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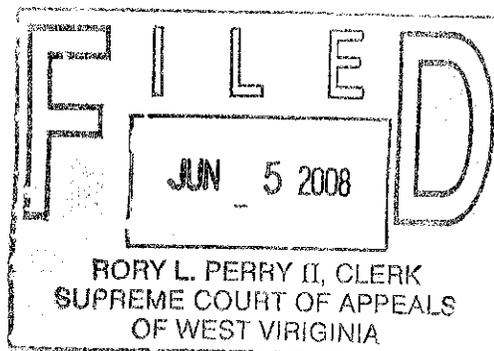
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JERRY ALLEN WEAVER, a
retiree of the West Virginia Public
Employees Retirement System,**

**Appellant and
Defendant Below,**

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

**Appellee and
Plaintiff Below.**



JERRY ALLEN WEAVER'S BRIEF ON APPEAL

Appeal from Final Order
dated July 23, 2007, in Civil Action No. 06-C-2360
In the Circuit Court of Kanawha County, West Virginia

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This proceeding is an appeal by Jerry Allen Weaver of an order issued by the Circuit Court of Kanawha County on July 23, 2007, terminating Mr. Weaver's membership in the Public Employees Retirement System ("PERS") pursuant to West Virginia Code §5-10A-1, *et seq.*, for Mr. Weaver's alleged "less than honorable service" as the Assessor for Lincoln County, West Virginia. For the reasons set forth herein, the Court's order was erroneous.

II. STATEMENT OF FACTS

A. Factual Background

Jerry Allen Weaver was elected as the Assessor of Lincoln County, West Virginia in 1980, a position he held from 1980 until his resignation on December 30, 2005. During that time, he was a participant in the PERS and made the necessary contributions toward his retirement. On August 2, 2005, the United States Attorney's Office charged Mr. Weaver in a single count of an eight-count federal indictment filed in the United States District Court for the Southern District of West Virginia with being a participant in a conspiracy to buy votes. Shortly thereafter, and without engaging in any plea negotiations with the United States Attorney's Office beforehand, Mr. Weaver acknowledged his culpability and decided to plead guilty to the single count against him. He was ultimately sentenced by United States District Court Judge John T. Copenhaver to twelve months in jail and fined Two Thousand Dollars (\$2,000). Critically, Mr. Weaver's only role in the alleged conspiracy was as a conduit of funds destined for vote-buying by receiving the funds and then delivering the funds to others for distribution. *See Partial Tr. of Proceedings*, pp. 2-3.

In the time between Mr. Weaver being named in the indictment and his sentencing, the United States Attorney's Office attempted to prove a connection between the vote-buying

conspiracy and Mr. Weaver's employment as Lincoln County Assessor, in part because such a connection would have potentially resulted in an enhancement, or increase, in the term of Mr. Weaver's sentence. In order to establish this nexus between Mr. Weaver's conduct and his public employment for sentencing purposes, the United States Attorney's Office only had to prove that Mr. Weaver abused his position in order to facilitate the vote-buying conspiracy by a lenient preponderance of the evidence standard. Nonetheless, they were unable to do so.

While the indictment against Mr. Weaver alleges that Mr. Weaver lowered real and personal property tax assessments and "fixed" various traffic and parking tickets as part of the vote-buying conspiracy, not one shred of evidence was offered that he had ever done so. Neither the United States Attorney's Office nor the West Virginia Consolidated Public Retirement Board ("WVCPRB") offered any evidence of any changed, incorrect or even questionable assessments or classifications of property. And the only evidence submitted regarding Mr. Weaver "fixing" tickets was his sworn admission to Judge Copenhaver that while he did assist friends with traffic tickets, he did not help his friends in order to buy votes (and sometimes did not even know if these friends were registered voters). *See* Tr. of Proceedings, pp. 37-39. Indeed, when specifically asked about their factual support for these allegations at the sentencing hearing, the United States Attorney's Office was forced to admit it could not offer any:

THE COURT: The allegations of the third superseding indictment and some of the material that has since been stricken for purposes of Mr. Weaver's sentencing from his presentence report reflect such things as traffic ticket fixing, real estate assessment lowering

--

MR. ELLIS: Yes, Your Honor.

THE COURT: -- automobile assessment fixing, but none of those things are before the Court now.

MR. ELLIS: That's right, Your Honor. We were unable to tie that -- there's evidence of those activities. *We did not feel like we*

could present the Court with evidence that would tie those directly enough to the purchase of votes.

Id. at 57-58 (emphasis added).

Since the United States Attorney's Office could offer no direct evidence that Mr. Weaver altered tax assessments, it argued that merely because he was a candidate in the very elections in which he was also a member of the conspiracy to buy votes was enough to prove he had abused his office. Again, upon specific inquiry by Judge Copenhaver, the United States Attorney's Office acknowledged a lack of factual support for that assertion as well:

MR. ELLIS: Your Honor, I can't point the Court to a particular chapter and verse in the record, and I don't have that support. My argument is simply as I laid it out before the Court. *I can't make it any more particular than that. There is no support in the record for anything more particular than that.*

Id. at 57 (emphasis added).

There has simply been no evidence presented that Mr. Weaver gained any advantage in securing his office as a result of his participation in an alleged vote-buying conspiracy. Even though Mr. Weaver ran for office in some of the years in which he was alleged to have participated in the scheme, the United States Attorney's Office presented *no actual* evidence that Mr. Weaver gained any electoral advantage as a result of his conduct. *See id.* at 56. Moreover, Mr. Weaver often ran *unopposed* in the elections that occurred during his participation in the scheme thoroughly eliminating any possible "advantage" he could have gained even if he were on the slates. *See id.* There is simply no evidence that Mr. Weaver bought votes for himself. Moreover, the following excerpt from proceedings in the Kanawha County Circuit Court underscores that there is no evidence that Mr. Weaver's name was even on the slate of candidates promoted by his co-conspirators or that Mr. Weaver received any benefit from the alleged conduct:

MS. LEGATO: While I don't have evidence that I can present to the Court today that would indicate that he clearly bought votes for himself, the evidence that we have and that was presented in court and that we are allowed to use in court today is that he participated in distributing slates and also distributing money with those slates, and --

THE COURT: (Interposing.) Well, what I'm saying --

MS. LEGATO: -- and those slates were distributed during elections in which [he] was a candidate. I think that it was from 1992 to 2005.

THE COURT: And I guess my pointed question is: "Was his name on that slate or not?"

Well, I assume that some elections, he had a slate, and he wasn't a candidate, so it may say "Candidate A, B and C."

In other years, on the on-year election, the four-year election, it would -- I'm assuming -- again, from what I read from you and Mr. Ellis, that on those years, when he was a candidate, the slate included "Mr. Weaver, Candidate for Assessor."

MS. LEGATO: *I make the same assumption*

See Tr. of Oral Arguments, pp. 7-8 (emphasis added). Neither the United States Attorney's Office nor the counsel for the WVCPRB, however, could offer anything more than this unsupported assumption.

Upon the failure of the United States Attorney's Office to prove the existence of a connection between Mr. Weaver's tenure as a public employee and the felony for which he was being sentenced, Judge Copenhaver made the following findings of fact:

Based upon the evidence before the Court as set forth in the agreed upon version of the presentence report in this case, as well as revisions to that report that have been made on the record of the hearing by agreement of the parties themselves, and based on the evidence received from the defendant at his guilty plea hearing, *the Court finds that the defendant did not abuse his position as assessor of Lincoln County in that he has not shown to have*

abused that position to facilitate the commission of the conspiracy offense to which he has pled guilty.

Similarly, the defendant has not been shown to have been an organizer, leader, manager, or supervisor of one or more participants in that conspiracy offense, but rather has been shown to have been a conduit of funds

See Partial Tr. of Proceedings, p. 2 (emphasis added).

At both his plea and sentencing hearings in federal court, Mr. Weaver admitted his role as a conduit for the distribution of money to others for vote buying in Lincoln County. Yet, Mr. Weaver has always steadfastly denied abusing his public office and has denied being a leader, organizer, or manager of the conspiracy. Neither the United States Attorney's Office nor the WVCPRB has offered any evidence that Mr. Weaver used his office as Lincoln County Assessor to intentionally or knowingly misrepresent real or personal property taxes for any reason, let alone as part of a vote-buying conspiracy. There is also no evidence that Mr. Weaver gained an electoral advantage from the vote-buying conspiracy. Mr. Weaver has completed the sentence imposed upon him by Judge Copenhaver and, though he has regained his liberty, he will never escape the blemish on his reputation. With all of that said, Mr. Weaver has not committed any offense "related to" his position as Lincoln County Assessor, and remains entitled to receive his public pension as a matter of law.

B. Procedural History

On December 27, 2005, Mr. Weaver entered a plea of guilty to one felony count of Conspiracy to buy votes, a violation of 18 U.S.C. Section 371. On September 18, 2006, the WVCPRB sent written notice to Mr. Weaver informing him that the Board believed, based upon Mr. Weaver's felony conviction, that Mr. Weaver had rendered "less than honorable service," thereby warranting the forfeiture of Mr. Weaver's pension benefits pursuant to West Virginia

Code Section 5-10A-1, *et seq.* By letter dated October 25, 2006, counsel for Mr. Weaver requested that the WVCPRB seek judicial determination as to whether Mr. Weaver had in fact rendered "less than honorable service." The WVCPRB filed a Petition for Termination of Benefits in the Kanawha County Circuit Court on November 6, 2006, and Mr. Weaver filed a Response and Affirmative Defenses on December 26, 2006.

On July 23, 2007, Judge Stucky of the Kanawha County Circuit Court entered an order granting the WVCPRB's Petition and directing the WVCPRB to terminate Mr. Weaver's retirement account and refund Mr. Weaver's employee contributions plus statutory interest minus any benefits that Mr. Weaver had previously received. On August 7, 2007, Mr. Weaver filed a Motion to Stay Enforcement of the Court's order pending appeal, which was denied by Judge Stucky on August 15, 2007. On October 19, 2007, Mr. Weaver filed a petition with this Court for leave to appeal the Kanawha County Circuit Court's July 23, 2007 order granting the Board's Petition for Termination of Benefits. This Court granted Mr. Weaver's petition on February 13, 2008, and Mr. Weaver now files this appellate brief.

C. Required Findings

As the record reflects, the parties to this appeal generally agree that in order to terminate Mr. Weaver's valuable contractual right to state pension benefits under West Virginia Code Section 5-10A-1, *et seq.*, the WVCPRB must prove that Mr. Weaver rendered "less than honorable service" during his tenure as Lincoln County Assessor. "Less than honorable service" means "[c]onviction of a participant of a felony for conduct *related to his or her office or employment* which he or she committed while holding the office or during the employment." W. Va. Code § 5-10A-2(e)(2) (emphasis added). In other words, in order to terminate Mr. Weaver's pension benefits, the Court must find that Mr. Weaver was (1) convicted for

participation in a felony (2) related to his office (3) which he committed while holding the office. Mr. Weaver does not contest that he pled guilty to, and thus has been convicted of, conspiracy to buy votes, which is a felony under federal law, or that he committed the felony while holding office as Lincoln County Assessor. Thus, the sole question remaining is whether the felony to which Mr. Weaver pled guilty was “related to” his office.

III. STANDARD OF REVIEW

“A determination of the circuit court [regarding a forfeiture of public pension] shall be a final order which may be appealed to the Supreme Court of Appeals in the same manner as decisions in other civil actions.” W. Va. Code § 5-10A-4 (2006). “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [the Court will] apply a *de novo* standard of review.” *Hawkins v. Ford Motor Co.*, 211 W. Va. 487, 490, 566 S.E.2d 624, 627 (2002) (quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)).

IV. ASSIGNMENTS OF ERROR

Mr. Weaver assigns the following errors of law:

A. The Circuit Court of Kanawha County erred in holding that “pursuant to West Virginia Code §5-10A-1, et. seq., . . . Jerry Allen Weaver, has rendered *less than honorable service* and as a consequence is legally ineligible to receive any benefits as a retirant of the Public Employees Retirement System.” *See* July 23, 2007 Order Terminating Benefits, at 4.

B. The Circuit Court of Kanawha County erred in holding that “the actions underlying the felony offense to which [Mr. Weaver] pled guilty constitute conduct *related to* his employment and occurred during his employment.” *See id.* at 3.

C. The Circuit Court of Kanawha County erred in holding that “[Mr. Weaver’s] felony conviction is *related* to his elected position.” *See id.* at 4.

V. POINTS AND DISCUSSION OF THE LAW

A. **The Circuit Court of Kanawha County Erred in Holding that “Pursuant to West Virginia Code §5-10A-1, et. seq., . . . Jerry Allen Weaver, has Rendered *Less Than Honorable Service* and as a Consequence is Legally Ineligible to Receive Any Benefits as a Retirant of the Public Employees Retirement System.”**

1. **The Public Employees Retirement System Pension Plan is Contractual in Nature and the Statutory Provisions Governing Forfeiture Must be Strictly Construed.**

By offering a pension to public employees, such as Mr. Weaver, the Legislature promises to provide those who forego other employment opportunities today with real pension benefits tomorrow in exchange for their years of public service. *See Booth v. Sims*, 193 W. Va. 323, 338, 456 S.E.2d 167, 182 (1994). In a law review article previously cited by Chief Justice Neely, Professor Charles A. Reich explained the importance of government-backed pensions. Professor Reich stated:

No form of government largess is more personal or individualized than an old age pension. No form is more clearly earned by the recipient, who, together with his employer, contributes to the Social Security fund during the years of his employment. No form is more obviously a compulsory substitute for private property; the tax on the wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property.

Booth, 193 W. Va. at 338, n.20, 456 S.E.2d at 182, n.20 (quoting Charles A. Reich, “The New Property,” 73 Yale L. Rev. 733, 738-739, 769 (1964)). Simply put, entitlement to benefits under a PERS pension plan is a contractually-based right, and the statutory preconditions to receiving pension benefits are contractual standards, not morally-based, values-driven standards. *See id.* at Syl. Pt. 6. All state employees who meet certain eligibility requirements have immediate

expectations that rise to level of constitutionally protected contract property rights. *See Booth*, 193 W.Va. at 337, 456 S.E.2d at 181 (citing W. Va. Const. Art. 3, § 4).

“Honorable service” is a statutory, contractual precondition to PERS pension eligibility. *See id.* at 334, 456 S.E.2d. at 178. In order to prevail in this case and strip Mr. Weaver of his valuable contractual right to a state pension, the WVCPRB must prove that Mr. Weaver rendered “less than honorable service.” W. Va. Code § 5-10A-1 *et seq.* This is a specific and limited legal standard expressed by statute and not a value judgment rooted in a moral or ethical proposition. The Legislature carefully chose to limit this punitive measure by defining “less than honorable service” specifically as “conviction of a participant [of the retirement system] of a felony for conduct *related to his or her office or employment*” W. Va. Code § 5-10A-2(e)(2) (emphasis added). As explained by Chief Justice Neely, this statutory scheme and its limiting provisions amount to a “forfeiture statute . . . penal in nature and must be strictly construed.” *West Virginia Public Employees Retirement System v. Dodd*, 183 W.Va. 544, 554, 396 S.E.2d 725, 735 (1990) (Neely J., dissenting). The statute must be applied cautiously to protect a participant’s contractual right to pension benefits.

In short, in order to strip Mr. Weaver of his pension rights, the WVCPRB must prove that Mr. Weaver engaged in “less than honorable service,” which is behavior that is clearly defined in the West Virginia Code as conviction of a felony “related to” Mr. Weaver’s office. This provision is to be strictly construed. The Circuit Court misapplied this statute; the facts of this case do not warrant forfeiture.

2. **In Defining and Punishing Dishonorable Conduct “Related to” One’s Office, the Legislature Contemplated That the Conduct Would Have Some Unique Nexus or Connection to the Office**

When it enacted Article 10A, Disqualification for Public Retirement Plan Benefits, the West Virginia Legislature recognized the sound policy that a public employee can lose his right to receive a public pension based upon his failure to perform the duties of his office. The Legislature created a law whereby would-be participants in a PERS pension plan who engage in “less than honorable service” forfeit eligibility to participate in such a plan. Yet, the Legislature carefully chose to limit this punitive measure by limiting it specifically to a “conviction of a participant [of the retirement system] of a felony for conduct *related to his or her office or employment . . .*” W. Va. Code § 5-10A-2(e)(2) (emphasis added).

The Legislature’s choice to define precisely what constitutes “less than honorable service” is critical because its decision to do so specifically precludes an automatic forfeiture of a pension for conduct unrelated to one’s office or employment. While this Court has not directly applied the definition of “less than honorable service” contained in W. Va. Code § 5-10A-2(e)(2) or explained what it means for felonious conduct to be “related to one’s office or employment,” an understanding of the Legislature’s intended meaning may be obtained by looking to the history behind the statutory scheme.¹

In 1961, when the Public Employees Retirement System (PERS) was first established, many [state employees] entered into a contract with the State, whereby they would work and make payments toward a pension, and, in return, the State agreed to pay them a pension upon retirement. . . . [I]n 1963, the legislature enacted [the precursor to § 5-10A-1] whereby the state would take the pension away from a ‘public official’ who was removed from

¹ Indeed, “the primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature.” *McDavid v. U.S.*, 213 W. Va. 592, 595, 584 S.E.2d 226, 229 (2003) (quoting Syl. Pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953)). “It is a cardinal rule of construction governing the interpretation of statutes that the purpose for which a statute has been enacted may be resorted to by the courts in ascertaining the legislative intent.” *Id.* (quoting Syl. Pt. 4, *State ex rel. Bibb v. Chambers*, 138 W. Va. 701, 77 S.E.2d 297 (1953)).

office on account of dishonorable conduct *involving his office*. However, the provision only applied to public officials, not to the rank and file.

Dodd, 183 W.Va. at 555-56, 396 S.E.2d at 736-37 (Neely J., dissenting) (emphasis added). The Legislature recognized a distinction between public officials and “rank and file” employees, warranting punishment for dishonorable conduct related to or involving a public official’s office. The only meaningful distinction between public officials and ordinary employees is that public officials possess the unique ability to use the powers of their office in order to engage in criminal conduct. Therein lies the Legislature’s meaning of “less than honorable conduct” that is “related to” one’s office.

The definition suggested by this history of the statute comports with the plain meaning of the phrase “related to.” According to Merriam - Webster’s New College Dictionary, “related to” means connected or associated. See *Webster’s II New College Dictionary* (Houghton Mifflin 2001). Where statutory language is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation. Syl. pt. 3, *Snider v. Fox*, 218 W.Va. 663, 627 S.E.2d 353 (2006); *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). West Virginia Code Section 5-10A-2(e)(2) is startlingly unambiguous: there must be a showing that Mr. Weaver’s participation in a conspiracy to buy votes was “related to” his office or employment as the Lincoln County Assessor. Thus, based on the plain meaning of “related to,” some meaningful nexus must exist between Mr. Weaver’s conduct and Mr. Weaver’s office to warrant a forfeiture of his pension benefits; the crime must have come about as a result of Mr. Weaver’s office or vice-versa.

Though the Legislature was free to do so, it did not make forfeiture of one’s retirement benefits contingent upon a conviction for conduct merely occurring *during* public employment.

Instead, as the statute's previous iteration and plain meaning demonstrate, the Legislature required the existence of a connection or nexus between the public employment and the illegal conduct. Interpreting the statute as requiring anything less would essentially render meaningless the words "related to." This Court has recognized that it is not to eliminate through judicial interpretation words that were purposely included by the Legislature, just as this Court should not add to statutes something the Legislature purposely omitted. *See, e.g., Longwell v. Board of Educ. of County of Marshall*, 213 W.Va. 486, 491, 583 S.E.2d 109, 114 (2003). Merely committing a crime while holding public office does not satisfy the disqualifying provision contained in Section 5-10A-2, which was purposefully drafted to require a showing that the illegal conduct "related to" one's office.

There is no question that Mr. Weaver pled guilty to and was criminally punished for being a member of a conspiracy to buy votes. However, Mr. Weaver's conduct was not that of a public official abusing the powers and prerogatives of his office. Rather, Mr. Weaver's conduct was that of that of a private citizen – wholly separate from the office he held. The record before the Court makes clear that Mr. Weaver only acted as a conduit of monies unrelated to his office. There is *no evidence* that Mr. Weaver used the powers associated with his office to buy votes or to facilitate his role as a conduit. Likewise, there is no evidence that Mr. Weaver benefited from his illegal conduct by gaining any advantage in obtaining office. There is simply no evidence that would suggest that Mr. Weaver's crime was in any way associated with his office.

Even though the crime committed was arguably one of a "political nature," there is no real connection between the powers of Mr. Weaver's position as Lincoln County Assessor and the crime of vote buying. Mr. Weaver's office did not provide a unique opportunity to commit the crime, nor did the crime provide a unique opportunity for Mr. Weaver to obtain his office.

This is simply insufficient to establish that Mr. Weaver's conduct was related to his office. In contrast, *West Virginia Public Employees Retirement System v. Dodd*, 183 W.Va. 544, 554, 396 S.E.2d 725, 735 (1990) demonstrates the type of nexus that is required. In *Dodd*, the Sheriff of Marion County pled guilty to public corruption under the Hobbs Act for accepting bribes in exchange for not enforcing certain anti-gambling laws. As the chief law enforcement officer of the county, Dodd bore the central responsibility to ensure that the anti-gambling laws were enforced. Yet, in exchange for payments from gambling operators, Dodd turned a blind eye to their activities, and thus engaged in a dereliction of his legal duties. As a result of his criminal conviction for conduct relating to his public employment, the sheriff lost his pension. In *Dodd*, the WVCPRB correctly applied the provisions of W.Va. Code Section 5-10A-2(e)(2) in terminating the Sheriff's pension.

The illegal conduct of the Sheriff in *Dodd* is easily distinguishable from that which Mr. Weaver committed. In *Dodd*, the Sheriff failed to perform the duties *of his office* in exchange for bribes. Here, the District Court found no evidence that Mr. Weaver engaged in similar conduct. Indeed, when asked if there was any evidence whatsoever tying Mr. Weaver's office to his role in the conspiracy, the answer given by the United States Attorney's Office was a resounding "no." There has been no evidence presented connecting Mr. Weaver's office, and his duties performed therein, to his role in the conspiracy. There is simply no nexus between the crime of conviction and the privileges and duties associated with Mr. Weaver's office. When asked specifically by Judge Copenhaver, the Assistant United States Attorney admitted as much:

THE COURT: How did what [Mr. Weaver] did play into the use of his position of public trust to significantly facilitate the commission of the offense?

MR. ELLIS: Your Honor, I can't point the Court to a particular chapter and verse in the record, and I don't have that support. My

argument is simply as I laid it out before the Court. *I can't make it any more particular than that. There is no support in the record for anything more particular than that.*

See Tr. of Proceedings, pg. 57-58 (emphasis added).

There is also no evidence that Mr. Weaver benefited from the slate involved in the conspiracy even though Mr. Weaver was running for election in some of the years in which he participated in the scheme. Indeed, some of slates by Mr. Weaver's co-conspirators were put forth in years in which Mr. Weaver was up for election in the race for Lincoln County Assessor. However, Mr. Weaver ran *unopposed* in many of the elections in question, *see id.* at 55, and there has been no evidence offered that Mr. Weaver's name appeared on **any** slate – there is only conjecture and assumption. Moreover, both the United States Attorney's Office and the WVCPRB have freely admitted that any benefit allegedly derived by Mr. Weaver from his role in the scheme is based on pure conjecture, speculation, and assumption. *See id.*; Tr. of Oral Arguments, at 6-9. In short, unlike the connection plainly demonstrated in *Dodd*, the WVCPRB has been unable to demonstrate any unique nexus whatsoever between Mr. Weaver's office and the crime to which he pled guilty and stands convicted.

Courts from other jurisdictions have also recognized this distinction. For example, although New Jersey's forfeiture rule is slightly different than West Virginia's rule,² whether misconduct is "related to" one's public office is still a critical factor in the New Jersey forfeiture analysis. *T.J.M. v. Bd. of Trustees of the Police and Firemen's Retirement System*, 527 A.2d 883, 886 (N.J. Super. Ct. App. Div. 1987). The New Jersey Superior Court held that the

² New Jersey's public pension law requires Courts to use a flexible balancing test to determine if total forfeiture is proper. *See T.M.J.*, 527 A.2d at 885-86. However, whether conduct is "related to" the pensioner's public office is a critical factor in the New Jersey test, and is given special consideration; only in the most compelling of circumstances should pension benefits be forfeited for conduct unrelated to the pensioner's office. *See id.* Accordingly, New Jersey's law is somewhat broader than West Virginia's statute in that New Jersey law at least contemplates the possibility of forfeiture for conduct unrelated to one's office, while in West Virginia forfeiture is *absolutely foreclosed where the conduct is unrelated to one's office.*

participant-police officer's misconduct – off-duty aggravated sexual assault – was “uniquely personal” and “completely unrelated” to his office because “no weapon or other instrument or indication of office was involved in the crime’s commission.” *Id.* The same can be said for Mr. Weaver’s crime. Additionally, the New Jersey Superior Court rejected the State’s arguments that “(1) a police officer always has the rights and responsibilities of a law enforcement officer, whether he is on or off duty; and (2) police officers should be held to a higher standard than other public employees because of their duties and the public’s perception of them.” *Id.* The Court found this connection to be “too attenuated” to be “related to” the participant’s public office, and – even under the broader New Jersey standard – reversed the lower court’s decision to strip the officer of his public pension. *Id.*

Critically, this sort of “attenuated connection” is the precise connection alleged by the WVPCRB in this case. The WVPCRB argues that Mr. Weaver’s behavior violated the general “public trust” that comes along with elected office. *See Resp. of the WVCPRB in Opp. of Pet. for Appeal* at 7. But, if the Legislature desired that a violation of the “public trust” held by those in public office be sufficient for the officeholder to forfeit his pension rights, it could have drafted the statute to say so. Instead, and much like the New Jersey Legislature, it tasked WVPCRB under the statute with proving that Mr. Weaver’s conduct was *related to* his public office. As in *T.J.M.*, an alleged breach of some general “public trust” *during* Mr. Weaver’s time in office is too attenuated a connection and is simply not enough to meet West Virginia’s statutory disqualification standard.

3. Mr. Weaver's Conduct Did Not Have any Unique Connection or Nexus to Mr. Weaver's Office

a) There is No General Nexus Between Mr. Weaver's Office and the Crime for Which Mr. Weaver Was Convicted.

Mr. Weaver was indicted and subsequently convicted under 18 U.S.C. Section 371 for conspiracy to buy votes under 42 U.S.C. Section 1973i(c). 42 U.S.C. Section 1973i(c) provides in pertinent part:

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both

42 U.S.C. § 1973i(c)(2007) (emphasis added). It is entirely possible for non-elected officials to engage in a conspiracy to commit the conduct proscribed by 42 U.S.C. Section 1973i(c). For example, an over-zealous group of politically active individuals, completely unaffiliated with any elected official, could select a candidate (or slate of candidates) and could mete out illegal payments in order to induce citizens to vote for the chosen candidate or slate. In other words, there is nothing about Mr. Weaver's office that relates to or even facilitates an ability to conspire to buy votes. Mr. Weaver's conduct was of a personal nature; any person, elected or otherwise, could have committed the same crime in precisely the same way. Such misconduct is not "related to" one's public office. *Compare T.J.M.*, 527 A.2d at 883 (reversing trial court's decision upholding denial of retirement benefits due to the participant-police officer's conviction of off-duty aggravated sexual assault) *with Dodd*, 183 W. Va. at 544, 396 S.E.2d at 725 (affirming the disqualification of a sheriff's pension due to "less than honorable service" for

accepting bribes in exchange for not enforcing certain anti-gambling laws because as the chief law enforcement officer of the county, *Dodd* bore the central responsibility to ensure that the anti-gambling laws were enforced). Mr. Weaver's holding a public office is no more than an unrelated coincidence to the conspiracy.

To the degree that Mr. Weaver could have used his office's resources to facilitate the commission of the underlying offense, the record clearly indicates no evidence whatsoever that Mr. Weaver did so; there is no evidence that Mr. Weaver fixed tickets or altered tax assessments to purchase votes. Rather, Mr. Weaver, as a politically involved private citizen, delivered monies unrelated to his office from third parties unrelated to his office to other third parties unrelated to his office for distribution. Any private individual, regardless of whether that individual also holds public office, may enter into a conspiracy to buy votes in precisely the same manner that Mr. Weaver did in this case. Mr. Weaver's position as Assessor did not result in, facilitate, or uniquely enhance his ability to act as a conduit in this particular conspiracy to buy votes.

**b) There is No Particular Evidence of Any Nexus Whatsoever
Between Mr. Weaver's Office and His Role in the Conspiracy
as There Must be under West Virginia Law**

There is no evidence whatsoever of any connection between Mr. Weaver's conduct and his office. The United States Attorney's Office tried to prove that there was some connection to or abuse of Mr. Weaver's office yet failed to do so. The failure of the United States Attorney's Office in this regard demonstrates that Mr. Weaver unequivocally *did not* use his position as Assessor to achieve the commission of his crime. Critically, the standard applied by the District Court in Mr. Weaver's sentencing hearing closely mirrors the burden imposed on the WVCPRB in this case. Indeed, the legal burden that the United States Attorney's Office failed to meet was

essentially a showing that, by a preponderance of the evidence (not by reasonable doubt), Mr. Weaver's conduct as a participant in the conspiracy related to his office and employment as the Lincoln County Assessor.

The precise issue before Judge Copenhaver at sentencing was whether Mr. Weaver abused a position of public trust in a manner that "contributed in some significant way to facilitating the commission or concealment of the offense." However formulated, the key issue and inquiry before the District Court was whether or not Mr. Weaver used his position as Lincoln County Assessor to facilitate the vote-buying conspiracy in any way, or whether Mr. Weaver's conduct related in any way to his position as the Lincoln County Assessor. Competent evidence of such abuse would have entailed a finding that property tax assessments and appeals were conducted in a way to reward political allies (or those who voted for the slate) while punishing political enemies. After hearing all of the evidence at sentencing and considering information learned by the United States Probation Department, Judge Copenhaver found that Mr. Weaver did not abuse his office in that he did not use his position as Lincoln County Assessor to facilitate the vote-buying conspiracy. This finding, quite simply, is dispositive of the legal issue facing this Court.

In conclusion, in order for the State to divest a retiree of the right to receive the pension benefits earned over many years of service, it must prove that the retiree rendered *less than honorable service* by engaging in a crime which *related to* the public employment. A retiree does not lose his right to a pension merely because of any illegal conduct he may have committed in his private life. Rather, because the Legislature carefully and selectively required a *direct connection* between the illegal conduct and the public office, and the WVCPRB must prove some relationship between the illegal conduct and the public employment. Here, the

Board has made no showing that Mr. Weaver was convicted of any crime related to his public employment. Accordingly, we respectfully request this Court reverse the order entered by the Kanawha County Circuit Court, reinstate Mr. Weaver's Public PERS retirement account, and grant Mr. Weaver additional relief as the Court deems to be appropriate.

VI. RELIEF PRAYED FOR

On the basis of the foregoing, Jerry Allen Weaver respectfully requests the Supreme Court to reverse the order issued by the Circuit Court of Kanawha County.

VII. REQUEST FOR ORAL ARGUMENT

Jerry Allen Weaver also respectfully requests oral argument on this brief and the issues identified herein.

Respectfully submitted,

JERRY ALLEN WEAVER

By Counsel

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Petitioner,

v.

Civil Action No.: 06-C-2360
(Judge James C. Stucky)

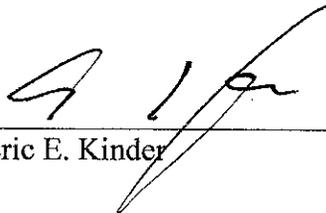
JERRY ALLEN WEAVER, a
retiree of the West Virginia Public
Employees Retirement System,

Respondent.

CERTIFICATE OF SERVICE

I, Eric E. Kinder, hereby certify that on this 5th day of June, 2008, the foregoing "Jerry Allen Weaver's Brief on Appeal" was served upon the following individuals and/or counsel to this action by depositing a true copy thereof in the United States First Class mail, postage prepaid, and addressed as follows:

*J. Jeaneen Legato
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Eric E. Kinder