

NO. 33502

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

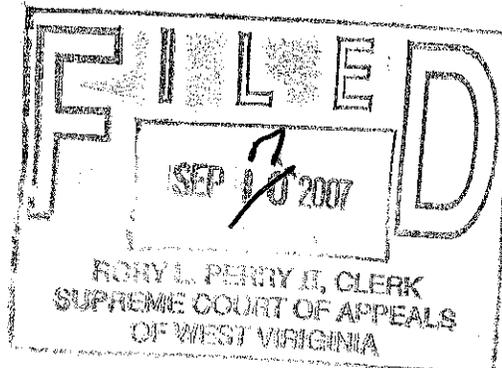
WILLIAM R. SMITH,

Petitioner Below - Respondent,

v.

**STATE OF WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

Respondent Below – Petitioner.



**WILLIAM R. SMITH'S RESPONSE TO
BRIEF ON CERTIFIED QUESTION IMPROPERLY
DENOMINATED BRIEF ON BEHALF OF APPELLANT**

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I. INTRODUCTION

Respondent William R. Smith submits this response to brief on certified question, which is improperly denominated a brief of appellant, filed by Petitioner State of West Virginia Consolidated Public Retirement Board (the "Board"). This Court should dismiss the certified question because the question does not meet the jurisdictional requirements of West Virginia Code Section 58-5-2, and the certificate does not meet the requirements of West Virginia Rule of Appellate Procedure 13(b). Specifically, the certificate does not state whether the question certified arises, in accordance with the provisions of Section 58-5-2, upon (1) the sufficiency of the summons or return of service; (2) a challenge to the sufficiency of a pleading or the venue of the circuit court; (3) the sufficiency of a motion for summary judgment where such motion has been denied; (4) a motion for judgment on the pleadings; (5) the jurisdiction of the circuit court of a person or subject matter; or (6) the failure to join an indispensable party. Manifestly, the question does not arise upon any of the enumerated circumstances required for this Court to exercise jurisdiction.

If it does not dismiss the certified question, then the Court should answer the certified question in the affirmative. The Circuit Court of Berkeley County properly held as a matter of law that the reelection of an incumbent to a consecutive term of office constitutes reemployment under West Virginia Code Section 5-10-18(a), thereby making the incumbent eligible to reinstate forfeited Public Employees Retirement System ("PERS") credit upon repayment of the amount withdrawn plus interest. In any event, Mr. Smith is also entitled to purchase credited service previously forfeited under West Virginia Code Section 5-10-18(d). Therefore, any error in the Circuit Court's answer to the question is harmless.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Mr. Smith commenced this action, which is an administrative appeal under the State Administrative Procedures Act, W. Va. Code Section 29A-5-4, on March 3, 2006. Mr. Smith has petitioned for appeal to the Circuit Court of Berkeley County from the final order of the Board on February 1, 2006, which adopted the recommended decision of Hearing Officer Jack W. DeBolt, and denied Mr. Smith's request to reinstate PERS credited service previously forfeited by him. The Board filed the administrative record on April 3, 2006, and the parties briefed the assignments of error thereafter.

The Circuit Court entered an order certifying a question to this Court on December 22, 2006.

The order states as follows:

Before this Court decides whether to affirm or deny the appeal, this Court certifies this legal question and stays the proceedings in the Circuit Court.

...

CERTIFIED QUESTION:

Does the reelection of an incumbent, to a consecutive term of office, constitute reemployment under W. Va. Code § 5-10-18(a), thereby making the incumbent eligible to reinstate forfeited PERS credit upon repayment of the amount withdrawn plus interest?

CIRCUIT COURT ANSWER:

YES

The Board filed a petition in certified question, which is improperly denominated a petition for appeal, on February 20, 2007.

This Court entered an order docketing the certified question for hearing on June 27, 2007.

III. STATEMENT OF FACTS

Mr. Smith is the Sheriff of Berkeley County and a member of the PERS. Mr. Smith had four years of credited service with the PERS through December 31, 2004, following his first four year term in office. Mr. Smith was reelected to office and has accrued additional credited service since January 1, 2005, when he started a second term. Mr. Smith was not sworn in for his second term until some time after January 1, 2005.

Prior to beginning his first term as Sheriff on January 1, 2001, Mr. Smith had twelve years and five months of credited service with the PERS as a Deputy Sheriff. Following the termination of his employment as a Deputy Sheriff in 1989, Mr. Smith withdrew his contributions.

In or about June 2004, Mr. Smith notified the Board by telephone of his intent to purchase the previously forfeited service credits. On or about June 23, 2005, Mr. Smith tendered \$5,000.00 to the Board in partial payment to reinstate the previously forfeited service credits. The Board, however, refused to accept the payment.

IV. STATEMENT OF ISSUES

A. Whether this Court should dismiss the certified question because the question does not meet the jurisdictional requirements of West Virginia Code Section 58-5-2, and the certificate does not meet the requirements of West Virginia Rule of Appellate Procedure 13(b).

B. Whether this Court should answer the certified question in the affirmative because the reelection of an incumbent, to a consecutive term of office, constitutes reemployment under West Virginia Code Section 5-10-18(a), thereby making the incumbent eligible to reinstate forfeited PERS credit upon repayment of the amount withdrawn plus interest.

V. STANDARDS OF DECISION AND REVIEW

The standard of decision applicable to the Circuit Court in this civil action under the State Administrative Procedures Act, W. Va. Code Section 29A-5-4,¹ is as follows:

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: “(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

Shepherdstown Volunteer Fire Dep't v. State ex rel. State of West Virginia Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342, Syl. Pt. 2 (1983).²

This Court should make an independent determination of whether the matters brought before it lie within its jurisdiction. *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807, Syl. Pt. 1 (1992). Moreover, a question of jurisdiction is a question of law, which this Court reviews *de novo*. *Carroll v. Stump*, 217 W. Va. 748, 619 S.E.2d 261, 264 (2005); *State ex rel. Orlofske v. City of Wheeling*, 212 W. Va. 538, 575 S.E.2d 148, 152 (2002) (quoting *Snider v. Snider*, 209 W. Va. 771, 551 S.E.2d 693, 699 (2001)).

¹This Court has recognized that the Board is subject to and governed by the State Administrative Procedures Act. *State ex rel. Young v. Sims*, 192 W. Va. 3, 449 S.E.2d 64, Syl. Pt. 1 (1994).

²Although the Board argues on page seven of its opening brief that the Court should afford deference to its construction of Section 5-10-18, this Court has refused to afford such deference in the past. See *Summers v. West Virginia Consolidated Public Retirement Board*, 217 W. Va. 399, 618 S.E.2d 408 (2005) (per curiam) (holding that Board rule did not apply to calculation of member's retirement benefits).

Similarly, the standard of review applicable to this Court for questions of law answered and certified by a circuit court is *de novo*. *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172, Syl. Pt. 1 (1996).

In addition, in *Hudkins v. State Consolidated Public Retirement Board*, 647 S.E.2d 711 (2007) (per curiam), this Court has recently articulated the standard of review of an administrative order under Section 29A-5-4 as follows:

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

2. "In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syllabus Point 2, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

Id. at Syl. Pts. 1 - 2.

VI. DISCUSSION

A. **The Court Should Dismiss the Certified Question because the Question Does Not Meet the Jurisdictional Requirements of West Virginia Code Section 58-5-2, and the Certificate Does Not Meet the Requirements of West Virginia Rule of Appellate Procedure 13(b).**

As a threshold matter, this Court should dismiss the certified question because the question does not meet the jurisdictional requirements of West Virginia Code Section 58-5-2, and because the certificate does not meet the requirements of West Virginia Rule of Appellate Procedure 13(b).

Section 58-5-2 provides:

Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of

a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the Supreme Court of Appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the Supreme Court of Appeals.

This Court has held that the question of certifiability of decisions of a circuit court goes to the jurisdiction of this Court. *State v. Brown*, 159 W. Va. 438, 223 S.E.2d 193, Syl. Pt. 2 (1976).

In addition, the Court has held that Section 58-5-2 should be strictly construed because it is in derogation of common law. *Toler v. Shelton*, 159 W. Va. 476, 223 S.E.2d 429, Syl. Pt. 1 (1976);

Brown, at Syl. Pt. 1. The Court has explained the purpose of Section 58-5-2 as follows:

The legislative purpose in enacting Code, 58-5-2, was to enable this Court to determine upon certificate all questions involving the sufficiency of a summons, a return of service or a pleading which affects or controls the final disposition of a case. The obvious underlying reason for this statute is to permit the adjudication of certain preliminary but essential matters before vexatious costs are incurred and needless delays take place in the ultimate and complete determination of the case.

Leishman v. Bird, 147 W. Va. 525, 129 S.E.2d 440, 442 (1963).

Accordingly, the Court has held:

Questions subject to certification pursuant to W. Va. Code 58-5-2 (1967), are *limited to* any question arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party.

Bass v. Coltelli, 192 W. Va. 516, 453 S.E.2d 350, Syl Pt. 3 (1994) (emphasis added).

Rule 13(b) is consistent with Section 58-5-2 and provides the form for the certificate in relevant part as follows:

The certificate shall . . . state, as to each question certified, whether it arises, in accordance with the provisions of W. Va. Code 58-5-2, upon (1) the sufficiency of the summons or return of service; (2) a challenge to the sufficiency of a pleading or the venue of the circuit court; (3) the sufficiency of a motion for summary judgment where such motion has been denied; (4) a motion for judgment on the pleadings; (5) the jurisdiction of the circuit court of a person or subject matter; or (6) the failure to join an indispensable party.

This Court has refused to docket certified questions where the criteria of Section 58-5-2 and Rule 13(b) apparently were not met. *See, e.g., Clutter v. Coastal Lumber Co.*, No. 941037 (W. Va. 1994) (where trial court's ruling on whether deferred bonus was covered by Wage Payment and Collection Act was certified); *McMillen v. City of Martinsburg*, No. 941387 (W. Va. 1994) (where trial court's interpretation of term "experience" as it related to police civil service examinations was certified).

In this action, the certificate does not state whether the certified question arises in accordance with the provisions of Section 58-5-2, upon (1) the sufficiency of the summons or return of service; (2) a challenge to the sufficiency of a pleading or the venue of the circuit court; (3) the sufficiency of a motion for summary judgment where such motion has been denied; (4) a motion for judgment on the pleadings; (5) the jurisdiction of the circuit court of a person or subject matter; or (6) the failure to join an indispensable party.

Manifestly, the question certified does not arise upon any of the enumerated circumstances. Indeed, the Circuit Court expressly stated in its order:

Before this Court decides whether to affirm or deny the appeal, this Court certifies this legal question and stays the proceedings in the Circuit Court.

The Circuit Court's statement recognizes the procedural posture of the administrative appeal, which simply is not consistent with the certifiability of questions under Section 58-5-2 and Rule 13(b). For these reasons alone, the Court should dismiss the certified question.

B. The Court Should Answer the Certified Question in the Affirmative.

If it does not dismiss the certified questions, then the Court should answer the certified question in the affirmative. The Circuit Court correctly answered the question of whether the reelection of an incumbent, to a consecutive term of office, constitutes reemployment under West Virginia Code Section 5-10-18(a), thereby making the incumbent eligible to reinstate forfeited PERS credit upon repayment of the amount withdrawn plus interest in the affirmative. Section 5-10-18(a) provides:

When a member of the Retirement System retires or dies, he or she ceases to be a member. When a member leaves the employ of a participating public employer for any other reason, he or she ceases to be a member and forfeits service credited to him or her at that time. If he or she becomes reemployed by a participating public employer he or she shall be reinstated as a member of the Retirement System and his or her credited service last forfeited by him or her shall be restored to his or her credit: Provided, That he or she must be reemployed for a period of one year or longer to have the service restored: Provided, however, That he or she returns to the members' deposit fund the amount, if any, he or she withdrew from the fund, together with regular interest on the withdrawn amount from the date of withdrawal to the date of repayment, and that the repayment begins within two years of the return to employment and that the full amount is repaid within five years of the return to employment.

The term "reemployment" or "reemployed" is not defined in the West Virginia Public Employees Retirement Act. *See* W. Va. Code § 5-10-2 (containing definitions). West Virginia Code Section 5-10-3a(a), however, provides that the provisions of the West Virginia Public Employees Retirement Act should be liberally construed. *See, e.g., Flanigan v. West Virginia Pub. Employees' Ret. Sys.*, 176 W. Va. 330, 342 S.E.2d 414, Syl. Pt. 1 (1986) (holding that forfeiture or waiver of

pension rights should be found only where clearly intended by parties). Moreover, this Court has held that PERS plan participants have contractually vested property rights, which are enforceable and cannot be impaired or diminished by the State. *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816, Syl. Pt. 16 (1988).

The term "reemployed" is used in the School Personnel Act, W. Va. Code § 18A-1-1, *et seq.*, in a context that makes it clear that the term should be liberally construed to include any reemployment, regardless of whether there is a break in service. West Virginia Code Section 18A-2-8a provides:

The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one [§ 18A-2-1] of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five [§§ 18A-2-4, repealed and 18A-2-5] of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.

Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been *reemployed* may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

(Emphasis added.) See *In re Estate of Lewis*, 217 W. Va. 48, 614 S.E.2d 695, Syl. Pt. 3 (2005) (stating in part that "[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia*").

Just as a probationary employee is reemployed under the School Personnel Act upon rehiring or retention, regardless of whether there is a break in service, an elected official in the PERS is reemployed under the West Virginia Public Employees Retirement Act upon reelection. Each term of office by an elected official in the PERS is a new, separate period of employment for that official from which, at minimum, the official has the right under Section 5-10-18(a) to seek to purchase previously forfeited service credits. *See* W. Va. Const. Art. IX, § 3 (providing for sheriff to serve no more than two consecutive terms); W. Va. Code § 6-5-1 (providing that terms of sheriffs shall begin on the first day of January next after their election).

In this action, Mr. Smith's reelection to a second term as Sheriff of Berkeley County was a reemployment, or a new, separate period of employment beginning in January 2005. Beginning at that time, Mr. Smith had the right under Section 5-10-18(a) to seek to purchase previously forfeited service credits as long as the repayment began within two years of January 2005, and the full amount is repaid within five years of January 2005. Mr. Smith's tender of \$5,000.00 to the Board in partial payment to reinstate the previously forfeited service credits met the requirements of Section 5-10-18(a), and the Board's refusal to accept the payment was erroneous.

The West Virginia Constitution, Article IV, Section 6 and West Virginia Code Section 6-5-2, which are also cited by the Board, are likewise inapposite. Neither provision discusses the term "reemployment" or "reemployed." Moreover, they are commonly referred to as holdover provisions, which expressly apply only when an official is not reelected or reappointed. *See State ex rel. Warder v. Gainer*, 153 W. Va. 35, 167 S.E.2d 290 (1969) (holding that where member of Board of Probation and Parole was not reappointed after expiration of term and successor member was not appointed, member continued in office under holdover provisions).

The Board's argument that the phrase "service last forfeited" in Section 5-10-18(a) would prohibit Mr. Smith from reinstating the previously withdrawn service credit is meritless. Discussion of this phrase is outside the scope of the certified question, which is limited to the meaning of the term "reemployment" or "reemployed." In any event, the service at issue is the service last forfeited. In fact, the service at issue is the only service forfeited. This Court has repeatedly emphasized the importance of the plain meaning rule. *See, e.g., State v. Green*, 207 W. Va. 530, 534 S.E.2d 395, 403 (2000); *Mildred L.M. v. John O.F.*, 192 W. Va. 345, 452 S.E.2d 436, 441 (1994); *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384, 386 (1970); *Norfolk & W. Ry. Co. v. Mingo County Court*, 123 W. Va. 461, 15 S.E.2d 574 (1941).

Finally, although also outside the scope of the certified question, it is important to note that Mr. Smith is also entitled to purchase credited services previously forfeited pursuant to West Virginia Code Section 5-10-18(d). Section 5-10-18(d) provides as follows:

Effective the first day of March, two thousand three, and ending the thirty-first day of December, two thousand four, any member may purchase credited service previously forfeited by him or her and the credited service shall be restored to his or her credit: Provided, that he or she returns to the members' deposit fund the amount, if any, he or she withdrew from the fund, together with interest on the withdrawn amount from the date of withdrawal to the date of repayment at a rate to be determined by the Board. The repayment under this section may be made by lump sum or repaid over a period of time not to exceed sixty months. Where the member elects to repay the required amount other than by lump sum, the member is required to pay interest at the rate determined by the Board until all sums are fully repaid.

Under the plain meaning of Section 5-10-18(d), there is no defined start date for repayment. The only requirement is that repayment may be made in increments or by lump sum within sixty months with interest.

In this action, Mr. Smith notified the Board by telephone of his intent to purchase previously forfeited credits in or about June 2004. Again, applying the plain meaning rule discussed above to Section 5-10-18(d), that notice was timely. Moreover, the notice gave Mr. Smith the right to purchase previously forfeited credits within sixty months of December 31, 2004. Accordingly, the Board should not have rejected his tender of \$5,000.00 on June 20, 2005, and any error in the Circuit Court's answer to the certified question is harmless given that the same positive result would obtain under Section 5-10-18(d) as under Section 5-10-18(a).

The Board's argument that Mr. Smith's opportunity to reinstate his previously forfeited service credit expired when no payment to the Board was received by December 31, 2004, ignores the plain meaning of Section 5-10-18(d) under the guise of interpretation. A statute may not, under the guise of interpretation be modified, revised, amended or rewritten. *Consumer Advocate Div. of Pub. Serv. Comm'n v. Public Serv. Comm'n*, 182 W. Va. 152, 386 S.E.2d 650, Syl. Pt. 1 (1989). This is especially true in this action because, as discussed above, Section 5-10-3a(a) requires that the provisions of the West Virginia Public Employees Retirement Act be liberally construed. As this Court has observed:

In approaching a resolution of this matter, it is noted that under West Virginia Code § 5-10-3a (1979 Replacement Vol.) we are directed to give substantial weight to the remedial nature of the PERS Act by the legislative ordination to construe its provisions liberally in favor of its intended beneficiaries. We are also guided by the proposition that "a governmental body, charged with as important function as the administration of a public employees retirement system, bears a most stringent duty to abstain from giving inaccurate or misleading advice."

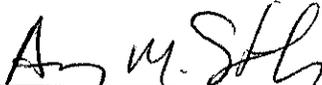
Flanigan, 342 S.E.2d at 419.

VII. CONCLUSION

For all of the foregoing reasons, this Court should dismiss the certified question on the grounds that the question does not meet the jurisdictional requirements of West Virginia Code Section 58-5-2 and that the certificate does not meet the requirements of West Virginia Rule of Appellate Procedure 13(b). Alternatively, the Court should answer the certified question in the affirmative, holding that the Circuit Court correctly answered the certified question, and that any error in the Circuit Court's reasoning is harmless.

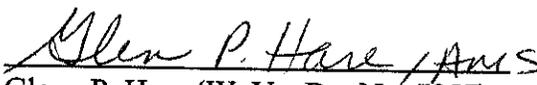
Dated this 7th day of September, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2007, I caused to be served the foregoing "William R. Smith's Response to Brief on Certified Question Improperly Denominated Brief on Behalf of Appellant" upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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