

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-308

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DONDI STEMPLE,

Applicant below, Petitioner,

v.

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Respondent.

Appeal from the West Virginia Consolidated Public Retirement Board

PETITIONER'S APPEAL BRIEF

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2. The forged signatures on the TRS withdrawal forms used two names that differed from the name Petitioner used in her TRS file;
3. At the time these unauthorized withdrawals were made, Respondent did not have any procedures in effect to make sure that the signature purportedly from the State employee seeking the withdrawal was genuine;
4. Although the TRS withdrawal form previously required the State employee's signature to be notarized, for reasons not made clear in the record, at the time of the forged withdrawals in this case and presently, Respondent does not require the State employee's signature to be notarized;
5. The abject failure of Respondent to have any policies or procedures in place to prevent another State employee from having their retirement contributions wiped out simply by someone submitting a forged unnotarized form is a violation not only of the highest fiduciary duty owed by Respondent, but also violated Petitioner's constitutional and contractual right to her earned pension; and
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PETITIONER'S APPEAL BRIEF

I. Introduction

To the Honorable Judges of the

Intermediate Court of Appeals of West Virginia:

Petitioner Donna or Dondi Stemple, who formerly was Dondi Shears and then Dondi Laney, was employed as a teacher at various times by the Pocahontas County School Board. As a public school teacher, Petitioner invested in and relied upon the pension she eventually would receive from the West Virginia Teachers Retirement System (TRS). In the Fall of 2022, when Petitioner asked Respondent West Virginia Consolidated Public Retirement Board to calculate what her pension benefits would be, Petitioner learned for the first time that a total of \$16,437.62, had been removed from her retirement account without her knowledge or permission, which dramatically reduced the pension she had relied upon and earned.

All it took to wipe out a significant portion of Petitioner's pension were two separate forms mailed to Respondent that contained an unnotarized forged signature using names different than the name Petitioner used in her files. Without consulting with Petitioner or making any attempt to verify the authenticity of the signature, Respondent, after verifying with Petitioner's employer that she had left her employment, simply mailed out the checks.

All State employees who participate in any of the State retirement systems have a constitutional and contractual right to their retirement benefits. Respondent has been entrusted by the Legislature to be a vigilant and responsible steward over the retirement contributions made by State employees and their respective State agencies. In fact, Respondent owes the highest fiduciary duty to State employees to manage the various State retirement systems consistent with the Legislature's mandates. This administrative appeal identifies a real vulnerability in the State retirement system where Respondent failed to live up to its obligations, resulting in Petitioner having a large portion of her retirement contributions removed without her knowledge or approval.

Having funds withdrawn from a retirement account is a big deal. Not only does the removal of those funds reduce the amount of pension benefits available at retirement, but also such withdrawals trigger costly and significant income tax penalties. After being informed about her missing retirement contributions, Petitioner filed an appeal and a hearing was held on April 18, 2023, before Hearing Examiner Anne B. Charnock. On or about June 7, 2023, Hearing Examiner Charnock issued a recommended order denying all relief to Petitioner. Respondent accepted these recommendations in a final order entered June 28, 2023. Petitioner timely appealed this final order to this Court.

II. Assignment of error

Whether Respondent erred in concluding that it had not violated the highest fiduciary duty it owed to Petitioner where:

- 1. Respondent paid out a total of \$16,437.62 from Petitioner's TRS account without her consent, signature, approval, or knowledge;**
- 2. The forged signatures on the TRS withdrawal forms used two names that differed from the name Petitioner used in her TRS file;**
- 3. At the time these unauthorized withdrawals were made, Respondent did not have any procedures in effect to make sure that the signature purportedly from the State employee seeking the withdrawal was genuine;**
- 4. Although the TRS withdrawal form previously required the State employee's signature to be notarized, for reasons not made clear in the record, at the time of the forged withdrawals in this case and presently, Respondent does not require the State employee's signature to be notarized;**
- 5. The abject failure of Respondent to have any policies or procedures in place to prevent another State employee from having their retirement contributions wiped out simply by someone submitting a forged unnotarized form is a violation not only of the highest fiduciary duty owed by Respondent, but also violated Petitioner's constitutional and contractual right to her earned pension; and**
- 6. Consistent with the highest fiduciary duty owed by the State to the beneficiaries of the State retirement system, most states either require the signature of the State employee seeking to withdraw retirement contributions to be notarized or such withdrawals must be made online, where**

**additional methods for verifying the authenticity
of the request have been implemented?**

III. Statement of the case

Petitioner was employed as a teacher in Virginia and West Virginia private and public schools beginning in 1977. (AR 20).¹ Relevant to this case, Petitioner was employed as a teacher by the Pocahontas County School Board from 1992 through 2002, and then from 2016 through 2023, when she retired. (AR 185, 194, 62).

On February 21, 1986, after her employment terminated, Petitioner signed a TRS form entitled “Application for Withdrawal from Membership in the State Teachers Retirement System” with her signature “Donna S. Stemple.” This version of the withdrawal form included a place for the signature to be notarized. Petitioner’s signature on this withdrawal form was notarized. (AR 179-80). For this withdrawal actually made by Petitioner, the State of West Virginia sent Petitioner a check totaling \$5,333.43. From 1992 through 2002, Petitioner returned to being employed as a teacher in Pocahontas County. The retirement contributions Petitioner made during this time period are at issue.

Some time in 2002, Petitioner terminated her employment. A TRS form entitled “WV Teachers Retirement System (TRS) APPLICATION FOR REFUND OF ACCUMULATED CONTRIBUTIONS” bears a signature “Dondi S. Shears Laney” and is dated “10-24-02.” The signature was not notarized and this form does not include a place for a notary public to sign. (AR 183). Petitioner did not sign this document nor did she authorize this withdrawal. (AR 70-73). Also, because Petitioner’s name in Respondent’s files was “Donna or Dondi Stemple,” making the

¹In this **BRIEF**, Petitioner cites to the Administrative Record (AR).

request in the name of “Dondi S. Shears Laney” should have at least triggered some inquiry by Respondent. It is clear from comparing the forged signature on this one-page form with Petitioner’s actual signature on other Respondent documents that Petitioner did not sign this withdrawal form. (AR 180-81, 194, 217, 230, 233, 238, 242, 244, 250). Of particular significance is Petitioner’s notarized signature on the February 21, 1986 withdrawal form that actually was signed by Petitioner.

Another TRS form entitled “The State of West Virginia Teachers Defined Contribution Retirement System Request for Distribution of Benefits” bears a signature “Dondi Shears Laney” and is dated “12-4-02.” (AR 185-86). The signature was not notarized and this two-page form does not include a place for a notary public to sign. (AR 74-77). Petitioner did not sign this document nor did she authorize this withdrawal. Also, because Petitioner’s name in Respondent’s files was “Donna or Dondi Stemple,” making the request in the name of “Dondi Shears Laney” should have at least triggered some inquiry by Respondent. It is clear from comparing the forged signature on this form with Petitioner’s actual signature on other Respondent documents that Petitioner did not sign this second withdrawal form. (AR 180-81, 194, 217, 230, 233, 238, 242, 244, 250). Of particular significance is Petitioner’s notarized signature on the February 21, 1986 withdrawal form that actually was signed by Petitioner.

On November 27, 2002, checks from the State of West Virginia in the amounts of \$384.54 and \$74.62 were written to “Laney Dondi.” (AR 175-76). Petitioner did not sign this document nor did she authorize this withdrawal. Also, because Petitioner’s name in Respondent’s files was “Donna or Dondi Stemple,” writing the checks in the name of “Laney Dondi” should have at least triggered some inquiry by Respondent. A comparison of the signature on the back of these two checks with Petitioner’s actual signature on the documents identified above shows that Petitioner did not endorse

the back of these two checks. Of particular significance is Petitioner's notarized signature on the February 21, 1986 withdrawal form that actually was signed by Petitioner.

Respondent's January 16, 2003 letter summarizing the details of these payouts was mailed to "Dondi Shears-Laney" at "604 **Creon** Street, Winchester, Virginia 22601." (AR 187). At that time, Petitioner's actual address was "604 **Green** Street, Winchester, Virginia 22601." On January 16, 2003, a check from the State of West Virginia in the amount of \$8,194.25 was written to "Dondi S. Shears Laney." (AR 189). A comparison of the signature on the back of this check with Petitioner's actual signature on the documents identified above shows that Petitioner did not endorse the back of this check. Of particular significance is Petitioner's notarized signature on the February 21, 1986 withdrawal form that actually was signed by Petitioner.

On January 16, 2003, a check from the State of West Virginia in the amount of \$4,496.69 was written to "Dondi S. Shears Laney." (AR 188). A comparison of the signature on the back of this check with Petitioner's actual signature on the documents identified above shows that Petitioner did not endorse the back of this check. Of particular significance is Petitioner's notarized signature on the February 21, 1986 withdrawal form that actually was signed by Petitioner.

Petitioner testified that neither Respondent nor the Pocahontas County Board of Education ever contacted her about these forged withdrawal requests. (AR 74). Petitioner provided testimony that she did not sign either of the two separate withdrawal forms submitted near the end of 2002 and that she never received the checks totaling \$16,437.62 identified above. (AR 74-77). Petitioner never personally received this money. (AR 91). It was not until she made an inquiry of Respondent about retiring that she learned for the first time that a substantial portion of her retirement contributions had been withdrawn. Petitioner did make efforts to obtain additional information, but

the bank she used at that time no longer exists and she was unable to obtain a copy of her income tax returns from 2002 and 2003 because she did not have her now divorced and deceased husband's Social Security Number. (AR 79-81). Because she no longer can rely upon her anticipated retirement payments to survive, Petitioner recently had to sell her house and move into her daughter's home to live. (AR 82).

Terasa Miller, Respondent's Deputy Director and Chief Operating Officer, agreed that Respondent owes a fiduciary duty to all of the State employees who participate in the State retirement system. (AR 127). She also testified that there are so many State employees who withdraw money from their State retirement accounts and Respondent has such a limited staff, it would not be possible for an employee or agent of Respondent to call each State employee seeking to withdraw their retirement contributions. (AR 143-44). With respect to why the TRS forms in this case do not, at a minimum, require the signature of the State employee seeking the withdrawal to sign the form in front of a notary public, Ms. Miller testified there is no statute requiring notarization and also said notaries sometimes cost money and would be an inconvenience for State employees. (AR 122, 145). Thus, despite the facts of this case, there is no evidence that Respondent is a going to implement any changes in an attempt to prevent any future State employee from being similarly victimized.

IV. Summary of argument

The West Virginia Supreme Court repeatedly has held that Respondent owes the highest fiduciary duty to the trust, the funds, and to all of the beneficiaries. A fiduciary duty is the highest duty implied by law.

Public employees have a property right protected under the contract clause because of their substantial detrimental reliance on the existing pension system. All employees who contribute to a state pension fund and who have substantially relied to their detriment on specific contribution and benefits schedules have immediate legitimate expectations that rise to the level of constitutionally protected contract property rights.

A fundamental flaw in the final order is the suggestion that although Respondent owes to State employees the highest fiduciary duty, Respondent takes the position that it only owes those duties that specifically are spelled out by statute. This holding by the Hearing Examiner and adopted by Respondent was made without citation to any legal authority and ignores the reality that the Legislature has delegated broad general authority to Respondent. Instead of micromanaging every aspect of the retirement system, the Legislature fully and correctly expects Respondent to be guided by the highest fiduciary duty in managing the day-to-day operations of the State retirement system.

All assets of the public retirement plans shall be held in trust. Respondent is a trustee for all public retirement plans. Respondent shall contract with a private pension, insurance, annuity, mutual fund or other qualified company or companies to administer the day-to-day operations of the system. In selecting such company or companies the board shall take into account as its highest duty, the proper safeguard and protection of the member and employer contributions and the interest dividends, or other return thereon.

Simply because the Legislature has not mandated that Respondent use a particular contributions withdrawal form does not mean that Respondent can comply with its obligations simply by accepting an unnotarized document seeking to withdraw funds without there being any

process in place to ensure that the signature on the form is authentic.

There are statutes and regulations recognizing that State employees in the various public retirement systems have the right, under certain circumstances, to seek a withdrawal of their contributions. Implicit in these statutes and regulations is that the withdrawal request actually is made by the State employee. It is up to Respondent to implement procedures to ensure that any contributions withdrawal form it receives actually is from the State employee, as opposed to someone trying to defraud the system.

There were a number of red flags in Respondent's files that should have caused Respondent, in light of the highest fiduciary duty it owed to Petitioner, to take notice and make further inquiry. However, Respondent failed to take any action to ensure that Petitioner actually wanted to make the withdrawals at issue.

Other states require their public employees retirement agency either to require the signature on a contributions withdrawal form to be notarized or have implemented online systems for an employee to use to withdraw contributed funds from a public employee's retirement account, which have a number of checks and balances in establishing these online accounts to protect against fraud. The public employees in West Virginia ought to have at least the same protections public employees are afforded in these other states.

Regardless of what procedure is used, clearly Respondent is derelict in its duties if it fails to recognize the need for a solution to address what happened to Petitioner under these facts. Without making this change, Respondent will continue to accept unnotarized contribution withdrawal forms in the mail and once again will risk destroying a State employee's long planned upon retirement. Affirming Respondent's final order in this case will send the message to Respondent that it does not

have to bother taking any action to ensure that the signature of a State employee on a retirement contributions withdrawal form is authentic. Such a result would jeopardize the constitutional and contractual right all State employees have in their well earned retirement benefits.

V. Statement regarding oral argument and decision

This appeal presents an issue never before decided by the West Virginia Supreme Court and identifies a serious potential problem that could impact other State employees who rely upon Respondent to protect and safeguard the contributions made by State employees and their employers into the various public retirement systems. Petitioner respectfully moves this Court at least for oral argument under Rule 19 to ensure the facts are fully understood and to answer any questions the Judges may have. Due to unprecedented nature of the issue presented, Petitioner respectfully submits the decision should be authored by one of the Judges of this Court.

VI. Argument

A. Respondent owes the highest fiduciary duty to State employees, who have a constitutional and contractual right to their pension

Petitioner provided years and years of service to the Pocahontas County School Board as a public school teacher and was looking forward to retirement. During her employment, Petitioner and the School Board made regular and appropriate contributions to her TRS pension fund. However, in the Fall of 2022, Petitioner learned for the first time that \$16,437.62 had been paid out by Respondent to someone other than Petitioner without her consent, signature, approval, or knowledge. As a result, Petitioner's pension benefits were reduced accordingly.

Before addressing the specifics of Respondent's final order, Petitioner respectfully submits it is critical for this Court to recognize the obligations of Respondent as well as Petitioner's interest

in her retirement. The West Virginia Supreme Court repeatedly has held that Respondent owes the highest fiduciary duty to the trust, the funds, and to all of the beneficiaries, as stated in Syllabus Points 5 and 14 of *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988):

5. The PERS Trustees have **the highest fiduciary duty** to maintain the terms of the trust, as spelled out in the statute.

14. The PERS Board, as trustee of retirement funds, must dispose of them according to the law. The board has a fiduciary duty **to protect the fund and the interests of all beneficiaries thereof**, and it must exercise due care, diligence, and skill in administering the trust. (Emphasis added).

In *Lucas v. Fairbanks Capital Corp.*, 217 W.Va. 479, 484, 618 S.E.2d 488, 493 (2005), the West Virginia Supreme Court gave the following definition of “fiduciary duty”:

We previously have defined a fiduciary duty as “ [a] duty to act for someone else’s benefit, while subordinating one’s personal interests to that of the other person. **It is the highest standard of duty implied by law [.]** ” *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 435, 504 S.E.2d 893, 898 (1998) (quoting *Black’s Law Dictionary* 625 (6th ed. 1990)). See generally *Black’s Law Dictionary* 523 (7th ed. 1999) (“A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer’s client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).”). (Emphasis added).

Another critical aspect of any State employment retirement case is that a public employee’s right to a State pension has a contractual and constitutional dimension and the employee’s detrimental reliance is a relevant factor. These contractual and constitutional issues are addressed in Syllabus Points 5, 11, 12, and 18 of *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1991):

5. In public employee pension cases, what often concerns the court is not the technical concept of "vesting," but rather the

conditions under which **public employees have a property right protected under the contract clauses because of substantial detrimental reliance on the existing pension system.**

11. If the State (or its political subdivisions) promise to defer salary until a person's retirement from state or local employment and to pay that deferred salary in the form of a pension, the State (or its political subdivisions) **cannot eliminate this expectancy without just compensation once an employee has substantially relied to his or her detriment.**

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

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

B. Respondent's final order adopts Hearing Examiner's recommendations

The essential facts in this case are not disputed. The Hearing Examiner found that Petitioner “denies, vehemently, withdrawing the 1988 to 2002 funds.” (AR 15). The Hearing Examiner also found, “That to withdraw funds from the Teacher’s Retirement Board, as Applicant did in the 1980’s, the application required that a notary public acknowledge the member’s signature. The Board does not have this requirement but does verify with the public employer that the member is no longer an employee.” (AR 15). Finally, the Hearing Examiner found that “neither statute nor legislative rule require a notary public acknowledgment on the application to withdraw retirement contributions.” (AR 15).

The Hearing Examiner rejected Petitioner's argument that because Respondent owes the highest fiduciary duty to the State employees participating in the various retirement systems, Respondent had a legal obligation to make some efforts to ensure that when it receives a form seeking to withdraw retirement contributions, the form authentically is from the State employee whose name is on the withdrawal form. Under these facts, Petitioner suggested that consistent with Respondent's high fiduciary duty, Respondent at least should require its contribution withdrawal form to require notarization of the State employees signature.

The Hearing Examiner rejected this argument by simply noting, "when no statute exists requiring a notarized application, no fiduciary duty exists to utilize a notarized application." (AR 16). In the penultimate paragraph, the Hearing Examiner concluded that Petitioner is not precluded from pursuing criminal charges against the perpetrator who stole these pension benefits. Because Petitioner is persuaded, based upon all of the facts, that the perpetrator is her divorced and deceased husband, this suggestion offers no solace or any chance of making her whole.

C. Respondent obligated to take actions to safeguard and protect member and employer contributions

A fundamental flaw in the final order is the suggestion that although Respondent owes to State employees the highest fiduciary duty, Respondent takes the position that it only owes those duties that specifically are spelled out by statute. This holding by the Hearing Examiner and adopted by Respondent was made without citation to any legal authority and ignores the reality that the Legislature has delegated broad general authority to Respondent. Instead of micromanaging every aspect of the retirement system, the Legislature fully and correctly expects Respondent to be

guided by the highest fiduciary duty in managing the day-to-day operations of the State retirement system.

Pursuant to W.Va.Code §5-10D-1, the Legislature declared that Respondent is required to administer all of the State public retirement systems, include the various teachers' retirement systems. Respondent holds all of the funds contributed in trust, as explained in W.Va.Code §5-10D-

1(g):

Notwithstanding any provision of this code or any legislative rule to the contrary, **all assets of the public retirement plans set forth in subsection (a) of this section shall be held in trust. The Consolidated Public Retirement Board is a trustee for all public retirement plans, except with regard to the investment of funds:** *Provided*, That the Consolidated Public Retirement Board is a trustee with regard to the investments of the Teachers' Defined Contribution Retirement System and any other assets of the public retirement plans administered by the Consolidated Public Retirement Board as set forth in subsection (a) of this section for which no trustee has been expressly designated in this code. (Emphasis added).

In placing Respondent in charge of the teachers' retirement systems, the Legislature in W.Va.Code §18-7B-6, noted the broad authority provided to Respondent and emphasized one of its main duties is to safeguard and protect the member and employer contributions:

The board has all powers necessary to effectuate the purposes of this article. The board shall contract with a private pension, insurance, annuity, mutual fund or other qualified company or companies to administer the day-to-day operations of the system. In selecting such company or companies **the board shall take into account as its highest duty, the proper safeguard and protection of the member and employer contributions and the interest dividends, or other return thereon.** The board shall promulgate rules regarding the proper investment of funds notwithstanding the provisions of article six, chapter twelve of this code. (Emphasis added).

Given its all encompassing Legislative mandate, Respondent is required to carry out its broad authority consistent with the highest fiduciary duty and to take actions to safeguard and protect member and employer contributions. The Hearing Examiner and Respondent are correct that the Legislature has not dictated by statute or rule the contents of every form that must be implemented by Respondent. However, simply because the Legislature has not mandated that Respondent use a particular contributions withdrawal form does not mean that Respondent can comply with its obligations simply by accepting an unnotarized document seeking to withdraw funds without there being any process in place to ensure that the signature on the form is authentic.

D. Notarizing a contributions withdrawal form used to be required

There are statutes and regulations recognizing that State employees in the various public retirement systems have the right, under certain circumstances, to seek a withdrawal of their contributions. Implicit in these statutes and regulations is that the withdrawal request actually is made by the State employee. It is up to Respondent to implement procedures to ensure that any contributions withdrawal form it receives actually is from the State employee, as opposed to someone trying to defraud the system.

There is no evidence or explanation in the record addressing why the withdrawal request form Petitioner actually signed in 1986 **REQUIRED** a notarized signature, but the subsequent TRS withdrawal forms in the record did not require any notarizations. The present forms for withdrawing retirement contributions from TERS² or the Public Employee Retirement System (PERS)³ or the

²<https://www.wvretirement.com/Forms/WVTF0081.pdf>.

³<https://www.wvretirement.com/Forms/WVPF0081.pdf>.

State Police Retirement System⁴ do not require the employee's signature to be notarized, but do require the State employee to execute a W-4R form.

Although it is not clear in this record, from the testimony of Ms. Miller, presumably Respondent made a very deliberate and calculated decision to remove the notarization of signature requirement from its various withdrawal of retirement contributions forms. Some official action had to have been taken by Respondent for the withdrawal form to be rewritten and the mandatory notarization of the signature removed.

Ms. Miller testified that notaries cost money and were an inconvenience to State employees. Of course, the "hassle" of obtaining a notarized signature on a withdrawal form is a small price to pay to make sure the State employee's signature on the form is authentic. In light of Respondent owing the highest fiduciary duty to the beneficiaries of the State retirement funds, eliminating this notarization requirement removed whatever protections such notarization afforded against a fraudulent signature. As a result, Petitioner became a victim of fraud when her now divorced and deceased husband simply filled out the withdrawal form, forged Petitioner's unnotarized signature, and mailed the forms to Respondent for processing.

E. Respondent was placed on notice that these withdrawal forms were not valid

There were a number of red flags in Respondent's files that should have caused Respondent, in light of the highest fiduciary duty it owed to Petitioner, to take notice and make further inquiry. In the Fall of 2002 and January, 2003, why were the names for Petitioner used on the forms and checks so different? Some used "Laney Dondi," or "Dondi S. Shears Laney," or "Dondi Shears Laney" when Petitioner's name on file was "Donna or Dondi Stemple." Even a cursory glance of

⁴<https://www.wvretirement.com/Forms/WVSPF0081.pdf>.

the various signatures shows Petitioner's genuine notarized signature on the 1986 withdrawal form was different than the unnotarized signatures on the two withdrawal forms and the endorsements on the checks. Also, Respondent sent the cover letter and check to an address different than Petitioner's actual address in her file. These types of differences should have been enough to cause someone at Respondent to question the authenticity of the withdrawal requests.

F. Respondent either should require notarized signatures on contribution withdrawal forms or implement some other method for ensuring the signature is valid

Based upon this record, what actions or protections have been put in place by Respondent to prevent a similar event from occurring in the future? The answer is none. Could what happened to Petitioner be repeated? Absolutely. While hopefully similar abuses of the State retirement system may be rare, in an effort to exercise the highest fiduciary duty to the beneficiaries of the various State retirement systems, Respondent needs to take actions to protect the interests of State employees and to prevent another public employee from also having his or her retirement stolen.

Counsel for Petitioner has done a survey of other State retirement systems to see what procedures they have in place to help prevent the kind of fraud perpetrated on Petitioner. In Texas⁵,

⁵<https://www.ers.texas.gov/Contact-ERS/Additional-Resources/FAQs/Retirement-Account-Withdrawal>.

Washington⁶, Nebraska⁷, Tennessee⁸, California⁹, South Carolina¹⁰, Oregon¹¹, Minnesota¹², Missouri¹³, and Utah¹⁴, for a State employee to withdraw retirement contributions from these respective public employee retirement systems, **the signature on the form has to be notarized**, which apparently was the rule in West Virginia at least in 1986.¹⁵ The Texas website explains, “Having documents notarized **helps reduce fraud by ensuring the correct individual signs the RAW disclaimer. The notary public makes sure the correct individual appears before them and has produced the proper identification.**” (Emphasis added). Several other states have implemented online systems for an employee to use to withdraw contributed funds from a public

⁶<https://snohomishcountywa.gov/DocumentCenter/View/2114/PERS-2---Withdrawal-of-Retirement-Contributions?bidId=>.

⁷<https://npers.ne.gov/SelfService/public/planInformation/school/instForLumpSumWithdraw.jsp>.

⁸<https://treasury.tn.gov/Portals/0/Documents/Retirement/Forms%20and%20Guides/Active%20Members/tr0026.pdf>.

⁹<https://www.calpers.ca.gov/docs/forms-publications/refund-election-application.pdf>.

¹⁰<https://forms.retirement.sc.gov/formGenericGet.do?formNum=web4101.xdp>.

¹¹<https://www.oregon.gov/pers/Documents/Form/731-OPSRP-Member-Withdrawal-Application-Packet.pdf>.

¹²<https://www.msrs.state.mn.us/refunds-rollover>.

¹³https://mosers.org/docs/default-source/forms/employee-surviving-spouse-request-for-refund-of-contributions.pdf?sfvrsn=9d7ec0e6_35.

¹⁴<https://www.urs.org/mango/pdf/urs/Forms/packet05.pdf>.

¹⁵Massachusetts requires the withdrawal form to be signed by the state employee as well as by a disinterested witness. <https://www.mass.gov/doc/refund-form-member/download>.

employee's retirement account.¹⁶ There are a number of checks and balances in establishing these online accounts to protect against fraud.

The public employees in West Virginia ought to have at least the same protections public employees are afforded in these other states. Clearly requiring the withdrawal form to have the signature notarized, which formerly was required, is not a monumental burden on State employees. The fact that a State employee may have to make some effort to have the withdrawal form notarized helps to emphasize how consequential that decision is. Such a withdrawal ends that public employee's interest in the retirement system and triggers expensive income tax consequences. Thus, not only does requiring notarization of the signature of the public employee on a withdrawal of retirement contributions form emphasize the significance of that decision, it also helps to discourage fraud. Furthermore, through technological advances, there may very well be other solutions available to Respondent to make sure the State employee's signature on the withdrawal form is authentic.

Regardless of what procedure is used, clearly Respondent is derelict in its duties if it fails to recognize the need for a solution to address what happened to Petitioner under these facts. Without making this change, Respondent will continue to accept unnotarized contribution withdrawal forms in the mail and once again will risk destroying a State employee's long planned upon retirement. Affirming Respondent's final order in this case will send the message to Respondent that it does not have to bother taking any action to ensure that the signature of a State employee on a retirement contributions withdrawal form is authentic. Such a result would jeopardize the constitutional and

¹⁶<https://www.azasrs.gov/content/refunding-your-account-and-terminating-asrs-membership>; <https://www.osc.state.ny.us/retirement/publications/1522/withdrawing-your-contributions-and-or-your-membership>; <https://www.opers.org/members/refunds.shtml>.

contractual right all State employees have in their well earned retirement benefits. Petitioner respectfully asks this Court to correct this injustice so that no other employee suffers a similar fate.

VII. Conclusion

Through this appeal, Petitioner Dondi Stemple respectfully seeks a reversal of Respondent's final order, asks for a remedy that actuarially would place Petitioner in the position she should have been had the \$16,437.62 not been withdrawn from her retirement account without her consent, signature, approval, or knowledge. All of Petitioner's service credits should be reinstated and Respondent should be held responsible for paying whatever financial contributions are required. Counsel for Petitioner is unable to make this very sophisticated calculation and would rely upon the actuaries employed by Respondent to come up with the appropriate figures. Finally, Petitioner seeks to recover the attorneys' fees incurred during the course of this proceeding¹⁷ as well as any additional relief the Court deems to be appropriate under these facts.

DONDI STEMPLE, Applicant below, Petitioner,

–By Counsel–

/s/ Lonnie C. Simmons

Lonnie C. Simmons (W.Va.I.D. No. 3406)

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¹⁷*West Virginia Education Ass'n v. Consolidated Public Retirement Board*, 194 W.Va. 501, 460 S.E.2d 747 (1995); *Phillip Leon M. v. Greenbrier Board of Education*, 199 W.Va. 400, 484 S.E.2d 909 (1996); *Cathe A. v. Doddridge County Board of Education*, 200 W.Va. 521, 490 S.E.2d 340 (1996); *Trozzi v. Board of Review West Virginia Bureau of Employment Programs*, 214 W.Va. 604, 591 S.E.2d 162 (2003); *Bennett v. Adkins*, 194 W.Va. 372, 460 S.E.2d 507 (1995); *see also Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986); *Security National Bank & Trust Co. v. Willim*, 153 W.Va. 299, 168 S.E.2d 555 (1969).

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-308

DONDI STEMPLE,

Applicant below, Petitioner,

v.

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Respondent.

Appeal from the West Virginia Consolidated Public Retirement Board

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITIONER'S APPEAL BRIEF** was served electronically on counsel of record on October 30, 2023, using the File and Serve Xpress system.

/s/ Lonnie C. Simmons

Lonnie C. Simmons (W.Va.I.D. No. 3406)