

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

No. 33502

William R. Smith,

Petitioner Below – Respondent,

v.

State of West Virginia Consolidated Public Retirement Board,

Respondent Below – Petitioner.

CERTIFIED QUESTION FROM THE CIRCUIT COURT OF BERKELEY COUNTY

**Civil Action No. 06-C-156
Christopher C. Wilkes, Judge**

**REPLY BRIEF ON BEHALF OF THE
WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD**

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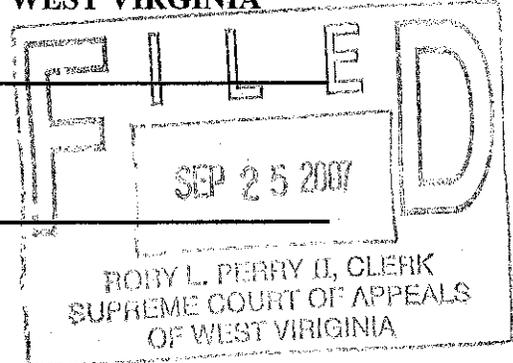


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COMES NOW, the State of West Virginia Consolidated Public Retirement Board (the "Board"), in Reply to "William R. Smith's Response to Brief on Certified Question Improperly Denominated Brief on Behalf of Appellant,"¹ and states as follows:

I. ARGUMENT

A. The Court Has Jurisdiction To Consider Any Question Of Law Upon Certification From A Circuit Court Pursuant To The Clear Language Of W. Va. Code § 58-5-2 (1998).

Smith's Response requests the Court to dismiss this certified question for want of jurisdiction. Smith's argument is apparently based on cases interpreting the statute allowing for the certification of questions to the Supreme Court of Appeals, West Virginia Code § 58-5-2; however, the decisions he cites interpreted a prior version of the statute, and are therefore no longer controlling. Moreover, the statute, as amended, clearly and plainly provides for jurisdiction over certified questions like the question at issue in this matter. Accordingly, Smith's argument has no merit.

The question certified by the Circuit Court of Berkeley County was:

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§ 5-10-18(a), thereby making the incumbent eligible to reinstate forfeited PERS credit upon repayment of the amount withdrawn plus interest?

¹ In his Response, Smith argues that the Board improperly denominated itself as the Appellant in this proceeding. The Court has held that "[t]he method of reaching the Supreme Court by certification ... is appellate in nature." *Wheeling v. C & P Tel. Co.*, 81 W. Va. 438, 94 S.E. 511 (1917). According to Rule 1(c) of the West Virginia Rules of Appellate Procedure, an "Appellant" is defined as "The party who takes the appeal." A "Petitioner" is defined as "The party who seeks the appeal and who, upon the granting of the appeal, becomes the appellant..."

The Petition in this matter was filed by the Board, in response to an adverse ruling on the certified question by the circuit court. It was the Board's understanding that when the Court granted the Petition, the Board became the "Appellant." The Board noted that the Order granting the Petition referred to Mr. Smith as the "Petitioner" and the Board as the "Respondent," but believed those denominations referred to the positions of the parties at the circuit court level. The Board apologizes for any confusion, and has conformed this Reply brief with the denominations used by Mr. Smith to avoid any further confusion.

Smith is correct that under earlier versions of Section 58-5-2, a question such as this, which is a pure question of law, was improper for certification because it is not related to one of the specific circumstances enumerated in Section 58-5-2. This is because the prior version of the statute expressly limited the types of questions that could be certified:

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, in any case within the appellate jurisdiction of the supreme court of appeals, may, in the discretion of the circuit court in which it arises, and shall, on the joint application of the parties to the suit, in beneficial interest, 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.

W. Va. Code § 58-5-2 (1967).

In 1998, however, the language of the statute changed significantly to allow the certification of questions of law exactly like the question presented in this appeal. As Smith states in his Response, Section 58-5-2 (1998) now provides as follows:

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.

(emphasis added). That Section 58-5-2 no longer limits certification to the enumerated circumstances is clear from the language “including, but not limited to,” which was added in 1998. Moreover, the statute now specifically states that “any question of law” may be certified.

Smith cites several of this Court’s pre-1998 opinions interpreting and applying the certification statute. While some of the Court’s general statements about the provision may be instructive, any decisions in which the Court found jurisdiction was lacking because the certified question did not relate to an enumerated circumstance are plainly inapplicable given the change in the language of the statute. See e.g. Bass v. Coltelli, 192 W. Va. 516, 453 S.E.2d 350 (1994) (finding a lack of jurisdiction for this reason under W. Va. Code § 58-5-2 (1967)); Clutter v. Coastal Lumber Co., No. 941037 (W. Va. 1994); McMillen v. City of Martinsburg, No. 941387 (W. Va. 1994) (emphasis added). Since the change to Section 58-5-2 in 1998, the Court has considered a number of certified questions asking it to interpret a statute or explain the law, despite the fact that the questions did not related to the specifically enumerated circumstances cited by Smith. See e.g. Phillips v. Larry’s Drive-In Pharmacy, Inc., ___ W. Va. ___, 647 S.E.2d 920 (2007) (certified question asked the Court to determine whether a pharmacy was a “health care provider” under the 1986 Medical Professional Liability Act, after circuit court denied a motion in limine regarding that question); Keith v. Keith, ___ W. Va. ___, 647 S.E.2d 731 (2007) (certified question asked the Court to settle a question of law regarding the interest of a remainderman in proceeds from an insurance policy applied for and purchased by a life tenant); Fitzgerald v. Fitzgerald, 219 W. Va. 774, 639 S.E.2d 866 (2006) (certified question asked the Court whether a spouse’s workers’ compensation benefits constitute marital property for purposes of equitable distribution, and if so, how distribution should occur, and was certified because it was a matter of first impression in West Virginia). Accordingly, the Court has

recognized that the 1998 amendment to Section 58-5-2 makes issues such as this appropriate for consideration upon certified questions, even though it does not arise under one of the enumerated circumstances.

Smith also refers to Rule 13(b) of the West Virginia Rules of Appellate Procedure, which establishes the form of the certificate of the circuit court required for certified questions. Rule 13(b) provides that the certificate of the circuit court shall state each question certified and the ruling the circuit court has made. Rule 13(b) does also provide that the certificate "shall also state ... whether it arises, in accordance with the provisions of W. Va. Code, 58-5-2, upon" the enumerated circumstances described in Section 58-5-2. Smith argues that the Court should dismiss the certified question because the circuit court's order did not specify whether the certified question arose under one of the enumerated circumstances.

Admittedly, the language of Rule 13(b) is unclear as to the form of a certificate where a certified question does not fall under one of the enumerated circumstances; however, this may be because Rule 13 was last amended in 1994, prior to the 1998 amendment of Section 58-5-2 which provided for this type of certified question. The circuit court's order did specify that the certified question arose under the following language found in Section 58-5-2:

'Any question of law ... 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.' W. Va. Code § 58-5-2.

See Order Certifying Question to the Supreme Ct. of Appeals of W. Va., No. 06-C-156, at p. 6 (Circuit Ct. of Berkeley County, W. Va. December 22, 2006). Accordingly, the Board suggests

that there was no error in the form of the certificate issued by the circuit court certifying this question to the Court.

The certified question presented to the Court in this appeal is appropriate under W. Va. Code § 58-5-2 in that it presents a question of law that was certified to the Court in the discretion of the circuit court. Smith's argument is based on authority that is no longer controlling, in that the language of the statute has changed since the decisions cited by Smith were issued. The Court clearly has jurisdiction to answer this question, and should reject Smith's argument outright.²

B. The Court Should Answer The Certified Question In The Negative, And Hold That The Reelection Of An Incumbent To A Consecutive Term Of Office Is Not Reemployment For Purposes Of W. Va. Code § 5-10-18(a).

In his Response, Smith urges the Court to answer the certified question in the affirmative, and hold that the reelection of an incumbent to a consecutive term of office constitutes reemployment under West Virginia Code § 5-10-18(a), such that the incumbent is eligible to reinstate previously withdrawn PERS credit upon repayment of the amount withdrawn plus interest. As the Board discussed in more detail in its Brief on Behalf of Appellant, the language of Section 5-10-18(a) clearly contemplates but one opportunity to reinstate service credit: within two years of the "return to employment."

Smith's Response cites Flanigan v. W. Va. Public Employees' Retirement Sys., 176 W. Va. 330, 342 S.E.2d 414 (1986) for the proposition that forfeiture or waiver of pension

² In addition to raising this issue in his Response, Smith filed a Motion to Dismiss the Certified Question. The Board notes that it is filing a Response to Smith's Motion to Dismiss simultaneous with this Reply Brief raising the same objections with regard to the outdated authority cited by Smith in support of his Motion.

rights should be found only where clearly intended by the parties. The Board suggests that this case should not be read as providing an opportunity for every PERS member to ignore the clear language of a statute and later claim the statute should be read so as to grant a right they “did not intend” to forfeit. Such an interpretation could result in a flood of litigation even where the guidelines and statutes are clear. Moreover, in Flanigan, the Court was merely responding to the fact that the member was given unclear advice about his pension rights, whereas in this case, there is no dispute that Mr. Smith was sent at least two letters informing him of the deadline by which he had to initiate repayment.

Smith then refers to a provision of the School Personnel Act, West Virginia Code Section 18A-2-8a, in which the word “reemployed” is used, arguing that Section 5-10-18(a) should be read *in pari materia* with this provision. This Court often looks to similar provisions for guidance in interpreting statutes; however, those statutes which “relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose” are the most instructive on this point. See In re Estate of Lewis, 217 W. Va. 48, 614 S.E.2d 695 (2003). The School Personnel Act, while dealing generally with public employees, does not have the same or even a similar purpose as the Public Employees Retirement Act (the “Act”). The School Personnel Act, and the provision cited by Smith in particular, do not govern the rights and obligations of state employees with regard to their retirement benefits, and therefore cannot be regarded as having the same purpose as the Act such that their terms should necessarily be read in conjunction with one another.

The Board suggests that the Court instead look to the use of the term “reemployment” within the Act itself. The word “reemployment” is used in several instances throughout the Act, each time referring to a “return to employment” after a break in employment,

and in particular, a retirement. See W. Va. Code §§ 5-10-26 (titled, in part, "reemployment," and referred to in part (b) as "[a] disability retirant who is returned to the employ of a participating public employer"); 5-10-35 (titled, in part, "transfers from fund on reemployment," and again referring to a disability retirant who returns to the employ of a participating public employer); 5-10-48 (titled, in part, "reemployment after retirement," and referring in various parts to "former employees" who retire and later are "reemployed"). Likewise, an opinion of the Attorney General rendered on the same provision supports this interpretation as well:

in order for an individual to retain credited service in the Retirement System (1) he must have been a member of the System in the first instance; (2) **he must, after having left the System, subsequently reenter it** within a period of five years from and after the date of his original separation; and (3) he must have returned to the members' deposit fund the amount, if any, which he withdrew therefrom together with regular interest from the date of withdrawal to the date of payment.

Op. Att'y Gen., Feb. 20, 1975, at p. *9-10 (emphasis added).

The Act provisions using the term "reemployment" and the Attorney General opinion cited above offer further support for the Board's position that reemployment occurs upon a "return to employment," which can only occur after an actual break in service or a retirement. No such break in service occurs in the case of an incumbent's reelection to a consecutive term of office. Despite Mr. Smith's argument to the contrary, the "holdover" provision found in West Virginia Code § 6-5-2 is instructive on this point as well, because it confirms that there is to be no break in service as long as a successor has not been elected. Smith goes on to argue that the Board's discussion of the phrase "service last forfeited," which is found within the Section 5-10-18(a), is outside the scope of the certified question. It seems clear that the word "reemployment"

should, at the very least, be read in the context of the remainder of the same provision in which it is found.

Finally, Smith argues that, even though the issue is outside the scope of the certified question, Mr. Smith should be entitled to reinstate his previously withdrawn credit under West Virginia Code Section 5-10-18(d). This issue has not been ruled upon by the Circuit Court and, as Smith concedes, was not brought up in the certified question; therefore, this issue is completely inappropriate for review by the Court at this time.

Both the plain meaning of the word “reemployment” and the context in which it is used, both within Section 5-10-18(a) and the PERS Act as a whole, support the Board’s position that an incumbent who is reelected to a consecutive term of office is not reemployed such that he receives an additional window of opportunity to reinstate previously forfeited service credit. Accordingly, the Board respectfully requests the Court to answer the certified question in the negative.

II. CONCLUSION

For all of the foregoing reasons, and in addition to those discussed in the “Brief on Behalf of Appellant,” the Court should deny Smith’s Motion to Dismiss, take up the certified question, and answer the certified question in the negative. The Board’s interpretation is reasonable and not contrary to legislative intent, and therefore should have been afforded great weight and substantial deference by the Circuit Court. For these reasons, the Circuit Court’s Order answering the certified question in the affirmative should be reversed.

Respectfully Submitted,

THE WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD
Respondent Below - Petitioner



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Christopher C. Wilkes, Judge

CERTIFICATE OF SERVICE

I, Lenna R. Chambers, counsel for Appellant, West Virginia Consolidated Public Retirement Board, hereby certify that I have served the foregoing *“Reply Brief on Behalf of West Virginia Consolidated Public Retirement Board”* upon the Respondent’s counsel by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 25th day of September 2007, addressed as follows:

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