

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 24-208

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ROBERT CLARK, *ET AL.*,

Petitioners,

v.

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

Respondent.

Certified Questions from the Circuit Court of Kanawha County, West Virginia

PETITIONERS' CERTIFIED QUESTION BRIEF

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PETITIONERS' CERTIFIED QUESTION BRIEF

I. Introduction

TO THE HONORABLE JUSTICES OF THE

WEST VIRGINIA SUPREME COURT OF APPEALS:

In *West Virginia Consolidated Public Retirement Board v. Clark*, 245 W.Va. 510, 859 S.E.2d 453 (2021), all five members of this Court agreed that Respondent West Virginia Consolidated Public Retirement Board had violated its mandatory statutory and fiduciary obligations owed to Petitioners, who are retired and active law enforcement officers¹ employed by the West Virginia Division of Natural Resources (DNR), by failing to correct errors in a timely manner in calculating their pensionable incomes. Following the remand, the parties disagreed over the full breadth and scope of this Court's holdings in *Clark*. In an effort to obtain an answer in the most judicially

¹In this **BRIEF**, a distinction will be made between retired and actively employed Petitioners. Retired Petitioners include all DNR law enforcement officers who were retired as of July 15, 2021, the date of this Court's mandate order. (JA 48). Actively employed Petitioners refer to the DNR law enforcement officers still employed as of the date of the mandate order.

efficient manner, the parties presented proposed certified questions to the Circuit Court of Kanawha County. After permitting the parties to brief and argue the issues, the Honorable Judge Jennifer Bailey posed two certified questions for this Court to consider and address.

The first certified question asks whether the statutory and fiduciary failure of Respondent to timely correct the pensionable compensation error relating to the statutory subsistence pay received by Petitioners applies to both retired and active law enforcement officers and results in both groups receiving pensions that include such compensation in calculating their pension benefits. The second certified question seeks a definitive ruling from this Court on whether or not Respondent is responsible for paying reasonable attorneys' fees to counsel for Petitioners in this matter that has been litigated beginning in 2015.

The trial court answered "Yes" to both questions consistent with the arguments presented by Petitioners. In the scheduling order, this Court ordered Petitioners to file the initial brief. Petitioners respectfully submit this Court should use its discretion to answer these certified questions and to hold that the trial court's resolution of these issues is correct.

II. Certified questions presented:

A.

The West Virginia Supreme Court held in *West Virginia Consolidated Public Retirement Board v. Clark*, 245 W.Va. 510, 859 S.E.2d 453 (2021), that Respondent Consolidated Public Retirement Board failed to timely correct the inclusion of statutory subsistence pay in calculating the officers' pensionable compensation. Does this holding mean that the subsistence pay received by all retired *and active* DNR law enforcement officers

as of the date of the mandate order issued on July 15, 2021², must be included in calculating their pensionable income?

Yes X No

B.

Under the facts of this case, is counsel for Petitioners entitled to recover reasonable attorneys' fees from Respondent Consolidated Public Retirement Board?

Yes X No .

III. Statement of the case

The controlling facts are set out in some detail in *Clark*, 245 W.Va. at 514-16, 859 S.E.2d at 457-59. At the time of the initial appeal, the focus of the dispute was whether or not the statutory subsistence pay earned by Petitioners, pursuant to the 1996 amendment to W.Va.Code §20-7-1, should have been included in the total wages earned by Petitioners, which then formed the basis for the contributions made by the DNR and Petitioners into the Public Employees Retirement System (PERS). Beginning in 1997, the DNR and Petitioners made the appropriate contributions into PERS, based upon the wages earned, including this monthly subsistence pay.

“In October 2015, the Board informed all DNR law enforcement officers—active and retired—that it had finally determined that the subsistence allowance was not pensionable compensation.” 245 W.Va. at 516, 859 S.E.2d at 459. In November, 2015, Petitioners filed multiple individual administrative appeals and requests for declaratory relief. These administrative appeals

²Although the certified question order has the date of the mandate order as July 14, 2021, the record shows the date actually was July 15, 2021. (JA 48). To be more precise and consistent with the record, the date for the mandate order will be referenced correctly as July 15, 2021 in this **BRIEF**.

were consolidated and after various hearings, Respondent affirmed the Administrative Law Judge's decision that the statutory monthly subsistence pay earned by Petitioners should not have been included in the total wages and compensation earned in calculating their PERS' benefits.

This final decision was appealed to the Circuit Court of Kanawha County and once again was consolidated into one case. On or about March 18, 2020, the trial court entered a **FINAL ORDER** agreeing with Petitioners that the monthly subsistence pay correctly was included in the pensionable compensation earned by Petitioners to determine their PERS' benefits. On or about May 4, 2020, the trial court entered an **AGREED ORDER** incorporating the Rule 54(b) language into the **FINAL ORDER**, which made the **FINAL ORDER** appealable immediately; retaining jurisdiction over Petitioners' request for an award of attorneys' fees, which issue would be decided after the appeal was resolved; and staying the effectiveness of the **FINAL ORDER** while the appeal was pending.

On June 14, 2021, after permitting the parties to present oral arguments, the Court issued its decision in this matter and remanded this case to the trial court for further proceedings consistent with the decision. Four members of the Court reversed the trial court and held that the statutory subsistence pay should not have been included in the calculation of Petitioners' pensionable income. However, all five Justices concluded that Respondent failed to correct this error in a timely manner in violation of its statutory and fiduciary obligations. Following the remand, counsel for both parties engaged in discussions and informal discovery prior to seeking a final ruling from the trial court on the remaining issues. Through these discussions, the parties determined that the case was in a position to be presented to the trial court again for final resolution. (JA 4, 49, 89, 94, 100, 135, 141, 165). Included in these filings were documents supporting Petitioners' request for an award of attorneys' fees. Prior to holding a hearing, Petitioners and Respondent submitted proposed certified

questions for the trial court to consider. (JA 223, 236). After reviewing *Clark* and the various briefs filed by the parties and after considering the arguments of counsel, on March 21, 2024, the trial court entered an order certifying the above-quoted questions to this Court. (JA 265).

The resolution of the first certified question will resolve the issue as to how the holding in *Clark* applies to Petitioners who had not retired as of July 15, 2021. The second certified question addressing whether or not attorneys' fees should be awarded under these facts will determine how many of these retirement law disputes involving State employees, which often are quite complex, will be litigated in the future.

IV. Summary of argument

By following the certified question procedure, this case is presented directly to this Court, pursuant to Rule 1(a) of the West Virginia Rules of Appellate Procedure. This Court indisputably is in the better position to address any substantive issue regarding the application of its holding in *Clark* and is the only appropriate Court to clarify or elaborate on its holdings.

Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal.

The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

For the retired Petitioners, this Court held that as a result of Respondent's violation of its statutory and fiduciary duties to correct errors in a timely fashion, Respondent could not exercise its right, under W.Va.Code §5-10-44(e), to prospectively adjust the benefits being received by the retired Petitioners nor could Respondent extract any money from these retired Petitioners to apply against any overpayment. The remedy for failing to timely correct the subsistence pay error, which

error was repeated for every DNR law enforcement officer from 1997 through October, 2015, was to allow these retired Petitioners to continue receiving their full PERS' benefits, including the additional benefits paid as a result of including the subsistence pay income.

The failure of Respondent to timely correct this error also impacted all of Petitioners who presently were employed as of July 15, 2021. Because this same statutory and fiduciary violation also impacted all of the DNR law enforcement officers employed by that date, the question on remand was how does the Court's holding in *Clark* apply to them. As to this issue, the Court's guidance in *Clark* was not as explicit as it was for Petitioners who already were retired.

Because the retired Petitioners were afforded this protection and are able to receive pensions based upon their pensionable compensation including this statutory subsistence pay, this same holding ought to be applied to Petitioners who actively were employed as of July 15, 2021. The same untimely delay by Respondent in correcting this error applies to retired and actively employed Petitioners. It would be unfair and inconsistent with this Court's analysis in *Clark* to treat these two groups of Petitioners differently.

This Court has issued multiple decisions awarding attorneys fees against various State or other governmental entities in litigation where the plaintiff is able to establish that the public official or agency refused to comply with a clear legal duty.

Attorneys fees have been awarded against Respondent in other similar cases where the plaintiff was able to prove that Respondent had failed to follow the applicable statutes.

If State employees cannot get lawyers to take on these administrative appeals addressing the pension rights of State employees, which the Court repeatedly has held involve contractual and constitutional issues, then many employees will be denied the full pension benefits they earned.

Also, where Petitioners were successful in persuading the Court that Respondent's interpretation and application of the law was incorrect, Petitioners should not have to lose money out of their own pockets to pay attorneys' fees.

V. Statement regarding oral argument and decision

Petitioners respectfully submit that Rule 19 or 20 oral argument would be helpful to the Court in addressing any and all questions regarding the complicated world of State employee retirement systems and how *Clark* should be applied to the law enforcement officers actively employed by the DNR as of July 15, 2021. Oral argument often clarifies the relevant facts as well as the legal positions asserted by the parties. Because *Clark* was authored by a Justice, Petitioners believe that an opinion addressing the two certified questions similarly should be authored by one of the Justices.

VI. Argument

A. The Court should exercise its discretionary authority to accept these certified questions

Procedurally, the Court first must decide whether or not to use its discretion to accept the certified questions presented by the trial court. Rule 17(a)(1) of the West Virginia Rules of Appellate Procedure references W.Va.Code §58-5-2, which provides that any issue of law can be certified to this Court. In this case, the Court is being presented with two legal questions that only this Court can address definitively.

In Syllabus Points 1 and 2 of *Wingett v. Chala*, 249 W.Va. 252, 895 S.E.2d 107 (2023), this Court provided the standard of review for addressing certified questions from trial courts and stated the right of the Court to reframe the questions:

1. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus Point

1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

2. “When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W. Va. Code*, 51-1A-1, *et seq.* and *W. Va. Code*, [58-5-2](#) [(1998)], the statute relating to certified questions from a circuit court of this State to this Court.” Syllabus Point 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

The main reason for choosing the certified question process is that now that West Virginians are blessed with having two appellate courts—this Court and the Intermediate Court of Appeals (ICA)—there are more procedural options available. By following the certified question procedure, this case is presented directly to this Court, pursuant to Rule 1(a) of the West Virginia Rules of Appellate Procedure. This Court indisputably is in the better position to address any substantive issue regarding the application of its holding in *Clark* and is the only appropriate Court to clarify or elaborate on its holdings. If this procedure is not followed, then the final order from the trial court first would have to be appealed to the ICA, pursuant to Rule 1(b)(1) and (4), and then that decision would be appealed to this Court. Due to no fault on its part, the ICA simply is not in a position to state with any authority what this Court intended when it issued *Clark*. Thus, it makes sense for this case to return to this Court under any procedure available.

Providing clear guidance on how the pensions of all Petitioners will be impacted by *Clark* will benefit all State employees, who may be faced with similar facts. This Court long has held that a State employee’s right to an earned pension is protected by contractual and constitutional principles. *See generally Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988). Furthermore, most lay persons have no way of really challenging any decision issued by Respondent, which has

actuaries, excellent lawyers, and extremely qualified staff members who are knowledgeable in this field. Thus, a decision by this Court that attorneys' fees may be awarded in litigation challenging Respondent's final decision regarding a State employee's retirement overall would benefit the system and would encourage lawyers to consider representing employees in these often complex cases.

In light of the critical issues at stake and the need for definitive rulings from this Court, Petitioners respectfully move the Court to use its discretion to accept these two certified questions and to issue a decision explaining the Court's rationale with respect to both queries.

B. The trial court carried out the letter and spirit of the *Clark* decision in affording the actively employed Petitioners with the same protections the Court afforded the retired Petitioners

When the Court issues an opinion and remands the case for further proceedings consistent with the decision, the circuit court has an obligation to carry out the letter and spirit of the decision. In Syllabus Points 2 through 5 of *State ex rel. Frazier & Oxley, LC v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003), the Court set out the following rules governing the remand of a decision to a lower court:

2. When this Court remands a case to the circuit court, the remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate. General remands, in contrast, give circuit courts authority to address all matters as long as remaining consistent with the remand.

3. Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. **The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.**

4. A circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed *de novo*.

5. When a circuit court fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out, the writ of prohibition is an appropriate means of enforcing compliance with the mandate. (Emphasis added).

In answering the first certified question in the affirmative, the trial court implemented the letter and the spirit of this Court's holding in *Clark*. For the retired Petitioners, this Court held that as a result of Respondent's violation of its statutory and fiduciary duties to correct errors in a timely fashion, Respondent could not exercise its right, under W.Va.Code §5-10-44(e), to prospectively adjust the benefits being received by the retired Petitioners nor could Respondent extract any money from these retired Petitioners to apply against any overpayment. The remedy for failing to timely correct the subsistence pay error, which error was repeated for every DNR law enforcement officer from 1997 through October, 2015, was to allow these retired Petitioners to continue receiving their full PERS' benefits, including the additional benefits paid as a result of including the subsistence pay income.

In answering the first certified question, the trial court had to review the decision in *Clark* to see how the Court reached its final decision. *Clark* was based upon the 2015 version of W.Va.Code §5-10-44.³ Subsections (a) and (e) in that version of the statute read as follows:

³The Court's holding that in addition to violating its statutory mandate, Respondent also violated its **fiduciary obligations** owed to Petitioners by not finding and correcting this error in a timely manner is significant. In footnote 77 of *Clark*, the Court noted that subsection (e) provided a more onerous timely correction of error standard than under subsection (a), which is prefaced by the phrase "Upon learning of any errors." Perhaps in recognition of this fact, the year after the *Clark* decision was issued, the Legislature amended W.Va.Code §5-10-44(e), and (f), by adding the phrase "upon learning of the error" into those two subsections. While this new language will give Respondent a statutory argument that its obligation to correct an error is triggered "upon learning

(a) *General rule.* -- Upon learning of any errors, the board shall correct errors in the retirement system in a timely manner whether an individual, entity or board was at fault for the error with the intent of placing the affected individual, entity and retirement board in the position each would have been in had the error not occurred.

* * *

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

In applying this timely error correction statute, this Court in *Clark* adopted the following two new Syllabus Points:

9. West Virginia Code § 5-10-44 (eff. July 1, 2015) is a remedial statute that may be applied to correct an error in the Public Employees Retirement System, found at West Virginia Code §§ 5-10-1 to 55, that occurred before July 1, 2015.

10. Under West Virginia Code § 5-10-44(e) (eff. July 1, 2015), the Consolidated Public Retirement Board shall correct in a timely manner any error that results in any member, retirant, beneficiary, entity or other individual receiving from the Public Employees Retirement System, found at West Virginia Code §§ 5-10-1 to 55, more than he or she would have been entitled to receive had the error not occurred.

of the error,” this statutory amendment does not in any way alter the fiduciary duty owed by Respondent to the members of PERS to correct such errors in a timely fashion.

In the context of this case, the error that Respondent failed to correct in a timely manner was the inclusion of the statutory subsistence pay received by Petitioners every month since 1996 in the calculation of the pensionable income earned by retired and actively employed DNR law enforcement officers. 245 W.Va. at 524, 859 S.E.2d at 467. Although the statute does not explain in any detail what is meant by “a timely manner,” the Court held this error appears to have been found by mere happenstance, held Respondent’s arguments “fall flat,” and noted Respondent’s fiduciary obligation “to maintain the terms of the trust contract set forth in the PERS statute, dispose of PERS funds according to those terms, and protect the interests of all PERS beneficiaries. In sum, the Board has failed to act in a timely manner to correct system overpayments that resulted from the erroneous treatment of subsistence allowance payments as pensionable compensation.” 245 W.Va. at 525-26, 859 S.E.2d at 467-68. Thus, this Court concluded Respondent had violated its statutory and fiduciary duties owed to Petitioners.

In crafting the appropriate remedy to be implemented on remand, this Court at 245 W.Va. at 526, 859 S.E.2d at 469, concluded:

In sum, the Board has failed to act in a timely manner to correct system overpayments that resulted from the erroneous treatment of subsistence allowance payments as pensionable compensation. Consequently, the Board may not require Respondents who have received overpayments from PERS due to that error to repay those amounts. For the same reason—a lack of timeliness, as that term is found in § 5-10-44(e)—the Board may not prospectively adjust payments to those retirant- and beneficiary- Respondents to whom annuity payments have already started.

This holding that Respondent failed to act in a timely manner to “correct system overpayments that resulted from the erroneous treatment of subsistence allowance payments as

pensionable compensation” applies equally to retired **and** actively employment DNR law enforcement officers, all of whom overpaid contributions into PERS, including the subsistence allowance as part of their pensionable compensation. The remaining sentences make it clear that this holding means the retired DNR law enforcement officers cannot be required to repay any prior benefits already received and also cannot have their pensions adjusted prospectively.

Based upon this holding, all parties as well as the trial court agreed that despite the specific language in W.Va.Code §5-10-44(e), the Court’s holding prevents Respondent either from prospectively adjusting the payment of benefits or requiring the repayment of overpayments by Petitioners who already were retired as of the date of the mandate order, which was on or about July 15, 2021. However, the failure of Respondent to timely correct this error also impacted all of Petitioners who presently were employed as of July 15, 2021. Because this same statutory and fiduciary violation also impacted all of the DNR law enforcement officers employed by that date, the question on remand was how does the Court’s holding in *Clark* apply to them. As to this issue, the Court’s guidance in *Clark* was not as explicit as it was for Petitioners who already were retired.

The best evidence as to the Court’s intent in *Clark*, 245 W.Va. at 526, 859 S.E.2d at 469, is the concurring and dissenting opinion by Justice Wooton, who states, **“I concur with the majority’s conclusion that respondents, current and former DNR officers and/or their beneficiaries (hereinafter ‘respondents’ and/or ‘DNR officers’), cannot now be stripped of retirement benefits which were calculated inclusive of their subsistence pay, due to the West Virginia Consolidated Public Retirement Board’s failure to timely take corrective action.”** Although Justice Wooton dissented because he found that the statutory subsistence pay correctly was included in calculating Petitioners’ pensionable compensation, he nevertheless voted in favor of the majority

opinion because the untimeliness in correcting this error applied to retired and actively employed DNR law enforcement officers.

If any of the four other Justices had disagreed with Justice Wooton's concurring analysis, a separate opinion responding to his assertion could have been provided, but none of the Justices opted to do that. Thus, the clearest statement from the Court in *Clark* addressing the full extent of the holding is the opening sentence from Justice Wooton.

Petitioners anticipate Respondent will argue that the overpayments made by Petitioners who were actively employed by the DNR as of July 15, 2021, are governed by the procedure outlined in W.Va.Code §5-10-44(d)(2015), which provides:

(d) *Overpayments to the retirement system by an employee:* When mistaken or excess employee contributions or overpayments have been made to the retirement system, the board shall have sole authority for determining the means of return, offset or credit to or for the benefit of the individual making the mistaken or excess employee contribution of the amounts, and may use any means authorized or permitted under the provisions of section 401(a), *et seq.* of the Internal Revenue Code and guidance issued thereunder applicable to governmental plans. Alternatively, in its full and complete discretion, the board may require the participating public employer employing the individual to pay the individual the amounts as wages, with the board crediting the participating public employer with a corresponding amount to offset against its future contributions to the plan. If the employer has no future liability for employer contributions to the retirement system, the board shall refund said amount directly to the employer: *Provided*, That the wages paid to the individual shall not be considered compensation for any purposes of this article. Earnings or interest shall not be returned, offset or credited under any of the means used by the board for returning employee overpayments.

In *Clark*, the Court does not include any detailed discussion of subsection (d), other than stating in footnote 77, "The circuit court's analysis, findings, and the majority of the parties' argument on appeal bear on the timeliness inquiry under § 5-10-44(e). So, we limit our review,

accordingly, and do not address the timeliness of other courses of corrective action. *See, e.g.*, W. Va. Code § 5-10-44(d) (2015) (pertaining to overpayments to the retirement system by an employee).” To resolve the question as to whether subsection (d) controls the remedy for the actively employed Petitioners, the Court need only refer to its conclusion that Respondent violated its statutory and fiduciary duties owed to Petitioners. The highest fiduciary obligation owed by Respondent is highlighted in Syllabus Points 5 and 6 of *Clark*:

5. “The PERS Trustees have the highest fiduciary duty to maintain the terms of the trust, as spelled out in the statute.” Syllabus Point 5, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988).

6. “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.” Syllabus Point 14, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988).

The Court found that Respondent had violated its fiduciary obligations owed to Petitioners in failing to timely correct the error regarding the inclusion of subsistence pay, and, as a consequence, the Court held that Respondent could not implement the procedure outlined in subsection (e) with respect to the retired Petitioners who already had begun receiving pension benefits under PERS. Thus, Respondent’s violation of its fiduciary obligations resulted in the retired Petitioners being able to continue receiving pension benefits based upon the inclusion of the subsistence pay they had earned. This result is justified in light of the decisions recognizing the contractual and constitutional principles governing a State employee’s interest in retirement as well as the cases holding Respondent owes the highest fiduciary duty.

Because the retired Petitioners were afforded this protection and are able to receive pensions based upon their pensionable compensation including this statutory subsistence pay, this same holding ought to be applied to Petitioners who actively were employed as of July 15, 2021. The same untimely delay by Respondent in correcting this error applies to retired and actively employed Petitioners. It would be unfair and inconsistent with this Court's analysis in *Clark* to treat these two groups of Petitioners differently.

The actively employed Petitioners from 1997 through October, 2015, relied upon the retirement system that included the subsistence pay as part of their compensable income. For some of these Petitioners, that extra income added to their pensions may have persuaded some to remain being employed by the DNR instead of seeking other more lucrative employment. However, Respondent seeks to have this Court ignore the violation of its fiduciary obligations owed to Petitioners and to obtain a ruling from the Court requiring Respondent to follow the procedures outlined in subsection (d), which would result in the actively employed Petitioners receiving taxable refunds of overpayments, without interest, and in the future when these actively employed Petitioners retire, their pension benefits will be less than they would have received if the subsistence pay had been included.⁴

The trial court's resolution of the first certified question is consistent with this Court's holdings in *Clark*, recognizes Respondent's violation of its fiduciary obligations, and provides equal

⁴Respondent's action in October, 2015, forced the DNR and the actively employed Petitioners to cease making payments into PERS based in part upon the subsistence pay earned. In the event the Court decides to treat the retired and actively employed Petitioners the same, some of these actively employed Petitioners will want to make payments into PERS to make up for the contributions they ceased to make as a result of Respondent's October, 2015 memorandum.

treatment to the retired and actively employed Petitioners. Therefore, Petitioners respectfully ask the Court to answer the first certified question in the affirmative.

C. An award of attorneys' fees is justified under these facts

Although there are a number of different decisions from the Court authorizing an award of attorneys' fees under facts similar to the present case and, such fees have been awarded in the past against Respondent, the Court and the parties would benefit from receiving a definitive ruling on this issue. The controlling case for awarding attorneys' fees to a successful State employee litigant against Respondent is *West Virginia Education Ass'n v. Consolidated Public Retirement Board*, 194 W.Va. 501, 460 S.E.2d 747 (1995). This decision involved a mandamus action that was litigated for years against the Governor, Auditor, and Appellee challenging a statutory scheme that authorized moneys held in trust as part of the TRS to be used to fund the Public Employees Insurance Agency. The end result was the Court held that mandamus relief was proper and remanded the case to the circuit court to consider the request for an award of attorneys' fees under the holdings set out in Syllabus Points 10 and 11:

10. Where a public official has deliberately and knowingly refused to exercise a clear, legal duty a presumption exists in favor of an award of attorneys' fees and expenses unless extraordinary circumstances indicate an award would be inappropriate, then attorneys' fees and expenses would be allowed. *State of West Virginia ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 193 W.Va. 650, 654, 458 S.E.2d 88, 92 (1995).

11. Where a public official has failed to exercise a clear, legal duty, although the failure was not the result of a decision to knowingly disregard a legal command, there is no presumption in favor of an award of attorneys' fees with the following factors to be considered in whether or not to award attorneys' fees and expenses and in what amount: (a) the relative clarity by which the legal duty

was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner for a small group of individuals; and (c) whether the petitioner has adequate financial resources such that it could afford to protect its own interests in court and as between the government and the petitioner. *State of West Virginia ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 193 W.Va. 650, 654, 458 S.E.2d 88, 92 (1995).

See also Phillip Leon M. v. Greenbrier Board of Education, 199 W.Va. 400, 484 S.E.2d 909 (1996)(Attorneys' fee award affirmed where defendant deliberately and knowingly refused to provide the student with an alternative education as required by the West Virginia Constitution); *Cathe A. v. Doddridge County Board of Education*, 200 W.Va. 521, 490 S.E.2d 340 (1996)(Case remanded for a reconsideration where trial court had denied an award of attorneys' fees based upon the "good faith" of the defendant); *Trozzi v. Board of Review West Virginia Bureau of Employment Programs*, 214 W.Va. 604, 591 S.E.2d 162 (2003)(Trial court's decision denying an award of attorneys' fees reversed); *Bennett v. Adkins*, 194 W.Va. 372, 460 S.E.2d 507 (1995)(Trial court's refusal to award attorneys' fees reversed); *see also Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986)(In a declaratory judgment action involving insurance coverage, the West Virginia Supreme Court held attorneys' fees should be awarded because "To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney's fees and expenses arising from litigation."); *Security National Bank & Trust Co. v. Willim*, 153 W.Va. 299, 168 S.E.2d 555 (1969)(Attorneys' fees may be awarded in a declaratory judgment action involving the settlement of an estate and trust fund).

Petitioners respectfully submit the present case warrants an award of attorneys' fees under both Syllabus Points as well as the additional cases cited. Under Syllabus Point 10, Respondent

“deliberately and knowingly refused to exercise a clear, legal duty” by failing to correct an error in a timely fashion. Under Syllabus Point 11, the “relative clarity” of the controlling statute was clear and unambiguous, this ruling impacted not only Petitioners, but all other employees who were similarly situated, and in comparison to the government, Petitioners lacked the financial resources to litigate this case.

In addition to the decision in *West Virginia Education Ass’n*, in at least two other cases involving litigation with Respondent, attorneys’ fees for the successful State employee either were sought or have been paid by Respondent. For example, in *Tackett v. West Virginia Consolidated Public Retirement Board*, 2017 WL 5509926 (No. 16-0963, 11/17/2017)(Memorandum Opinion), the Court at the end of the decision remanded “the case to the circuit court for prompt resolution of petitioner’s request for attorney’s fees.”

In *West Virginia Consolidated Public Retirement Board v. Wood*, 233 W.Va. 222, 757 S.E.2d 752 (2014), where five State employees were successful in obtaining a ruling that they were entitled to military service credits, on remand to the Circuit Court of Kanawha County, counsel for these Petitioners and Respondent entered into an agreed order explaining the procedure to be followed in connection with the appellants’ motion for the payment of attorneys’ fees, which were agreed upon and paid by Respondent. (JA 94).

The fact that Respondent owes the highest fiduciary duty to the State employees participating in a retirement plan presents the Court with additional considerations in favor of awarding attorneys fees. Respondent is not simply any State agency, but rather is a State agency entrusted with millions of dollars. In Syllabus Point 14 of *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988), the Court explained:

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.

In Syllabus Points 5 and 25 of *Dadisman*, the Court emphasized that Respondent is required to exercise the highest fiduciary duty in administering and investing the funds entrusted to it. Clearly, Respondent owes a higher fiduciary duty to the State employees, who rely upon Respondent to administer and invest the pension funds entrusted to it consistent with the highest fiduciary standards. Included in this fiduciary duty would be to apply clear and unambiguous statutes correctly to the State employees governed by such statutes.

Additionally, as noted in Syllabus Points 16 and 18 of *Dadisman*, a State employee's interest in his or her pension is both a contractual and constitutional right that cannot be diminished once it has vested:

16. Retired and active PERS plan participants have contractually vested property rights created by the pension statute, and such property rights are enforceable and cannot be impaired or diminished by the State.

18. The realization and protection of public employees' pension property rights is a constitutional obligation of the State. The State cannot divest the plan participants of their rights except by due process, although prospective modifications which do not run afoul of the federal or State impairment clauses are possible.

Petitioners have sought to protect their constitutional and contractual rights to receive the full retirement pension they earned as employees of the State. The failure of Respondent to carry out its mandatory statutory and fiduciary duties to correct errors in a timely fashion justifies an award of attorneys fees.

Finally, questions about State pension and retirement issues are extremely important to the employees involved. State employees spend their working lives looking forward to retirement. So when Respondent sends out a letter to State employees reducing their pensions, the idea of trying to figure out the pension system involved and challenging it is daunting. If State employees cannot get lawyers to take on these administrative appeals addressing the pension rights of State employees, which the Court repeatedly has held involve contractual and constitutional issues, then many employees will be denied the full pension benefits they earned. Also, where Petitioners were successful in persuading the Court that Respondent's interpretation and application of the law was incorrect, Petitioners should not have to lose money out of their own pockets to pay attorneys' fees. That is why counsel in this case, which has been litigated since October, 2015, has never received a penny from Petitioners because the case law cited and the experience in the military service credit litigation demonstrated that attorneys' fees would be awarded, as long as Petitioners were successful.⁵

The trial court's resolution of the second certified question is consistent with this Court's holdings in *Clark* as well as the foregoing attorneys fees cases cited, recognizes Respondent's violation of its fiduciary obligations, and affords State employees with the ability to obtain counsel to challenge decisions by Respondent impacting the retirement rights of State employees. Therefore, Petitioners respectfully ask the Court to answer the second certified question in the affirmative.

⁵The Court's resolution of the attorneys fees issue also will impact whether or not such fees will be awarded in *Birchfield-Modad v. West Virginia Consolidated Public Retirement Board*, 2022 WL 16646485 (No. 20-0747, 11/3/22)(Memorandum Decision), where this Court found that Respondent had miscalculated that petitioner's service credits. The attorneys fees issue is pending in the Circuit Court of Kanawha County and is stayed pending the resolution of the present case.

VII. Conclusion

For the foregoing reasons, Petitioners, who are retired and active law enforcement officers employed by the West Virginia Division of Natural Resources (DNR), respectfully ask the Court to exercise its discretion to accept the certified questions posed by the Circuit Court of Kanawha County, to allow oral argument, and issue a signed opinion answering both certified questions in the affirmative.

**PETITIONERS (ALL ACTIVE AND RETIRED DNR LAW
ENFORCEMENT OFFICERS, INCLUDING WIDOWS AND
WIDOWERS),**

–By Counsel–

/s/ Lonnie C. Simmons

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 24-208

ROBERT CLARK, *ET AL.*,

Petitioners,

v.

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

Respondent.

Certified Questions from the Circuit Court of Kanawha County, West Virginia

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that on July 2, 2024, a copy of the foregoing **PETITIONERS' CERTIFIED QUESTION BRIEF** was electronically filed on all counsel of record using the File & Serve Xpress system.

/s/ Lonnie C. Simmons

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