

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

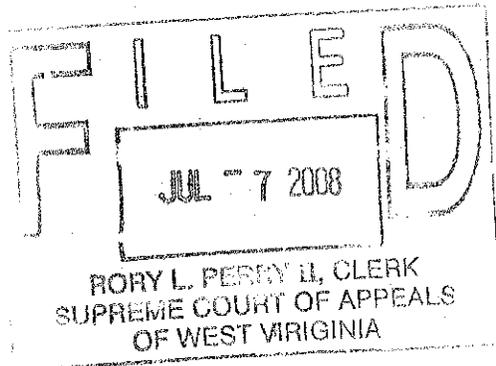
**Supreme Court Docket No. 33864**

**Civil Action No. 06-C-2360 (Circuit Court of Kanawha County)**

**WEST VIRGINIA CONSOLIDATED  
RETIREMENT BOARD,  
Petitioner,**

v.

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



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**RESPONSE BRIEF OF THE WEST VIRGINIA CONSOLIDATED PUBLIC  
RETIREMENT BOARD IN OPPOSITION TO BRIEF FOR APPEAL**

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**J. Jeaneen Legato (WV Bar ID # 6978)  
Counsel for WV Consolidated Public Retirement Board  
4101 MacCorkle Ave. S.E.  
Charleston, WV 25304  
(304) 558-3570 ext. 52409  
*direct dial number: (304) 957-3522***

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**I. KIND OF PROCEEDING AND  
NATURE OF RULING IN LOWER TRIBUNAL**

**A. Introduction**

In 1980, the Appellant, Jerry Allen Weaver, was elected to the position of Assessor for Lincoln County and remained in that position, repeatedly winning reelections, until his resignation on December 30, 2005. Appellant was a retiree of the Public Employees Retirement System (PERS).

On December 27, 2005, the Appellant entered a plea of guilty to one felony count of the federal offense of *Conspiracy to Buy Votes*, a violation of 18 U.S.C. §371. By Order entered on January 30, 2006 by John T. Copenhaver, Jr., United States District Judge, the Appellant was adjudged guilty of this felony offense. Appellant's felony conviction involved acts committed by him during the years of 1990 through 2004. The felonious acts committed by the Appellant occurred while he was an elected official and a contributing member of the Public Employees Retirement System (PERS).

The Appellant was convicted of corrupting many of the elections which triggered his eligibility and allowed for his continued participation in the public funded pension system (PERS). Pursuant to West Virginia Code §5-10A-1, et. seq., the circuit court entered an Order granting the West Virginia Consolidated Public Retirement Board's petition to terminate Jerry Allen Weaver's retirement benefits for less than honorable service. Appellant is appealing this decision.

The parties agree that the issue before the lower tribunal and now this honorable Court is as follows:

***Whether a felony conviction for Conspiracy to Buy Votes is conduct "related to" being an elected official?***

**B. PROCEDURAL HISTORY AND STATEMENT OF FACTS**

The West Virginia Consolidated Public Retirement Board, hereinafter referred to as the "Board", is the statutory administrator of various West Virginia public pension systems, including the West Virginia Public Employees Retirement System (PERS). In 1980, the Appellant, Jerry Allen Weaver, was elected to the position of Assessor for Lincoln County, West Virginia and remained in that position, repeatedly winning reelections, until his resignation on December 30, 2005. Appellant was a retiree of the PERS plan. He had 27.5 years of service and was receiving a monthly annuity of \$2,020.79.

On December 27, 2005, Appellant entered a plea of guilty to one felony count of *Conspiracy to Buy Votes*, a violation of 18 U.S.C. §371. By Order entered on January 30, 2006 by John T. Copenhaver, Jr., United States District Judge, the Appellant was adjudged guilty of this felony offense. During the August 2006 Board meeting, board members voted to terminate the membership of Appellant in the Public Employees Retirement System for rendering less than honorable service. On September 18, 2006, the Board sent written notice to the Appellant informing him that the Board believed based upon his felony conviction he had rendered *less than honorable service*. By letter dated October 25, 2006, counsel for Appellant requested that the Board seek a judicial determination as to whether Appellant had rendered *less than honorable service*.

On November 6, 2006, the Board filed a *Petition of West Virginia Consolidated Public Retirement Board for Termination of Benefits* in the circuit court of Kanawha County, West Virginia. On December 26, 2006, Appellant, by counsel, filed a *Response*. On March 6, 2007, the Board filed a brief in support of the petition to terminate benefits. On May 15, 2007, counsel for Appellant filed a brief in opposition to the petition; and, on May 25, 2007 the Board filed a reply. Oral arguments

were held on June 19, 2007.

On July 23, 2007, the circuit court entered an Order granting the Board's *Petition to Terminate Benefits* and further directed the Board to terminate Appellant's retirement benefits and refund his employee contributions plus interest minus any benefits he had previously received.

On August 7, 2007, counsel for Appellant filed a *Motion to Stay* enforcement of the Court's Order pending appeal. On August 15, 2007, the circuit court entered an Order denying a stay. On August 22, 2007, the Board issued a check to Appellant in the amount of \$24,844.29 reflecting his remaining employee contributions plus interest minus the benefits he had previously received. On October 19, 2007, counsel for Appellant filed this *Petition for Appeal* with the Supreme Court of Appeals of West Virginia. This Court granted his petition on February 13, 2008.

## II. STANDARD OF REVIEW

"In reviewing challenges to the findings and conclusions of the circuit court, the court applies a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review."<sup>1</sup>

Interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight, and such an agency's construction of these statutes must be given substantial deference. *Sniffen*, citing *WV Department of Health v. Blankenship*, 189 W. Va. 342, 431 S. E. 2d 681 (1993); *WV Non-Intoxicating Beer Commr' v. A&H Tavern*, 181 W. Va. 364, 382 S. E. 2d 558 (1989); *Dillon v. Board of Educ.*, 171 W. Va. 631, 301 S. E. 2d 588 (1983); *Smith v. State*

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<sup>1</sup>*Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995); *Ballard v. Painter*, 213 W. Va. 290, 582 S.E.2d 737 (2003).

*Workmen's Comp. Comm'r.*, 159 W.Va. 108, 219 S. E. 2d 361 (1975).

In the absence of an error of law, factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or "arbitrary and capricious." See, e.g. Healy v. West Virginia Bd. of Medicine, 506 S.E. 2d 89, 92 (W.Va. 1998).

As to judicial review of an administrative agency's interpretations of the statutes and regulations which it administers, and notwithstanding the general rule of *de novo* review of issues of law, the Court has held that "absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of [a] statute by [an administrative agency]" having policy making authority relating to the statute. See, e.g., Sniffen v. Cline, 193 W. Va. 370, 456 S. E. 2d 451 (1995).

### **III. ISSUE ON APPEAL**

Whether the circuit court erred in finding that a felony conviction for *conspiracy to buy votes* was conduct related to being an elected official and constituted *less than honorable service*.

### **IV. DISCUSSION OF LAW**

#### **A. Less Than Honorable Service**

Pursuant to West Virginia Code §5-10A-5 and §5-10A-6, the Board is charged with terminating a participant's membership and refunding his or her contributions plus interest upon a determination that the member has rendered less than honorable service. The participant, as in this case, may request a judicial determination as to whether he rendered less than honorable service.

Less than honorable service is defined in West Virginia Code §5-10A-2 as follows:

(e) "**Less than honorable service**" means:

(1) Impeachment and conviction of a participant under the provisions of section nine, article four of the constitution of West Virginia, except for a misdemeanor;

**(2) Conviction 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; . . .**

With respect to Appellant's case, West Virginia Code §5-10A-2(e)(2) essentially establishes a three prong test to determine whether the Appellant, Jerry Allen Weaver, has rendered less than honorable service. The following three conditions must exist to terminate Appellant's benefits:

- (A) Conviction of a felony;
- (B) For conduct related to his office; and
- (C) Committed while holding the office.

There is no dispute among the parties as to prongs (A) and (C). As previously stated, Appellant's felony conviction for *conspiracy to buy votes* involved acts committed by him during the years of 1990 through 2004. The felonious acts committed by Appellant occurred while he was an elected official (Lincoln County Assessor) and a contributing member of the Public Employees Retirement System (PERS).

As to prong (B), Appellant's felony conviction was related to him being an elected public official. The Appellant was convicted of corrupting many of the elections which triggered his eligibility and allowed for his continued participation in the public funded pension system (PERS).

Counsel for Appellant argues that the legislature intended that the felony would have some "unique nexus" to the office and that no such nexus exists in this case. Although such a stringent standard is not mandated by the explicit language of the statute, the facts of this case would also satisfy Appellant's proposed standard. Appellant's office exists by virtue of election. He tampered with elections. There simply could not be a more direct nexus.

**B. Through the enactment of West Virginia Code §5-10A-1 et. al., the legislature intended to provide a mechanism for terminating retirement benefits of public employees and public officials who rendered less than honorable service.**

It strains credulity to argue that the legislative intent behind the enactment of Article 10A, titled as “Disqualification for Public Retirement Plan Benefits”, was for the protection rather than the termination of retirement benefits.

Legislative intent regarding the termination of public pension benefits for those who render *less than honorable service* is clearly expressed in West Virginia Code §5-10A-1, *Findings and declarations*, which states as follows:

“The Legislature finds and declares that every retirement plan instituted and created under the laws of this state has from the inception thereof contemplated and each now contemplates that **the service rendered by any participating public officer or employee shall at all times be honorable**. The Legislature further finds and declares that **honorable service is a condition to receiving any pension, annuity, disability payment or any other benefit under a retirement plan**”

At common law, as under West Virginia Code §5-10A-1 through §5-10A-10, “a public employee’s service must be honorable at all times, and if not, there is a total forfeiture of the public pension.”<sup>2</sup>

The Court in Dodd held that the legislative intent under the Act for public service to be “honorable at all times” is also indicated by the clear language of West Virginia Code §5-10A-9, which provides, in relevant part, that the right to receive any public retirement plan benefit is conditioned upon the “rendering of honorable service throughout the service in public employment

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<sup>2</sup>West Virginia Public Employees Retirement System v. Dodd, 183 W. Va. 544, 396 S.E.2d 725, (1990).

or public office.”<sup>3</sup>

Citing the dissenting Justice in the Dodd case, opposing counsel suggests that public officials should be held to a lower standard than the “rank and file” employees. This is simply not true. By virtue of being elected, public officials hold an even greater position of public trust.

Throughout Chapter five, Article ten-A of the West Virginia Code, the legislature distinguishes between a public official and a public employee by specifically listing each separately.<sup>4</sup> More specifically, §5-10A-1 refers to “service rendered by any participating **public officer or employee**” and §5-10A-2(e)(1) refers to “**impeachment**” of a participant under the Constitution of West Virginia. This distinction clearly indicates the legislature’s recognition that public officials, by virtue of being elected by the public, hold an even greater level of public trust than do public employees. With a position of public office comes a position of public trust. When Appellant repeatedly conspired to buy votes, he violated that position of public trust.

Each time Respondent was sworn into office he took an oath to support the Constitution of the United States of America. Article IV, Section V of the Constitution of West Virginia states:

“Every person elected or appointed to any office, before proceeding to exercise that authority, or discharge the duties thereof, shall make oath or affirmation that he will support the Constitution of the United States and the Constitution of this state, and that he will faithfully discharge the duties of said office to the best of his skill and judgment . . . .”

Appellant’s conduct of engaging in a *conspiracy to buy votes* is a violation of that oath. The principles enunciated in the Constitution are void of meaning without a fair electoral process.

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<sup>3</sup>Id. at 548.

<sup>4</sup>See West Virginia Code §5-10A-1 and §5-10A-2.

This is evidenced even more by the fact that originally the termination statute only applied to public officials. Appellant's tampering with numerous elections in which he was a candidate is a violation of that oath and the public's trust. Appellant's felony conviction for *conspiracy to buy votes* is clearly related to his position as an elected official.

Other sections of the Code also address legislative intent to hold public officials accountable. On December 27, 2005, Appellant entered a plea of guilty to one felony count of *Conspiracy to Buy Votes*, a violation of 18 U.S.C. §371. On December 30, 2005, he resigned from his elected position of Assessor of Lincoln County. Shortly thereafter, he began serving his sentence of incarceration. Had he not resigned and instead waited until he was removed from office, then unquestionably his membership would have been terminated in PERS. West Virginia Code §5-10-49 calls for the immediate termination of membership in the retirement system for any member who has been removed from office. This statute is contained in a different article of the code and is in addition to article 10A *Disqualification for Public Retirement Plan Benefits*.

Legislative intent to hold public officials to a higher, not lower, standard than "rank and file" employees is clearly evidenced by West Virginia Code and, in particular, West Virginia Code §5-10A-1 and the statute's legislative history.

C. **The standard is "related to" not "abuse of". The felony offense of conspiracy to buy votes is "related to" being an elected public official.**

West Virginia Code §5-10A-2(e)(2) defines *less than honorable service* as "conviction 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."

Every elected official in the state of West Virginia, by virtue of his elected position, is a

member of one of the various public pension plans administered by the Board. Every elected official is also a public employee. The legislature specifically used the terms "office" and "while holding office" **in addition to** [public] employment. This is a clear indication of the legislature's intent to include political crimes such as *conspiracy to buy votes*; otherwise, there would have been no need to add the language of "office" or "while holding office" since every elected official is a public employee.

On August 2, 2005, a third superceding indictment was filed against the Appellant, Jerry Allen Weaver, in the United States District Court for the Southern District of West Virginia. Appellant was adjudged guilty of Count 1 of this indictment. The indictment states that for the years of 1990, 1992, 1994, 1996, 1998, 2000, 2002, and 2004 the Appellant engaged in a conspiracy with others to buy votes. During this period of time, Appellant was the elected County Assessor for Lincoln County, West Virginia.

As part of this conspiracy, Appellant would meet with others for the purpose of comprising "slates", a list of candidates the conspirators sought to have elected. Appellant and others engaged in a conspiracy to distribute the slates along with cash to various precinct captains who would then use the cash to buy votes for the candidates named on the slate. During many of these elections, Appellant was a candidate for and later won election for County Assessor of Lincoln County.

Appellant's felony conviction for *conspiracy to buy votes* is clearly "related to" his position as an elected official. As an elected official of Lincoln County for more than two decades and by virtue of his position, he acquired intimate knowledge of the electoral process. He knew who, how, when, and where to distribute the slates and the money in the most effective manner. He used this knowledge he acquired as an elected official to influence the outcome of elections. In many of those

elections, he was a candidate for office. He tampered with the electoral process, the vehicle he used as means to employment and a public pension.

A fair and free election is the core of any democracy. It is impossible to know the full impact the fourteen (14) year criminal conspiracy had on Lincoln County. Perhaps some who knew about the conspiracy chose not to become candidates or failed to vote because they felt it would be pointless to vote or run for office in a "fixed" election.

Additionally, counsel for Appellant's argument that there is nothing "unique" about this crime because any ordinary citizen could have committed it is rather flawed logic. Any public employee could rape or molest a child; however, if that public employee were a school teacher who molested his student, then this Board would undoubtedly move to terminate that portion of his pension that has been funded with public monies. Appellant was not just an employee in the Assessor's office; rather, he was the **elected** Assessor for Lincoln County, West Virginia.

Counsel for Appellant cites the New Jersey case of T.J.M. to support the argument that Appellant's conduct was unrelated to his elected position as Lincoln County Assessor.<sup>5</sup> However, the T.J.M. case is easily distinguishable. In T.J.M., the police officer committed sexual assault while off-duty.<sup>6</sup> The police officer's crime was rightfully found not to be related to his public position, as neither the assaults nor the victim were in any way tied to his position. Yet, Appellant's crime is directly related to his public position. Appellant was re-elected as Assessor during the time he was engaged in the *conspiracy to buy votes*. While Appellant's crimes may have been committed while

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<sup>5</sup>Jerry Allen Weaver's Brief on Appeal, pg. 14; see T.J.M. v. Bd. of Trustees of the Police and Firemen's Retirement System, 527 A.2d 883 (N.J. Super. Ct. App. Div. 1987).

<sup>6</sup>T.J.M., 527 A.2d at 883.

“off-duty,” the *conspiracy to buy votes* affects all candidates running for elected positions. By corrupting the voting process, it is wholly unclear whether any elected official would have earned their position legitimately. Even if Appellant’s crime is narrowly viewed to only relate to the candidates on the slates, Appellant has never specifically denied being listed on any of the involved slates. This is decidedly more than an “attenuated connection.”<sup>7</sup> Appellant’s felony conviction for *conspiracy to buy votes* is clearly “related to” his elected position of Lincoln County Assessor.

Counsel for Appellant’s proposition that Appellant’s felony conviction is not conduct “related to” his office or employment because during the enhancement portion of Appellant’s sentencing hearing, Judge Copenhaver found that Appellant did not “abuse his position as assessor” by facilitating the commission of the conspiracy offense is simply misleading. The issue is whether Appellant’s felonious conduct is “related to” his office. One is elected to Appellant’s office. Appellant tampered with elections.

“Abuse of his position as assessor” in the context of a criminal case is a different standard than “conduct related to his office” as contained in West Virginia Code §5-10A(e)(2). Judge Copenhaver seemed to require that a strict and direct nexus exist before he would enhance Appellant’s sentence with additional incarceration. In a criminal context, Appellant’s liberty is at stake. In a civil context, like this case, it is Appellant’s entitlement to a publicly funded pension for rendering honorable service that is at stake.

Opposing counsel relies upon Judge Copenhaver’s *Sentencing Order* and the dissenting opinion by Justice Neely in *Dodd* as a veiled attempt to argue collateral estoppel and that this is a forfeiture statute that must be strictly construed resulting in the same finding by this Court.

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<sup>7</sup>Jerry Allen Weaver’s Brief on Appeal, pg. 15.

This argument ignores the majority opinion in *Dodd*. In *Dodd*, the Court held that “it is significant in a contributory pension plan, such as the PERS plan, the pensioner’s rights vest [only] when *all* the conditions entitling them thereto have been fulfilled.”<sup>8</sup> A condition of continued public employment and a pension is that one render honorable service. Rendering less than honorable service is a breach of one’s employment contract with the state and the public.

As for this statute being a forfeiture statute, the Appellant has forfeited nothing. His employee contributions plus interest were returned to him. Any loss incurred by him would be for a future expectation of state contributions (public monies) towards his retirement. He breached his contract of employment with the state and should not be entitled to his future expectation of public money.

In terminating all of Sheriff Dodd’s retirement service [including that portion that was **not** related to the felony conviction], the *Dodd* Court recognized that this may be somewhat penal in nature, but that “it is not unconstitutionally disproportionate, especially where as here the forfeiture is triggered by a felony conviction for conduct which constitutes a fundamental breach of the public trust.”<sup>9</sup> Appellant’s conduct of engaging in a fourteen (14) year *conspiracy to buy votes* in which he was a candidate for and won elections was a “fundamental breach of the public trust”.

As previously discussed, the legislature has certain expectations of public employees and public officials as clearly expressed through legislation. The Court in Dodd found that even without an express statutory requirement of honorable public service, “[i]t is, of course, axiomatic that one of the fundamental purposes of the pensioning of civil servants is to secure good behavior and the

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<sup>8</sup>Dodd at 551.

<sup>9</sup>Dodd at 551.

maintenance of reasonable standards of discipline during service. . . . In other words, public service, compensated at public expense, is a public trust and necessarily implies faithful service.”<sup>10</sup> Political corruption erodes public trust.

Appellant’s pension exists by virtue of him winning election after election. *Conspiracy to buy votes* is a political crime. Appellant has been a politician for more than two decades. The issue is whether Appellant’s crime is “related to” his office, not whether he “abused” his office.

The burden of “related to” is clearly met when an elected official is convicted of conspiring to buy votes for elections in which he was a candidate for office.

Counsel for Appellant correctly asserts that “where language from the statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.”<sup>11</sup> The statute in this case is clear and unambiguous. “Related to” means related to not “abuse of.”

West Virginia Code §5-10A-2 states as follows:

**“(e) Less than honorable service means:**

(2) Conviction 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 . . .”

Counsel for Appellant is asking this Court to change the text of the statute and therefore its meaning from “related to” to “abuse of”; whereas, the Board is asking this Court to apply the statute’s plain meaning.

Accepting Appellant’s convenient modification of the statute could result in the subversion

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<sup>10</sup>Dodd 183 at 549, quoting Fromm v. Board of Directors, 81 N.J.Super. 138, 143, 195 A.2d 32, 34 (App. Div. 1963); also see W. Va. Const. Art. III, § 2.

<sup>11</sup>See p. 11 of Appellant’s brief, citing Snyder 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).

of legislative will. Appellant argues as though this statute were enacted for the **protection** of persons like himself. This is simply not the case. As previously stated, the impetus for the legislation was to create a means to terminate a person's eligibility to receive additional public monies once that individual had rendered less than honorable service. The legislature specifically included the term "office" to distinguish elected officials from other public employees and to encompass crimes of a political nature which erode public trust.

Furthermore, as aptly summarized by this honorable Court in Dodd, "[s]imply put, public pensions, unlike private-sector pensions, are premised in part upon faithful service of the public trust; therefore, a breach of that trust leads to a forfeiture of a public pension."<sup>12</sup>

#### V. CONCLUSION

Appellant was an elected official for twenty-six years. As an elected official, he gained intimate knowledge of the electoral process and the key participants in that process. Over a fourteen year period, he used his position as an elected official and the knowledge gained from this position to distribute slates and cash during elections, some of which he was a candidate. By *conspiring to buy votes* he did irreparable harm by corrupting the electoral process for more than a decade. The same electoral process he used as a means for eligibility and continued participation in a publicly funded pension system.

Political corruption erodes public trust and shatters the very foundation of any democracy. *Conspiracy to buy votes* is "related to" being an elected public official. There simply cannot be a more direct nexus under any standard. Appellant should not be entitled to that portion of his pension which has been funded by the public. Consistent with the circuit court's Order, Appellant has been

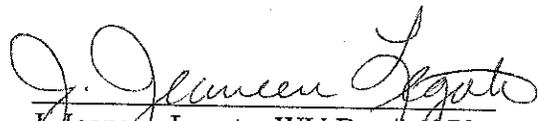
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<sup>12</sup>Dodd 183 at 553.

refunded his employee contributions plus interest.

For all of the forgoing reasons, the Appellees respectfully urge this honorable Court to affirm the final order of the Circuit Court of Kanawha County in the proceedings below, and for such other just and proper relief deemed appropriate by the Court.

Respectfully Submitted,



J. Jeaneen Legato, WV Bar # 6978

Counsel for WV CPRB

4101 MacCorkle Ave. S.E.

Charleston, WV 25304

(304) 558-3570 ext. 52409

direct dial number: (304) 957-3522

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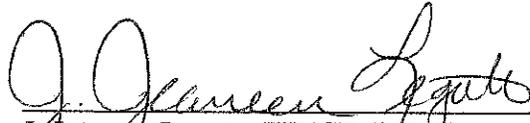
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**WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD,  
Respondent.**

**CERTIFICATE OF SERVICE**

I, J. Jeaneen Legato, counsel for the West Virginia Consolidated Public Retirement Board, do hereby certify that a copy of the foregoing *RESPONSE BRIEF OF THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD IN OPPOSITION TO BRIEF FOR APPEAL* was served upon Jerry Allen Weaver, by service upon his attorneys on this 7<sup>th</sup> day of July, 2008, by regular mail, postage prepaid, addressed as follows:

Eric E. Kinder  
Randal M. Whitlatch &  
Stephanie L. Ojeda  
Spilman, Thomas & Battle  
300 Kanawha Blvd. East  
PO Box 273  
Charleston, WV 25321-0273



J. Jeaneen Legato (WVSB #6978)  
WV Consolidated Public Retirement Board  
4101 MacCorkle Ave. S.E.  
Charleston, West Virginia 25304  
Telephone: (304) 558-3570 ext. 52409  
Direct dial number: (304) 957-3522  
Facsimile: (304) 558-6337