

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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ROBERT CLARK, *ET AL.*,

Petitioners,

v.

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

Respondent.

Response to Petitioner's Certified Question Brief

**Counsel for Respondent, the West Virginia
Consolidated Public Retirement Board**

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I. Questions Presented

Petitioners included the questions from the Certification Order in their Certified Questions Brief. Pursuant to West Virginia Code § 51-1A-4 “the Supreme Court of Appeals of West Virginia may reformulate a question certified to it.” CPRB urges the Court to reformulate the questions as follows or to simply overturn the answers in the Certification Order:

1. Is the Supreme Court’s holding that CPRB did not timely correct DNR’s error of including subsistence allowance in retirement contributions limited to the “*retirant-and beneficiary-Respondents to whom annuity payments have already started*” as stated in the *Clark* decision on page 526 and in footnote 77 and also stated in subsection (e) of § 5-10-44? *See, W.Va. Consolidated Public Retirement Bd. v. Clark*, 245 W.Va. 510, 526; 859 S.E.2d 453, 469 and n. 77 (2021).
2. If the answer to #1 is no, is this holding broadened to include officers who had not retired at the time of the *Clark* decision and have not yet retired and if so, is this Court directing CPRB to disregard this Court’s holding that subsistence allowance is not pensionable and to disregard CPRB’s duties under § 5-10-44 (c) and (d) and instead require that CPRB accept retirement contributions that include subsistence allowance through the date of the Supreme Court mandate for the active officers?
3. If the answer to #2 is yes, CPRB requests direction on how CPRB can accomplish including subsistence allowance, which is not compensation under PERS, in retirement contributions for the active officers on an on-going basis while continuing to maintain the PERS plan’s tax-deferred status with the Internal Revenue Service?

II. Summary of Argument

This honorable Court previously decided the issues presented by certified question in the previous appeal in this case, *W.Va. Public Retirement Bd. v. Clark*, 245 W.Va. 510; 859 S.E.2d 453 (2021) (the “*Clark*” decision). No ambiguity exists in the *Clark* decision. Yet, over the past three years since the decision, the West Virginia Consolidated Public Retirement Board (“CPRB”) has not been able to follow the clear direction of this Court because, despite several attempts, CPRB has not swayed Petitioners from their erroneous interpretation. The dispute over Petitioners’ erroneous interpretation resulted in much briefing before the Circuit Court culminating

with Petitioners' request for certified questions. Earlier this year, the Circuit Court held a hearing on the issue of whether to certify questions to the Supreme Court and on March 21, 2024, entered an order accepting Petitioners proposed certified questions to this Court. In that order, the Circuit Court adopted Petitioners' answers to both certified questions. Both answers are erroneous and based on the *Clark* decision, this Court should overturn the Circuit Court's answers.

The *Clark* decision in its most basic essence holds two things: (1) subsistence allowance is NOT pensionable compensation; and (2) because the Supreme Court concluded that CPRB did not timely discover DNR's error in including subsistence allowance as pensionable income, CPRB could not recover the overpayments made to retirants or their beneficiaries as a result of that error. CPRB has made several efforts over the past few years to implement that decision, but Petitioners claim this Court's limited holding should be extended to the active DNR officers who were still employed at the time of the Court's decision. This is wrong and the Circuit Court erred in agreeing with Petitioners.

First, this Court's opinion specifically limits its holding regarding untimeliness to payments made by CPRB to retirees. *See* 245 W.Va. at 525; 859 S.E.2d at 468 and fn. 77. This limitation is supported by the Statute that requires timely correction by CPRB of overpayments *from* the retirement system, but the timeliness correction is not required for overpayments *to* the retirement system (like the prior overpayments made by not-yet-retired DNR officers and DNR).

Second, the distinction in requiring timely correction of overpayments to retirees, but not including a timeliness requirement as to overpayments to CPRB makes sense because retirees already have received their benefits. If correction of the overpayments to the retirees here were enforced, the retired officers would have to return those benefits (which likely they have already spent on daily living expenses) to CPRB. Conversely, retirement benefits for the officers

that had not retired at the time of the appeal have not even been calculated yet and thus, those active officers have no expectation that the \$130 monthly subsistence allowance¹ should be included in calculating their retirement benefits. Importantly, the \$130 monthly subsistence allowance has not been included since October 2014 when CPRB discovered DNR's error. Moreover, the active DNR officers will be reimbursed for any amounts based on subsistence allowance that DNR wrongfully included in the submission to CPRB for retirement contributions.

In addition to overturning the Circuit Court's answer to the first certified question, this Court should overturn the answer to the second certified question. The Circuit Court's answer to the second certified question improperly grants Petitioners' their attorneys' fees in a case where the Petitioner lost on the primary legal issue.

III. Statement Regarding Oral Argument

The first issue in this certified question appeal was clearly addressed in the *Clark* decision. The second issue, whether Petitioners are entitled to attorneys' fees, is not novel or complicated and actually was already decided by the Court's Mandate that states each party will "bear their own costs." Thus, CPRB does not believe oral argument is necessary, but also does not oppose it if the Court believes it would be helpful.

¹ In accordance with the PERS plan, for DNR officers hired before July 1, 2015, only 4.5% of the \$130 monthly subsistence allowance is included in retirement contributions. Thus, the monthly contribution amount is \$5.85.

IV. Argument

A. Subsistence allowance is not pensionable income and retirement contributions of DNR officers who had not yet retired as of July 14, 2021, the date of the West Virginia Supreme Court’s Mandate must be corrected.

Petitioners argue to stretch this Court’s holding in the *Clark* decision and apply it to the DNR officers who had not yet retired at the time of this Court’s decision. In the *Clark* decision, CPRB appealed the ruling of the Circuit Court finding that subsistence allowance is pensionable. The Supreme Court disagreed with the Circuit Court and instead held specifically that subsistence allowance does not fall within the definition of “compensation” in the PERS statutory plan and therefore is not pensionable compensation. *See*, 245 W.Va. at 52; 859 S.E.2d at 463. This was the primary legal issue on appeal and this Court ruled against Petitioners and determined that DNR acted improperly and erroneously in including subsistence allowance in its calculations of employer and employee retirement submissions to CPRB.

Even so, this Court found that CPRB did not timely correct system *overpayments* to retirees that resulted from DNR’s erroneous treatment of subsistence allowance payments as pensionable compensation, and as a consequence CPRB “may not require Respondents² *who have received overpayments* from PERS due to that error *to repay those amounts*,” and in addition “*may not prospectively adjust payments to those **retirant-and beneficiary-Respondents** to whom annuity payments have already started.*” *See*, 245 W.Va. 510, 526; 859 S.E.2d 453, 469 [emphasis added]. The *Clark* decision regarding untimeliness of error correction is specifically limited to “**retirant-and beneficiary-Respondents** to whom annuity payments have already started.” *Id.* [emphasis

² In the *Clark* decision, the DNR officers were Respondents because CPRB appealed the decision of the Circuit Court. Here, the DNR officers are Petitioners because they are petitioning the Court with certified questions.

added]. This Court “limit[ed the] review” on this issue to retirants and their beneficiaries. Further, the Court specifically pointed to “overpayments to the retirement system by an employee” as corrective action that the *Clark* decision on untimely correction does not apply. *Id.* n. 77.

The holding in the *Clark* decision follows the very clear requirements of the PERS statutory plan as set forth in West Virginia Code § 5-10-44. Subsection (e) of that statute requires CPRB to correct errors regarding overpayments to retirees “in a timely manner.” Two other error correction subsections in § 5-10-44 are also implicated by the *Clark* holding that subsistence allowance is not pensionable -- (c) overpayments to the retirement system by an employer; (d) overpayments to the retirement system by an employee. DNR and its officers did overpay up until November 1, 2015³ because the retirement contributions submitted to CPRB erroneously included subsistence allowance. Pursuant to the *Clark* holding that subsistence allowance is not pensionable, CPRB is duty-bound and statutorily required to refund those overpayments under subsections (c) and (d) of § 5-10-44. *See* Illustrative Graphic below:

Retirees	Overpayment to Retirees of Retirement Benefits	<i>Clark</i> decision – CPRB did not correct in timely manner	CPRB cannot seek repayment	§ 5-10-44(e)
Active Officers	Overpayment of retirement contributions by Officers and DNR to CPRB up to 11/1/15	<i>Clark</i> decision - subsistence allowance is not pensionable and no requirement in (c) and (d) for “timely” correction	CPRB must reimburse overpayments	§§ 5-10-44(c) and (d)

CPRB is expected to take the corrective action required under subsections (c) and (d) of § 5-10-44 because the Supreme Court specifically “limit[ed the] review” on the timeliness issue to subsection

³ As noted above, when CPRB discovered that DNR was including subsistence allowance in calculating retirement contributions, CPRB advised DNR of the error and DNR stopped including subsistence allowance November 1, 2015.

(e) – overpayments to retirees -- and specifically stated that CPRB is not precluded from “other courses of corrective action” like those in subsections (c) and (d) of § 5-10-44. *Id.* n. 77.

Under the *Clark* decision, the retired officers whose pensions had already been calculated based on DNR’s wrongful inclusion of subsistence allowance and had already begun receiving retirement benefits, will continue to receive their benefits with no change. If this Court had intended the *Clark* decision to apply to the currently employed officers that had not yet retired, the Supreme Court would not have explicitly limited the holding to “***retirant-and beneficiary- Respondents.***” In an attempt to extend that holding, Petitioners rely on one word in the **concurring/dissenting**⁴ opinion of Justice Wooton – “current.” Justice Wooton dissented on the primary legal issue as noted in footnote 4. His two sentence concurrence states that he agrees with the majority’s conclusion, but then overstates that the conclusion holds all respondents, “current and former DNR officers and/or their beneficiaries cannot now be stripped of retirement benefits.” *See*, 245 W.Va. at 526; 859 S.E.2d at 469. Clearly, the majority opinion limited the ability of CPRB to correct the overpayment error only as to “retirants and their beneficiaries.” *Id.* at 526. Even applying the statutorily-mandated error correction provision to the officers who have not retired, they will not be “stripped of retirement benefits,” but rather, they will receive a refund of the amounts erroneously submitted by DNR that include subsistence allowance.

Moreover, Petitioners’ reliance on this sentence in the Wooton concurrence is unpersuasive because a concurrence is not binding precedent. *State v. Beaver*, 248 W.Va. 177; 887 S.E.2d 610, fn. 5 (2022); *Maryland v. Wilson*, 519 U.S. 408, 413 (1997). Rather, the majority’s

⁴ Justice Wooton’s opinion focuses primarily on explaining his dissent to the majority’s decision that subsistence allowance is not pensionable. His concurrence is stated only in 2 sentences in his approximately 5 ½ page opinion and the rest of the opinion addresses his dissent.

opinion that subsistence allowance is not pensionable compensation is binding precedent and as such, CPRB must correct DNR's error of including subsistence allowance in submissions to CPRB for those DNR officers who have not yet retired. W.VA. CODE § 5-10-44.

Why is it important and mandated for CPRB to correct the error as to DNR officers who have not yet received retirement benefits? CPRB is a public body established pursuant to W. Va. CODE § 5-10D-1, *et seq.*, and serves as the statutory administrator of the PERS, JRS, TRS plans, among others. As the fiduciary for these plans, CPRB must act for the exclusive benefit of all participants and beneficiaries of the plans. This requires CPRB to administer the plans in accordance with plan terms, which are set forth in various State statutes and rules. *See* Syl. Pt. 5, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1989) (holding that CPRB as the trustees of a public plan “have the highest fiduciary duty to maintain the terms of the trust, as spelled out in the statute.”)

Permitting PERS members or retirees to receive additional benefits from the plan on the basis of errors in the records of an employer could significantly undermine the ability of the CPRB to properly administer PERS and other plans. The State and other participating employers that fund the plans are not required to fund erroneously awarded benefits. Unfortunately, such errors are inevitable in PERS with more than 700 participating employers throughout the state and over 63,000 members, but in enacting the error correction provisions of W. VA. CODE § 5-10-44, the Legislature made clear that CPRB must correct those errors, regardless of any equitable concerns.

Petitioners argue that they have a “legitimate expectation” that their future retirement benefits should include subsistence allowance despite the holding in the *Clark* decision that subsistence allowance is not pensionable. This argument is unsupported by the facts. The

DNR officers that have not retired have not received a calculation of their retirement benefit and indeed no calculation occurs until the employee contacts CPRB and requests this calculation. The DNR and its officers that have not retired will suffer no loss as a result of the error correction because the DNR and each officer will receive a full refund of any amounts submitted to CPRB erroneously based on subsistence allowance. Conversely, under Petitioners' interpretation of *Clark*, both DNR and the DNR officers who had not yet retired will be required to submit additional retirement contributions going back to November 1, 2015, when DNR stopped including subsistence allowance in retirement submissions to CPRB up through July 15, 2021, the date of this Court's Mandate. Due to the statutorily-mandated method for calculating Final Average Salary in determining retirement benefits, as set forth in W. VA. CODE § 5-10-2 (13), under Petitioners' interpretation of *Clark*, current DNR officers who have not retired will owe contributions to CPRB (that include a calculation based on subsistence allowance), but those contributions will not appreciably increase the amount of the officer's retirement benefits and in some instances will not increase the benefits at all.

On page 16 of their Brief, Petitioners' argue that they "relied upon the retirement system that included subsistence pay as part of their compensable income" and further speculate that due to that reliance some of the Petitioners "may have" stayed employed by DNR instead of seeking more lucrative employment. In addition to being wildly speculative,⁵ this argument ignores the Court's holding in *Clark*: "[subsistence] allowance is not, under the terms of PERS, pensionable compensation, nor has it ever been. Thus, no promise was made upon which

⁵ The speculation seems unfounded since the monthly contribution based on subsistence allowance submitted erroneously by DNR is only \$5.85.

[Petitioners] – active or retired – could have relied to their detriment regarding the allowance’s status as pensionable compensation.” *See* 245 W.Va. 510; 859 S.E.2d 453, n. 73.

Even if Petitioners had an expectation that subsistence allowance would be included in their retirement calculations, CPRB must still correct the error and pay back the overpayments made by Petitioners and their employer. Prior decisions of our Supreme Court firmly establish this jurisprudence holding that CPRB is required to correct errors made by participating PERS employers, even if the employee may have detrimentally relied on those errors. *See e.g. W. Va. Cons. Pub. Ret. Bd. v. Jones*, 233 W. Va. 681, 683; 760 S.E.2d 495 (2014) (per curiam) (CPRB was not estopped from determining that Jones was ineligible to participate in PERS where employer erroneously enrolled him even though he participated in PERS for the next eight years); *Curry v. W. Va. Consol. Pub. Ret. Bd.*, 236 W. Va. 188, 192, 778 S.E.2d 637, 641 (2015) (noting the “mootness” of an argument that the CPRB is estopped by an employee’s reliance on his employer’s promise of PERS participation); *Ringel-Williams v. W. Va. Consol. Pub. Ret. Bd.*, ___ W. Va. ___, 290 S.E.2d 806 (2016) (denying employee’s request that the CPRB be equitably estopped from correcting an employer’s error with respect to Teachers’ Retirement System eligibility); *Myers v. W. Va. Consol. Pub. Ret. Bd.*, 226 W. Va. 738, 704 S.E.2d 738 (2010) (per curiam) (“[w]hile [employee] may have relied on the Board’s erroneous representation that he would receive service credit, the Board is statutorily bound by West Virginia Code § 5-10-44 to correct errors...The statute does not limit this requirement for equitable reasons.”).

Employer errors such as these can, in the aggregate, have a fiscal impact on the plan, but perhaps more importantly, failing to correct for the DNR officers that have not yet retired

would then be unfair to other public employees receiving subsistence allowance.⁶ Allowing certain employees to receive these benefits when others are denied that opportunity solely on the basis that their employers did not make the same mistake as the DNR would be unjust. The Legislature, the Supreme Court's prior rulings and decision in this case mandate that such errors must be corrected. Thus, the Court should follow its own decision in *Clark* and find that overpayments submitted by currently employed DNR officers and their employer to CPRB that include subsistence allowance must be corrected and the overpayment returned to the payors.⁷

⁶ For example, State Troopers receive subsistence allowance, but it is not included in their retirement contributions to CPRB because it is not pensionable.

⁷ To facilitate the return of overpayments, CPRB needs to know the identification of each DNR employee whose retirement contributions (both employer and employee) included subsistence allowance and the amounts and dates for such contributions. DNR is a large State agency with 100s of employees and only a small number are officers collecting subsistence allowance. At last check, DNR had a total of 686 employees in the retirement system, only 110 are officers, and 37 of the officers were hired after November 2015, which is when DNR ceased remitting retirement contributions on subsistence allowance. The number of DNR officers whose retirement contributions will be corrected is 73 which is the number of officers who were employed during the period in which retirement contributions were remitted on subsistence pay (ending November 2015). When DNR submits its retirement contributions to CPRB, DNR does not designate the job title and also does not designate whether subsistence allowance is included in the retirement contribution. See 2013 Retirement Deduction Report shown below and also part of the Joint Stipulation in *Clark*, paragraph 33. To adhere to the Supreme Court's decision, CPRB needs further identification from DNR regarding subsistence allowance paid to the 73 officers who were employed during the time period at issue including any times that the officer was not paid subsistence allowance. CPRB has been provided with the names of the 73 officers and only 1 of the DNR employees shown on the sample list below is an officer – Dustin S. Allen. The Report below does not state anything regarding subsistence allowance and neither do any reports submitted by DNR to CPRB during the period in question.

REPORT: WVVENDDR		GENERATED: 25 JUN 2013 10:06		RUN: TUESDAY MAR112014 08:44		PAGE 20	
301		West Virginia State Auditor's Office		Retirement Deduction Report		Check Date: 03/14/14	
DEPT: 0310 NATURAL RESOURCES DIVISION OF							
TYPE	SSN	NAME	GROSS EARNINGS + EMPLOYMENTS	EMPLOYEE RETIREMENT DEDUCTION	PCT/ GROSS	EMPLOYER DEDUCTION AMOUNT	TOTAL DEDUCTIONS
SSN Redacted		ABEL, LIZA	1,038.00	46.71	4.50	150.51	197.22
		ADDESA, JOSHUA M	1,518.37	68.33	4.50	220.16	288.49
		ADKINS, ANTHONY W	833.00	37.49	4.50	120.79	158.28
		ADKINS, CALVIN P	812.00	36.54	4.50	117.74	154.28
		ADKINS, CHARLES R	157.78	7.10	4.50	22.88	29.98
		ADKINS, DANIEL G	935.38	42.09	4.50	135.63	177.72
		ADKINS, ERNEST W	1,978.00	89.01	4.50	286.61	375.82
		ADKINS, PATRICIA A	2,097.20	94.37	4.50	304.09	390.46
		ALLEN, DUSTIN S	1,518.37	68.33	4.50	220.16	288.49
		ALLEN, HANDELL	773.00	34.79	4.50	112.09	146.88
		ALLISON, JOSHUA D	1,112.00	50.04	4.50	161.24	211.28

B. Petitioners are not entitled to Attorneys' Fees.

The issue was resolved by this Court when the Court directed in the July 15, 2021 Mandate that each party would “bear their own costs.” In Petitioners’ Brief, Petitioners ignore this Court’s Mandate. However, the Court’s mandate is warranted because Petitioners lost on their primary legal argument – that subsistence allowance is pensionable income and lost several of their supporting arguments.

Moreover, Petitioners are not entitled to an award of attorneys’ fees because they have not established any basis to depart from the general rule that each party is responsible for his or her own attorneys’ fees. West Virginia embraces the “American Rule,” according to which “each litigant bears his or her own attorney’s fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.” *See Sally-Mike Props. v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986); *in accord, see also State ex rel. Bronson v. Wilkes*, 216 W. Va. 293, 607 S.E.2d 399 (2004); *State ex rel. W. Va. Citizens Action Group v. W. Va. Econ. Dev. Grant Comm.*, 217 W. Va. 102, 617 S.E.2d 143 (2003); *Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 512 S.E.2d 217 (1998). The American Rule is predicated on the principle that a losing party “should not be penalized for merely prosecuting or defending a lawsuit, as litigation is at best uncertain.” *Sally-Mike Props.*, 179 W. Va. at 52.

In West Virginia, only limited circumstances warrant an award of attorneys’ fees -
- where the losing party is found to have acted in bad faith, or if express statutory or contractual authority exists. *Sally-Mike Props.*, 179 W. Va. at 51. 9 W. Va. at 52. The Legislature can authorize an award of attorneys’ fees by including an express provision in a statutory scheme. For

example, awards of attorneys' fees are statutorily provided for and may be awarded to successful litigants in cases filed pursuant to West Virginia's Freedom of Information Act, W. Va. CODE § 29B-1-7, the West Virginia Consumer Credit and Protection Act, W. Va. CODE § 46A-5-104, and the West Virginia Human Rights Act, W. Va. CODE § 5-11-13(c). As Petitioners admitted in their initial Motion for Fees, the Administrative Procedures Act, under which Petitioners appealed, includes no similar fee-shifting provision. *See* W. Va. CODE § 29A-5-1, *et seq.* Nor do the Legislative Rules governing CPRB standards and decisions provide for such fee-shifting. *See* W. Va. Code R. § 162-2-7. Accordingly, there is no statutory support for the Petitioners' Motion. Furthermore, there is no contractual agreement that the Petitioners could obtain attorneys' fees in the event they prevailed.

Petitioners seem to argue that as "a successful State employee litigant," Petitioners are entitled to attorneys' fees. However, as noted above, Petitioners did not prevail on the main legal issue and also lost many supporting issues in their *Clark* appeal. Importantly, this Court rejected Petitioners' main argument and overturned the decision that subsistence allowance is pensionable compensation. This Court also agreed with CPRB and held that W. Va. CODE § 5-10-44 (2015), which governs CPRB's error correction is a remedial statute, so that its terms may be applied to correct an error in PERS occurring before the amended statute's effective date of July 1, 2015. This Court also disagreed with Petitioners' argument that DNR's inclusion of subsistence allowance as pensionable compensation was a "deliberate act" protected from the Error Correction Provision. Success can be measured by degrees, but even so, Petitioners cannot meet the high standard for an award of attorneys' fees.

In support of their claim for attorneys' fees, Petitioners rely on a mandamus case decided almost 30 years ago: *West Virginia Educ. Ass'n v. The Consolidated Public Retirement*

Bd., 194 W.Va. 501, 460 S.E.2d 747 (1995). The *Clark* matter before this Court is not a mandamus proceeding and the case and standard cited by Petitioners do not apply. The correct standard for an award of attorneys' fees for a declaratory judgment action⁸ of an administrative appeal such as *Clark* is found in *Board of Review of Bureau of Employment Programs v. Gatson*, 210 W. Va. 753, 559 S.E.2d 899 (2001); *see also*, Final Order, *Shackelford v. The W.Va. Consolidated Public Retirement Bd.*, Circuit Court of Kanawha County, Civil Action No. 08-C-416 (2009) (holding that the standard for fee-shifting in mandamus actions does not apply in declaratory judgment action on an administrative appeal).

In *Gatson*, the Supreme Court of West Virginia held that a court has the authority to grant an equitable award of attorneys' fees to a ***prevailing*** litigant only when the losing public official litigant acts in "bad faith, vexatiously, wantonly, or with malice" in the course of, or in connection with proceedings (the "Bad Faith Rule"). 210 W.Va. 753, 559 S.E.2d 899 (2001). The Court further held that attorneys' fees are available as an award under the Bad Faith Rule only if (i) the subject litigation is the result of a public official willfully refusing to obey the law, or (ii) where "public officials deliberately disregard mandatory statutory provisions." 210 W.Va. 753, 559 S.E.2d 899 (2001). In 2018, the Supreme Court further held that the Bad Faith Rule is to be construed narrowly. *Tri-State Petroleum Corp. v. Coyne*, 814 S.E.2d 205, 227 (W. Va. 2018).

The *Clark* matter does not meet this high standard for fee-shifting. At the administrative level, the Hearing Officer found that subsistence allowance paid by DNR to Petitioners for such things as telephone service, dry cleaning and meal expenses did not meet the

⁸ Petitioners' Initial Brief filed in Circuit Court on March 30, 2018, specifically describes this as an "appeal of a declaratory judgment." *See* Petitioners' Initial Brief, pg. 1, which was part of the *Clark* appendix at JA 503.

statutory requirements for pensionable compensation. This is because the PERS' statutory definition of compensation requires that the payment was "for personal services rendered" by the member and the Hearing Officer concluded that subsistence allowance was not paid for personal services rendered.

In the administrative appeal in *Clark*, although the Circuit Court disagreed with the Hearing Officer's decision and CPRB's adoption of that decision, the Circuit Court found simply that this decision of CPRB was wrong. The Circuit Court did not state in its Order that CPRB's decision was vexatious, in bad faith, wanton or oppressive. Quite the contrary, CPRB did not defend and appeal this case in bad faith as there was a legitimate dispute as to the state of the law on whether subsistence allowance is pensionable. Indeed, this was THE hotly contested issue in the *Clark* matter – ruled in CPRB's favor at the administrative level; ruled in Petitioners' favor at the Circuit Court level and then overturned in CPRB's favor by this Court. Accordingly, there is no justification for an award of attorneys' fees under the prevailing standard.

Even under the standard relied upon by Petitioners for attorneys' fees, such an award is not warranted. Indeed, under the mandamus action cited by Petitioners, *West Virginia Educ. Ass'n v. The Consolidated Public Retirement Bd.*, 194 W.Va. 501, 460 S.E.2d 747 (1995) ("*W.Va. Educ. Ass'n v. CPRB*"), one could argue that the standard is similar and even higher than in *Gatson*. Petitioners cite to two syllabus points in *W. Va. Educ. Ass'n v. CPRB* that permit consideration of attorneys' fees to a prevailing party. First, syllabus point 10 allows a court to consider attorneys' fees when "a public official has **deliberately and knowingly** refused to exercise a **clear, legal duty**." Syllabus point 11 allows a court to consider attorneys' fees when "a public official has failed to exercise a clear, legal duty and certain other factors exist." Even if the Court were to apply these syllabus points from *W.Va. Educ. Ass'n v. CPRB* (which is the wrong

standard for a declaratory judgment action like *Clark*), neither support an award of attorneys' fees here.

First, applying syllabus point 10 from *W.Va. Educ. Ass'n v. CPRB*: in the *Clark* decision, this Court did not find that CPRB deliberately and knowingly refused to exercise a clear, legal duty. That language is found nowhere in the *Clark* decision. Quite the contrary, this Court simply found that CPRB did not uncover the erroneous submissions by DNR and correct them as to retirees in a timely manner. Petitioners have no valid basis for arguing that the fee-shifting standard in *W.Va. Educ. Ass'n v. CPRB* applies. Rather, CPRB adhered to its legal duty to correct the error (as soon as CPRB discovered it) of DNR including subsistence allowance as pensionable income by advising DNR to stop including subsistence allowance. Thus, no award of attorneys' fees is warranted by syllabus point 10 of *W.Va. Educ. Ass'n v. CPRB*.

Second, in applying syllabus point 11 from *W.Va. Educ. Ass'n v. CPRB*: in the *Clark* decision, this Court did not find that CPRB "failed to exercise a clear, legal duty." Rather, CPRB was properly executing the PERS plan and following its legal duty when it advised DNR to stop including subsistence allowance in retirement contributions. Thus, there is no need for the Court to consider the other factors set forth in syllabus point 11 of *W.Va. Educ. Ass'n v. CPRB*.

In addition to failing to meet any standard for fee-shifting, the Circuit Court's answer in the Certification Order contains no findings as to why fees are warranted.⁹ In the case

⁹ The Certification Order also does not address the amount of time billed and indeed no bills or individual time entries have been submitted by Petitioners. The Certification Order also does not adopt an hourly rate for Petitioners' counsel. In the *Second Supplement to Petitioners' Brief on Issues to be Addressed following Remand*, page 3, Petitioners' counsel claims a billing rate of \$650 per hour. *Clark* J.A. 000143. This billing rate is exceptionally high especially in light of the fact that Petitioners' counsel claimed a billing rate of almost half that (\$350) in circuit court briefing in a 2022 retirement matter against CPRB. See *Birchfield-Modad v. West Virginia Consolidated Public Retirement Board*, Civil Action Number 19-AA-24, Circuit Court of Kanawha County, WV, see *Clark*, JA, p. 175. Petitioners' counsel has not explained why his rate almost doubled in *Clark* for legal services during approximately the same time

relied upon by Petitioners, *W.Va. Educ. Ass'n v. CPRB*, the Supreme Court reversed the Circuit Court's award of attorneys' fees in that mandamus proceeding and remanded with directions for the Circuit Court to consider certain factors in deciding whether attorneys' fees were warranted. No remand on this issue is needed here because Petitioners have not met the high standard for fee-shifting. Nevertheless, the fact that Circuit Court did not explain the basis for why such an unprecedented award¹⁰ was granted, is further support to overturn the Circuit Court's answer to certified question number 2.

V. Conclusion

The Court's holding in *W.Va. Consolidated Public Retirement Bd. v. Clark*, 245 W.Va. 510; 859 S.E.2d 453 (2021) is clearly limited to overpayments of retirement benefits *from* CPRB under subsection (e) of § 5-10-44. Because the holding regarding untimeliness does not apply to subsections (c) and (d) which govern overpayments *to* CPRB by employers and employees, CPRB must continue to adhere to the PERS plan and its fiduciary duty to correct the errors for active DNR officers who had not retired at the time of the *Clark* decision and must remove all contributions based on subsistence allowance that DNR made to CPRB on behalf of those officers and must return those amounts to the payors. This correction is mandated by W.Va.

period for the same type of case as *Birchfield-Modad* and where Petitioners lost on the main legal issue and several other issues. While CPRB agrees that legal issues involving retirement are challenging, \$650 per hour is way overpriced. Even \$350 is high as West Virginia courts have approved much lower hourly rates for attorneys' fees. Specifically, in a 2017 Circuit Court case where **CPRB was awarded attorneys' fees**, Judge Burnside in Raleigh County approved an hourly rate of \$250.

¹⁰ Such an award would be unprecedented as Petitioners have cited to no prior case where a court ordered CPRB to pay attorneys' fees for its opponent. Petitioners reference two Circuit Court matters, but in neither case did the Circuit Court find that attorneys' fees were warranted. First, in *Tackett v. CPRB*, 2017 WL 5509926 (No. 16-0963, 11/17/2017 Memorandum Opinion) all issues in *Tackett* have been resolved and that matter has been dismissed with no ruling on the motion for attorneys' fees. See, June 29, 2023 *Agreed Dismissal Order*. The Order does not mention attorneys' fees. Second, Petitioners cite to *W.Va. Consolidated Public Retirement Bd. v. Wood*, 233 W.Va. 222, 757 S.E.2d 752 (2014), but admits that the Court did not rule on attorneys' fees, and instead the parties reached an agreement on that issue.

Code § 5-10-44(c) and (d) and is necessary to implement the Court’s holding in *Clark* that subsistence allowance is not pensionable compensation. Thus, the Court should overturn the Circuit Court’s answer to certified question 1.

Because Petitioners have not met the high standard for fee-shifting, the Court should also overturn the Circuit Court’s answer to certified question 2 and as stated in the Court’s mandate each party shall “bear their own costs.”

**The West Virginia Consolidated
Public Retirement Board**

By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 24-208

ROBERT CLARK, *ET AL.*,

Petitioners,

v.

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

Respondent.

Certificate of Service

I, Ronda L. Harvey, do hereby certify that on this 5th day of August 2024, a copy of the foregoing refiling of *Response to Petitioner's Certified Question Brief* was electronically filed on all counsel of records using the File & Serve Xpress system.

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