be eligible to participate in the Teachers Retirement System. From 1981-1992, Petitioner was employed on a part time basis. In 1992, she became employed on a full-time basis. JA 36, 50.

Respondent Board as an administrator and fiduciary to the TRS was authorized pursuant to its inherent power as well as its error correction statute to amend Petitioner's service credit by removing the years in which she was not statutorily eligible to participate.

This correction of error did not impair Petitioner's statutory, constitutional, contractual or property rights because Petitioner cannot *rely* upon a right that she never had.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a)(4) of the Rules of Appellate Procedure, counsel for Respondent believes that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Rule 18(a)(4) of the W.V. Rules of Appellate Procedure.

IV. STANDARD OF REVIEW

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo;* findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996).

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

> (g) The Court may affirm the ...decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the...decision of the agency if the substantial rights of the petitioner...have been prejudiced because the administrative...decisions are:
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> (1) In violation of constitutional or statutory provisions; or
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> (2) In excess of statutory authority or jurisdiction of the agency; or
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> (3) Made upon unlawful procedure; or
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> (4) Affected by other error of law; or
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> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
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> West Virginia Code §29A-5-4.

In the absence of an error of law, factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or "arbitrary and capricious." See, e.g. *Healy v. West Virginia Bd. of Medicine*, 506 S.E. 2d 89, 92 (W.Va. 1998). Under the arbitrary and capricious standard, a circuit court which is reviewing the factual findings of an administrative agency must "not substitute its judgment for that of the hearing examiner." *Woo v. Putnam County Board of Education*, 504 S.E. 2d 644, 646 (W.Va. 1998).

Legal issues, such as statutory and regulatory interpretation, are legal matters which are subject to *de novo* review. Id.

Interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight, and such an agency's construction of these statutes must be given substantial deference. *Sniffen*, citing *WV Department of Health v. Blankenship*, 189 W. Va. 342, 431 S. E. 2d 681 (1993); *WV Non-Intoxicating Beer Commr' v. A&H Tavern*, 181 W.Va. 364, 382 S. E. 2d 558 (1989); *Dillon v. Board of Educ.*, 171 W.Va. 631, 301 S. E. 2d 588 (1983); *Smith v. State*

Workmen's Comp. Comm'r., 159 W.Va. 108, 219 S. E. 2d 361 (1975).

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

V. ARGUMENT

A. Trial Court Rulings

It is undisputed that during the period of time in question, 1982-1993, Petitioner was employed on a permanent **part-time** basis as a secretary for the College of Graduate Studies (COGS). The record reflects that Petitioner first began public employment in July of 1981 as a secretary for the College of Graduate Studies (COGS) at the campus of Concord College. JA 35. She worked four days per week, six hours per day, twenty four hours per week in a permanent part-time position until December of 1992 at which time she became a full-time employee. JA 36. All of her work was secretarial in nature. JA 50.

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

must be "regularly employed for full-time service" to be eligible to participate in the TRS. *W.V. Code §18-7A-3 & §18-7A-35* (current version).

West Virginia Code §18-7A-3, in effect in 1981, defined "teacher" as follows:

§18-7A-3. Definitions.

> "Teacher" includes the following persons, if regularly employed for at least half-time service: (a) Any person employed for instructional service in the public schools of West Virginia; (b) principals; (c) public school librarians; (d) superintendents of schools and assistant county superintendents of schools; (e) any county school attendance director holding a West Virginia teacher's certificate; (f) the executive secretary of the retirement board; (g) members of the research, extension, administrative or library staffs of the public schools; (h) the state superintendent of schools, heads and assistant heads of the divisions under his supervision, or any other employee thereunder performing services of an educational nature; (i)employees of the state board of education who are performing services of an educational nature; (j) any person employed in a nonteaching capacity by the state board of education, the West Virginia board of regents, any county board of education, the state department of education or the teachers retirement board, if such person was formerly employed as a teacher in the public schools; (k) all classroom teachers, principals and educational administrators in schools under the supervision of the state commissioner of public institutions; and (l) employees of the state board of school finance if such person was formerly employed as a teacher in the public schools.
>
> "Members of the administrative staff of the public school" includes deans of instruction, deans of men, deans of women, and financial and administrative secretaries.
>
> "Members of the extension staff" of the public schools includes every agriculture agent, boys' and girls' club agent, and every member of the agricultural extension staff whose work is not primarily stenographic, clerical or secretarial.
>
> "Retirement system" means the state teachers retirement system provided for in this article.

The trial court correctly concluded that Petitioner's employment did not satisfy any of the criteria delineated in the above-cited statute to be deemed a "teacher" and because she was only employed part time she was not eligible to participate as a non-teacher pursuant to W.V. Code §18-

7A-35.

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

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

Counsel for Petitioner takes issue with the trial court's ruling. First, Petitioner is critical of the trial court referring to Petitioner as a "secretary"; however, Petitioner referred to herself as a secretary, was classified by her employer as a secretary during the relevant time frame, and all of her duties were of a secretarial nature. JA 50 - testimony of Petitioner; JA 376 - Letter from COGS President appointing Petitioner as "Part-Time Permanent Secretary, dated September 14, 1981; JA 377 - Letter from COGS President noting Petitioner's appointment Secretary II, dated June 30, 1983; JA 378 - Classified Employee Appointment from COGS President appointing Petitioner as Secretary II, dated June 18, 1987; JA 380 - Classified Employee Appointment from COGS President appointing Petitioner as Secretary II, dated June 18, 1989.

Second, Petitioner takes issue with the trial court's conclusions of law; however, the trial court correctly concluded that Petitioner did not meet the definition of "teacher" in W.V. Code §18-7A-3 subsections (g) or (j) because (g) refers to cabinet level secretaries or those who have the power to make or implement policy decisions and excludes those who perform secretarial or clerical work, and (j) is explicitly conditioned upon "if such person was formerly employed as a teacher in the public schools." JA 406. Petitioner was never employed as a teacher. JA 333.

Third, contrary to opposing counsel's assertion, the trial court correctly concluded that since

Petitioner did not meet the criteria to be deemed a "teacher" that she was also not eligible to participate as a non-teacher because W.V. Code §18-7A-35 requires non-teachers to be employed on a "full-time" basis to be eligible to participate and that during the relevant years Petitioner was employed on a part-time basis. JA 406-407.

Fourth, as a fiduciary to the public pension plans, the trial court correctly concluded that the Respondent Board appropriately corrected the error in Petitioner's years of service credit because Petitioner was ineligible to participate in the TRS during the years in question. JA 410-411.

Furthermore, Respondent respectfully submits that the trial court's rulings on all of these issues are consistent with applicable law and previous decisions by this honorable Court.

B. Liberal construction does not confer a benefit where none was intended.

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

In this case it is clear pursuant to the relevant statutes in effect in 1982-1993 that the Legislature intended eligibility in the TRS to be available to "teachers" who were *regularly employed for at least half time service* and "nonteachers" who were *regularly employed for full-time service*. As a nonteacher working part time during the years of 1982-93, Petitioner was not eligible to participate in the TRS during those years.

C. Petitioner is <u>not</u> a "teacher" under subsection (g)

Petitioner asserts that she meets the definition of "teacher" and thus was eligible to participate in the TRS pursuant to subsection (g) of W.V. Code §18-7A-3, which in 1981 stated as follows:

"Teacher" includes the following persons, if regularly employed for at least half-time service: (a) Any person employed for instructional service in the public schools of West Virginia; (b) principals; (c) public school librarians; (d) superintendents of schools and assistant county superintendents of schools; (e) any county school attendance director holding a West Virginia teacher's certificate; (f) the executive secretary of the retirement board; **(g) members of the research, extension, administrative or library staffs of the public schools;** (h) the state superintendent of schools, heads and assistant heads of the divisions under his supervision, or any other employee thereunder performing services of an educational nature; (i)employees of the state board of education who are performing services of an educational nature; (j) any person employed in a nonteaching capacity by the state board of education, the West Virginia board of regents, any county board of education, the state department of education or the teachers retirement board, if such person was formerly employed as a teacher in the public schools; (k) all classroom teachers, principals and educational administrators in schools under the supervision of the state commissioner of public institutions; and (l) employees of the state board of school finance if such person was formerly employed as a teacher in the public schools.

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

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

"Retirement system" means the state teachers retirement system provided for in this article."[2]

However, subsection (g) - "members of the research, extension, administrative or library staffs of the public schools" - refers to public school staff who are cabinet level secretaries or those

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[2]The present version of subsection (g) (now (F)) of W.V. Code §18-7A-3 defines "teacher" without the subsequent clarifying paragraphs. Petitioner and Respondent agree the applicable version that should govern this case is the version in effect in 1981 when Petitioner first became employed. Applying the present version of the statute(s) would make the distinction between "teacher" and "nonteacher" immaterial as to this issue because the present version requires both types of employees to be employed full time to be eligible to participate in the TRS and Petitioner was only employed part time during the years at issue.

who have the power to make or implement policy decisions such as the "executive secretary of the retirement board" as described in subsection (f) or "educational administrators" as described in subsection (k). This is also evident from the subsequent paragraph which further defines administrative staff as including deans and "financial and administrative secretaries." The following paragraph defining extension staff further clarifies that those who perform secretarial or clerical work are not included. *W.V. Code §18-7A-3* (1975 & 1984 version).

All of the subsections require employment of an educational or instructional nature, former employment as teacher or positions of authority. *W.V. Code §18-7A-3* subsections (a)-(l) (1975 & 1984 version). Petitioner's position as a part-time secretary does not meet any of the criteria delineated above but rather is more aptly categorized as a "nonteaching" position for which eligibility for participation has always required employment on a full-time basis. W.V. Code §18-7A-35.

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

This position is reinforced by the legislative rules that were in effect in 1981. Ms. Terasa Miller, Deputy Director for Respondent Board, testified that pursuant to the 1978 and 1983 legislative rules the burden is upon the employer to certify to the Board that the member meets the eligibility requirements for "teacher" or "nonteaching", and that nonteaching members must be employed on a full-time basis to be eligible to participate. JA 59-65. She further testified that full-

time service was an employee who worked a twelve month contract for two hundred and forty or two hundred and sixty-one days and that Ms. Birchfield -Modad worked one hundred and fifty four days during the years in question. JA 65. Therefore, it was her opinion that she was a "nonteaching" member and was not eligible to participate during the years of 1981-92 while she was employed on a part-time basis. JA 65.

Under opposing counsel's theory, there is no distinction between "teaching" and "nonteaching" members of the TRS. Opposing counsel's assertion that Petitioner meets the definition of "teacher" is contradicted by Petitioner's own testimony. During the administrative hearing, she testified as follows:

Q. And what did you do in administrative services?
A. Secretarial, you know things of that nature.
Q. Did you perform secretarial work?
A. Yes.
Q. Did you ever perform any educational instructional work?
A. No.
Q. So all of your work was secretarial in nature?
A. Yes. (JA 50).

It was clear from the testimony given that Petitioner was a secretary rather than an administrator; and therefore, as a "nonteacher" she was statutorily required to work full time to be eligible to participate in the TRS. As to this issue, the trial court correctly affirmed the Respondent Board's Final Order which adopted the following findings of its Hearing Officer Gary Pullin:

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

eligible for benefits as a non-teaching employee working less than full-time. The additional evidence submitted by Appellant confirm and prove that during the period July 1981 through December 1992 Appellant was consistently classified as a Secretary II performing duties that were clerical in nature.

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

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

Based on all of the evidence which has now been submitted, Appellant does not meet the definition of "Teacher" under W. Va. Code §18-7A-3 because there is no evidence that she was an Administrative Secretary or a member of an Administrative Staff during her less than full-time employment between July 1981 and December 1992." JA 394-98.

The trial court, Respondent Board and Hearing Officer found that Petitioner's employment as a part-time secretary did not meet the statutory definition of "teacher." This is a factual finding which should be afforded substantial deference by this Court. In the absence of an error of law, factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or "arbitrary and capricious." See, e.g. *Healy v. West Virginia Bd. of Medicine*, 506 S.E. 2d 89, 92 (W.Va. 1998). Under the arbitrary and capricious standard, a circuit court which is reviewing the factual findings of an administrative agency must "not substitute its judgment for that of the hearing examiner." *Woo v. Putnam County Board of Education*, 504 S.E. 2d 644, 646 (W.Va. 1998).

As to judicial review of an administrative agency's interpretations of the statutes and regulations which it administers, and notwithstanding the general rule of *de novo* review of issues of law, the Court has held that "absent clear legislative intent to the contrary, we afford deference

to a reasonable and permissible construction of [a] statute by [an administrative agency]" having policy making authority relating to the statute. See, e.g., *Sniffen v. Cline*, 193 W. Va. 370, 456 S. E. 2d 451 (1995). Interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight, and such an agency's construction of these statutes must be given substantial deference. *Sniffen*, citing *WV Department of Health v. Blankenship*, 189 W. Va. 342, 431 S. E. 2d 681 (1993); *WV Non-Intoxicating Beer Commr' v. A&H Tavern*, 181 W.Va. 364, 382 S. E. 2d 558 (1989); *Dillon v. Board of Educ.*, 171 W.Va. 631, 301 S. E. 2d 588 (1983); *Smith v. State Workmen's Comp. Comm'r.*, 159 W.Va. 108, 219 S. E. 2d 361 (1975).

D. Petitioner is not a "teacher" under subsection (j)

Petitioner next contends that she meets the definition of teacher pursuant to subsection (j) of §18-7A-3which states "any person employed in a nonteaching capacity by the state board of education, the West Virginia board of regents, any county board of education, the state department of education or the teachers retirement board, **if such person was formerly employed as a teacher in the public schools**." *(emphasis added).* Contrary to Petitioner's contention, subsection (j) is clearly conditioned upon Petitioner having formerly been employed as a teacher. No evidence was presented that she had ever been employed as a teacher.

Additionally, opposing counsel's rule of statutory construction involving the "doctrine of last preceding antecedent" is clever but a real stretch and inapplicable. This Court recently held that "although the TRS definitions are not as explicit as those contained in the PERS statute at issue in *Curry*, we decline to find that they create ambiguity about petitioner's eligibility for retirement..... With regard to statutory interpretation, this Court has stated: "To ascertain the Legislature's intent,

'[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.' " *Hammons v. W. Va. Office of Ins. Comm'r*, 235 W.Va. 577, 584, 775 S.E.2d 458, 465 (2015) (quoting *Appalachian Power Co. v. State Tax Dep't of W. Va.* , 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995)). As is well-established, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder* , 152 W.Va. 571, 165 S.E.2d 108 (1968). *See Ringel-Williams v. W. Va. Consol. Pub. Ret. Bd.*, 237 W.Va. 669, 790 S.E.2d 806 (W.Va., 2016).

The trial court correctly concluded that the doctrine of last preceding antecedent is simply not applicable because the language in subsection (j) of W.V. Code §18-7A-3 is plain, clear and unambiguous in that the qualifying phrase "if such person was formerly employed as a teacher" applies to all employers listed in subsection (j). JA 409-10. As Hearing Officer Pullin concluded, the use of a comma is a stylistic choice and does not denote that the Legislature intended for the qualifying phrase to apply only to the last two employers. JA 396-97.

Petitioner's assertion that the qualifying phrase only applies to the State Department of Education or the Teachers Retirement Board is illogical when the subsection is read in its entirety. There would be no reason for the Legislature to make such a distinction between the five (5) employers listed in subsection (j). Had that been the Legislature's intention it could have easily separated those employers by placing them in another subsection as the Legislature did in subsection (l) which stated "(l) employees of the state board of school of finance if such person was formerly employed as a teacher in the public schools. W.V. Code §18-7A-3 (1975 & 1984 version).

Therefore, it is clear that since Petitioner was never "formerly employed as a teacher" she does not meet the eligibility criteria of subsection (j).

E. W.V. Code §18-7A-35 applies to Petitioner because she was and is a nonteaching employee of the West Virginia Board of regents.

Petitioner asserts that W.V. Code §18-7A-35 does not apply to her because it specifically excludes "teachers"; however, this argument is predicated upon the Court finding that she meets either the criteria in subsections (g) or (j) to be deemed a "teacher." As previously discussed, she does not.

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

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

W.V. Code §18-7A-35 applies to Petitioner because she is a nonteaching employee of the West Virginia Board of regents. The trial court correctly concluded that as a secretary Petitioner was a nonteaching employee and pursuant to this applicable statute she was not eligible to participate during the years of 1982-93 because she was only employed on a part time basis during that time. Had she been regularly employed on a full time basis during that time she would have been eligible to participate and been entitled to all of the rights and benefits that "teachers" had in the plan. West Virginia Code §18-7A-35(b) has always stated that "such nonteaching employees" meaning those *regularly employed for full time service* shall be entitled to the same rights and benefits as teaching employees.

F. As a fiduciary to the public pension plan (TRS) it administers, Respondent has a duty to correct any errors which are contrary to statutory pension plan provisions. Petitioner cannot be deprived of or *rely* on a right she never had. Petitioner never had a constitutional, contractual or statutory right to participate in the TRS as a nonteacher while employed on a part time basis.

Petitioner's final argument that the Respondent Board acted contrary to its limited authority under the error correction statute is seriously flawed. Petitioner asserts that her employer's action was a "deliberate act" rather than an "employer error", and as such, the Board has no authority to correct it because the definition of "employer error" contained in W.V. Code §18-7A-3 states that "a deliberate act contrary to the provisions of this section by a participating public employer does not constitute employer error." *W.V. Code §18-7A-3(10)* [1975 & 1984 version], in the current version the definition of various term are not numbered.

However, from a common sense perspective, the Legislature would never grant eight hundred public employers the discretion to act contrary to statutory pension plan provisions. Such unfettered access to trust fund monies would jeopardize the solvency of the funds. The error correction statutes denote the manner in which the Board will correct errors, more specifically who is responsible for correcting the error by making additional contributions or refunds with or without interest. The only authority conferred in these error correction statutes is the authority conferred upon the Board to correct the errors; no authority is conferred upon the employers to commit the errors. Any employer or member who deliberately commits an act contrary to statute has committed fraud, and there are statutory provisions in each plan to deal with such fraudulent acts. A deliberate act contrary to statute is not "error", it is fraud.

Even without these error correction statutes, it is axiomatic that the Board as a fiduciary to the trust funds has the authority and responsibility to correct any errors and to administer the plans in a manner consistent with all statutory plan provisions.

Pursuant to West Virginia Code §5-10D-1(g), the West Virginia Consolidated Public Retirement Board is a trustee for all public retirement plans. As such, it occupies a fiduciary position with respect to the members of all retirement systems and the funds it is charged with administering.

As fiduciaries of the plans it administers and as required by federal plan qualification requirements, the Board must apply the terms of the plans for the exclusive benefit of all participants and beneficiaries according to plan terms. Permitting an act that is contrary to the explicit mandate of the statute violates this fiduciary duty to the plan and its members.

The Internal Revenue Code requires a plan to be administered in a manner consistent with its terms or the plan faces disqualification. *Treas. Reg. 1.401-1(a)(2); §1.401-1(a)(3)(111).* To allow participation by employees who are not statutorily eligible to participate is inconsistent with West Virginia Code §18-7A-3. The consequences of plan disqualification would involve potentially significant liabilities to plan participants, participating employers and the State of West Virginia, including past due taxes, interest and penalties, as well as the inability to rollover distributions to an IRA or other qualified employer plan. *Id.*

As to whether this was a deliberate or unintentional act by Petitioner's employer, it should be noted that the Hearing Officer found no evidence that the employer in this case acted with deliberate intent as opposed to a mistake and that it must be concluded that the employer's decision

to enroll her in 1981 was "employer error" which required the Board upon learning of the error to take steps to correct it pursuant to W.V. Code §18-7A-14c. JA 398.

It should also be noted that Petitioner refers to the Respondent Board exceeding its authority under the "error correction" statute, but then cites W.V. Code §18-7-3(10) which is the definition of terms section of the plan. Petitioner then in footnote 7 of her brief states that the "definition of "employer error" must be read in conjunction with W.V. Code §18-7A-14c."

West Virginia Code §18-7A-14c is the error correction statute in the Teacher Retirement System. Although this section did not exist until 2013, Respondent agrees with Petitioner that it is applicable because as an administrator and fiduciary to the public pension plan it has always had the inherent ability to correct errors. The error correction statute once enacted detailed how the Respondent Board corrected such errors. With respect to eligibility errors, W.V. Code §18-7A-14c(g) states as follows:

§18-7A-14c. Correction of errors; underpayments; overpayments.

(g) Eligibility errors: If the board finds that an individual, employer, or both individual and employer currently or formerly participating in the retirement system is not eligible to participate, the board shall notify the individual and his or her employer of the determination, and terminate participation in the retirement system. Any erroneous payments to the retirement system shall be returned to the employer and individual in accordance with the methods described in subsections (c) and (d) of this section and any erroneous payments from the retirement system to such individual shall be returned to the retirement system in accordance with the methods described in subsection (e) of this section. **Any erroneous service credited to the individual shall be removed....** W.V. Code §18-7A-14c(g).

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

"While Mr. Myers may have relied on the Board's erroneous representation that he would receive service credit for those two months, the Board is statutorily bound by West Virginia Code § 5–10–44 to correct errors in the calculation of a PERS member's service credit. Id. ("If any change or employer error in the records of any participating public employer or the Retirement System results in any person receiving from the system more or less than he or she would have been entitled to receive had the records been correct, the Board shall correct the error...."). The statute does not limit this requirement for equitable reasons. Thus, the circuit court correctly upheld the Board's decision in this regard."[3]

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

Even if there had been evidence or a finding that Petitioner's employer deliberately enrolled her contrary to statutory plan provisions, then she still would not be entitled to participation because only the Legislature through passing legislation can give her that right. There have been numerous pension cases in which this Court has held as a matter of law that a public employer's act whether it be deliberate or unintentional cannot bind the Respondent Board or pension plan if said act is inconsistent with statutory eligibility requirements and/or statutorily entitled benefits.[4]

[3]Myers v. West Va. Consol. Pub. Ret. Bd., 226 W.Va. 738, 704 S.E.2d 738 (W.Va., 2010), Footnote 7.

[4]*CPRB v Hunting*, No. 16-0628 (W.Va. 2017); *Ringel-Williams v. West Virginia Consol. Pub. Ret. Bd.*, 237 W.Va. 669, 790 S.E.2d 806 (2016); *Curry v. West Virginia Consolidated Public Retirement Board*, 236 W.Va. 188, 778 S.E.2d 637 (2015); and, *West Virginia Consolidated Public Retirement Board v. Jones*, 233 W.Va. 681, 760 S.E.2d 495 (2014).

In *Hunting*, the employer and employee entered into a settlement agreement which allowed Mr. Hunting to treat a lump sum settlement as though it had been earned in his last year of employment so he could spike his final average salary to receive a higher retirement annuity. *Hunting, p. 2.* Although this was a deliberate act by the employer, the Court did not permit it because it was contrary to anti-spiking statutory plan provisions. *Id.*

In *Jones,* the employer actively recruited the employee with promises of pension eligibility and erroneously enrolled him in PERS for years before the error was corrected by the Board. *CPRB v. Jones*, 233 W.Va. 681, 760 S.E.2d 495 (2014). Similarly, in *Curry,* the employer promised the employee participation in the PERS plan, and he too was erroneously enrolled in PERS for years before the error was corrected by the Board. *Curry v. CPRB*, 236 W.Va. 188, 778 S.E.2d 637 (2015). In both of those cases, the Court held that the Respondent Board was authorized to take away the service credit because the *deliberate* act of the employers in enrolling the Petitioners in the retirement plan was contrary to statute.

With respect to a TRS eligibility case, this Court stated in *Ringel-Williams,* **"while we are sympathetic to petitioner's situation and monetary losses, this Court is simply not at liberty to confer statutory eligibility where none exists."** *Ringel-Williams v. West Virginia Consol. Pub. Ret. Bd.*, 237 W.Va. 669, 790 S.E.2d 806 (2016),citing *In re Cain,* 476 S.E.2d 185, 189 n. 9 (1996) .

Similar to this case, the employer in *Ringel-Williams* had erroneously enrolled her in TRS when her part-time employment did not meet statutory eligibility requirements. For the third time

in approximately one year, the Supreme Court ruled that public employers may not bind public pension plans with a promise to an employee of eligibility that is inconsistent with statutory plan provisions.[5] In both *Ringel-Williams* and this case, retirement statements reflecting the alleged erroneous service credit were mailed by Respondent Board, but the Board was unaware of the error at the time of the mailings and the Board did not make and was not responsible for making any misrepresentations regarding eligibility. The *Ringel-Williams* Court held that the Respondent Board was authorized to correct the mistake.

Additionally, Petitioner asserts that a reduction in her retirement service credit "implicates Petitioner's fundamental right to her TRS retirement" and goes on to say that 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." *Page 20, Petitioner's brief.* Petitioner then cites *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 636 (1994); *Dadisman v. Moore*, 181 W.Va. 181 W.Va. 779, 384 S.E.2d 816 (1988); *Wagnoner v. Gainer*, 167 W.Va. 139, 279 S.E.2d 636 (1981); and a few other cases in support of this proposition.

While it is true that this Court has a long history of being very protective of a public employee's constitutional, contractual, and statutory rights to his or her retirement benefits, those cases are **not** applicable to this case because in this case the Petitioner never had a constitutional,

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[5]*Ringel-Williams v. West Virginia Consol. Pub. Ret. Bd.*, 237 W.Va. 669, 790 S.E.2d 806 (2016); *Curry v. West Virginia Consolidated Public Retirement Board*, 236 W.Va. 188, 778 S.E.2d 637 (2015); and, *West Virginia Consolidated Public Retirement Board v. Jones*, 233 W.Va. 681, 760 S.E.2d 495 (2014).

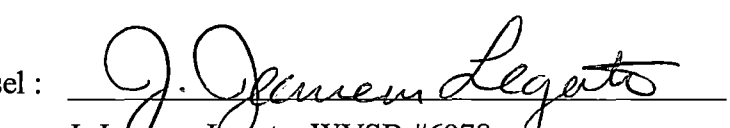
contractual or statutory right to participate in the TRS while she was employed for part time service. In all of the cases cited by the Petitioner, the Petitioner in those cases had a statutory right to the benefit and years later after the Petitioner in those cases had *detrimentally relied* on that right the Legislature attempted to take away that right through amendments to the statute thereby impairing those Petitioners's constitutional, contractual and property rights to the benefit that had previously been established by statute. This is not an estoppel or detrimental reliance case. This is a statutory construction case.

In this case, Petitioner cannot be deprived of a right she never had. Petitioner never had a constitutional, contractual or statutory right to participate in the TRS as a nonteacher while employed on a part time basis, and this Court has a long history of strictly construing eligibility statutes involving public pension plans.

VI. CONCLUSION

For the foregoing reasons, Respondent West Virginia Consolidated Public Retirement Board prays this honorable Court will affirm the Circuit Court's *Final Order Affirming West Virginia Consolidated Public Retirement Board's Final Order.* JA 401-413.

RESPECTFULLY SUBMITTED,
W.V. Consolidated Pubic Retirement Board,

By Counsel : 

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0747

LINDA BIRCHFIELD-MODAD,
Petitioner,

v.

(Kanawha County Circuit Court)
(Civil Action No. 19-AA-24)

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,
Respondent.

CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, counsel to the West Virginia Consolidated Public Retirement Board, do hereby certify that *Respondent's Brief*, filed herein on this 17th day of February 2021, was forwarded to counsel for Petitioner by U.S. Mail with proper postage affixed on the same day of said filing, and further certify that same was mailed to the following address:

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Respectfully Submitted,
WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD

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