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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
DIVISION II

WILLIAM R. SMITH,

Petitioner,

v.

STATE OF WEST VIRGINIA
CONSOLIDATED PUBLIC
RETIREMENT BOARD,

Respondent.

CIVIL ACTION
NO. 06-C-156,
JUDGE WILKES

BERKELEY COUNTY
CIRCUIT CLERK
2006 DEC 22 AM 10:10
VIRGINIA STATE COURTS

ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

I. INTRODUCTION

This certified question stems from an appeal by William R. Smith, Sheriff of Berkeley County ("Petitioner"), by counsel Glenn P. Hare, Esq. Petitioner appeals a decision by the Consolidated Public Retirement Board ("Board"), by counsel Erica M. Mani, Esq., which denied Petitioner's request to reinstate previously forfeited service credit by return of withdrawn contributions. The Board issued its order on February 1, 2006, adopting the recommendations of Hearing Officer, Jack W. DeBolt, dated November 16, 2005, and Board, by counsel, filed the Administrative Record on April 3, 2006. The Circuit Court established a briefing schedule at a hearing on March 31, 2006 and entered a scheduling order April 19, 2006. Counsel for Mr. Smith filed the brief in support on May 16, 2006. Judge David H. Sanders recused from the instant action on June 23, 2006.

cc
G. Hare
E. Mani

ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

II. STATEMENT OF THE FACTS

1. The Petitioner, William R. Smith, born on June 11, 1947, is presently Sheriff of Berkeley County and a member of the Public Employees Retirement System (hereinafter "PERS").

2. The Petitioner has held the position as Sheriff of Berkeley County since January 1, 2001, and since January 1, 2001, the Petitioner has accumulated approximately six (6) years of credited service in PERS.

3. Previously, Petitioner was employed as a Deputy Sheriff in Berkeley County and compiled 12 years and 5 months of credited service in PERS. This employment terminated in 1989, and he withdrew his contributions which amounted to \$11,075.77.

4. On May 21, 2003, the staff of the Board sent the Petitioner a letter advising him of his right to reinstate his previously withdrawn service credit by repaying the withdrawn amount plus interest, totaling \$21,868.78.

5. The May 21, 2003 letter set forth several payment options and the requirement that initial payment must be made before December 31, 2004.

6. On June 29, 2004, the Board's staff sent a second letter to Petitioner.¹

7. On January 1, 2005, the Petitioner commenced his second consecutive term as Sheriff of Berkeley County and continued uninterrupted in his performance of duties and receipt of pay.

8. Petitioner does not recall when he took his oath of office but he recalls that it was later

¹ In the administrative appeal hearing before Officer DeBolt, Petitioner Smith testified that he just did not pay attention to the detail of these letters.

than January 1, 2005. (See Tr. Nov. 4, 2005 at 10-11.)

9. On June 20, 2005, the Petitioner attempted to make a partial payment of \$5,000 to the Board to reinstate his 12 years and 5 months of forfeited service credit, but the Board returned this payment to Petitioner as untimely received.

10. On July 12, 2005, the Board denied his request to reinstate his previously withdrawn service credit.

11. The Petitioner requested an administrative appeal hearing, which was held on November 4, 2005.

12. At the November 4, 2005 hearing, the following colloquy transpired:

The Court: [I]t has just occurred to me and run through my head and I don't know, this is not something I've given any thought to, the fact that [Petitioner] had a term of office that ended and commenced in your term of office, I wonder what the position of the Board's staff would be with respect to whether or not his normal opportunity to reinstate, whether or not that would have commenced anew as of January 1, 2005, I don't know how that has been done henceforth.

Susan A. Saxe, Esq.: I would have to inquire as well. I would assume that if people are elected into each successive term, that they don't stop participation and then reenroll. I think that would only be if there was a break in service, and it doesn't sound as if there was here, but I would have to defer to the staff on that issue...

The Court: And we can take a short break, if necessary, but I think I'd like to know what

the staff's position is on whether or not, if, for example, someone switches jobs and goes to a new job, even though they don't miss a day's worth of work, or if in the case of Mr. Smith that, you know, where he, it's a new term of office, what the staff, what their position on that is.

Ms. Saxe: I can go back and discuss with the acting executive director, if we can take a brief –

The Court: Sure.

Ms. Saxe: I feel certain I know the answer, but I'll go confer with him.

(WHEREUPON, a brief recess was taken.)

The Court: Ms. Saxe, you were going to check to see what the traditional handling of job shifts or new terms of office for elected personnel are.

Ms. Saxe: Correct, and I have the acting executive director of the Board, so we could just put him under oath and I could ask him the question...

J. Michael Adkins: I'm the acting executive director for the Consolidated Public Retirement Board...My understanding from the reading of the Code and as we have applied, since there was continuous employment without break in PERS and employment service, that it would be applied as a single hiring, if that makes sense...

The Court: And [the Petitioner] would have been permitted to have continued contributing to the system, even though there might have been a gap until such time as he was actually sworn in to his second term of office?

Mr. Adkins: That's my understanding. As long as there was no break in his continuous coverage under the plan...[a]nd employment.

(See Tr. Nov. 4, 2005 at 9-10 & 14-17.)

13. At the close of the hearing, Petitioner presented a brochure in support of his request. The brochure indicates, in pertinent part:

REINSTATEMENT OF PREVIOUSLY WITHDRAWN SERVICE.

Any member who has been re-employed for one full year by a participating PERS employer may purchase previously withdrawn PERS service, provided that they redeposit the withdrawn funds plus interest. Reinstatement payments must begin within two years of the return to employment and the full amount repaid (in lump sum or payments) within five years of the return to employment.²

(Capitalization in original.)

14. On November 16, 2005, Hearing Officer DeBolt issued his recommended decision to deny Petitioner's request. In Officer DeBolt's order, he noted:

[T]he applicant may be able, following his employment as Sheriff and after a break in employment, to cause possible new opportunities to reinstate by becoming employed by a participating public employer

² The brochure also has a disclaimer, which reads as follows: "Information contained in this brochure illustrates the CPRB's understanding of PERS. These provisions are contained in the current plan statutes, and are subject to modification by the West Virginia Legislature each year. This brochure is for general guidance purposes only. In the event there is a discrepancy between information contained in this brochure and the WV State Code and Rules, the language in the Code and Rules shall prevail."

under the Public Employees Retirement System and avail himself of the provisions of § 5-10-18(a) of the Code or, should he be employed as a deputy sheriff, possibly qualifying for reinstatement under the provisions of § 7-14D-13 of the Code.

(Rec. Decision Hr'g Officer Nov. 16, 2005 at 7.)

15. On February 1, 2006, the Board denied Petitioner Smith's appeal and adopted the recommendations of Hearing Officer DeBolt.

III. STANDARD OF LAW FOR CERTIFYING LEGAL QUESTIONS

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

IV. PERTINENT STATUTE

Reinstatement of previously forfeited service credit is controlled by W. VA. CODE § 5-10-18(a), which provides as follows:

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.

(Emphasis in original.)

V. QUESTION PRESENTED

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

VI. PROCEDURE AFTER THE COURT ENTERS THIS ORDER, CERTIFYING THIS LEGAL QUESTION

In cases where certified questions have been made pursuant to the provisions of W. Va. Code, 58-5-2, the party presenting the certified questions shall, within sixty days of the date of entry of the order of certification, file with the circuit clerk an original and nine copies of a petition which shall include the note of argument and be in the same form as provided for in Rule 3(c). One copy of the petition and note of argument shall be served on the other parties pursuant to Rule 15. An original and nine copies of a response may be filed with the circuit clerk within thirty days of the filing of the petition.

W. VA.R. APP. P. 13(a). Therefore, if Petitioner chooses to present this certified question, he shall do so within 60 days in order for the Supreme Court to consider the petition.

VII. CONCLUSION

Accordingly, the Court **CERTIFIES** this question to the Supreme Court of Appeals of West Virginia.

The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to enter this order and distribute attested copies to the following counsel of record:

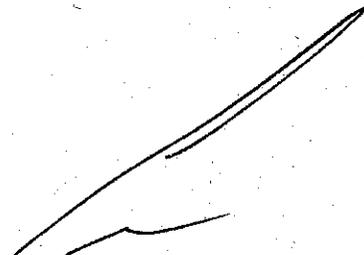
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Entered: Dec. 27, 2006



CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA