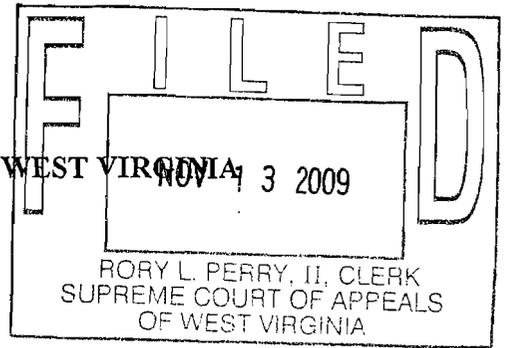


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IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

RODNEY A. MYERS and

DIANE M. MYERS,

Petitioners,

v.

CIVIL ACTION NO. 08-C-126

WEST VIRGINIA CONSOLIDATED

PUBLIC RETIREMENT BOARD,

Respondent.

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**FINAL ORDER**

This matter comes before the Court on a Petition Appealing Final Order (Petition) filed by Petitioners Rodney A. Myers and Diane M. Myers pursuant to W.Va. Code § 29A-5-1 et seq.. Mr. Myers and Mrs. Myers ask this Court to reverse a Final Order of the West Virginia Consolidated Public Retirement Board (Board) dated September 3, 2008. The Board's Final Order adopted, in its entirety, the Recommended Decision of hearing Officer issued by Jack DeBolt on May 20, 2008. The Board's Final Order denies two requests made by Mr. Myers upon his retirement: first, the order denies Mr. Myers' request for service credit for his 1972 summer co-op employment and, second, the order denies Mr. Myers' request to include the amount of a lump sum payment for unused annual leave in his final average salary for purposes of calculating the amount of his retirement annuity.

After a careful, independent review of the record, the parties briefs, the argument heard on May 14, 2009, and pertinent legal authority, for the reasons stated in the following Findings of Fact and Conclusions of Law, this Court does hereby **AFFIRM**, as to the first issue, and

REVERSE, as to the second issue, the Final Order of the Board, based on the following findings of fact and conclusions of law.

### FINDINGS OF FACT

1. Petitioner Rodney A. Myers was born on January 21, 1954, and is a retired member of the West Virginia State Public Employees Retirement System (PERS), which is administered by the West Virginia Consolidated Public Retirement Board (Board). Mr. Myers retired from the West Virginia Department of Transportation, Division of Highways, effective January 1, 2008. Petitioner Diane M. Myers is Mr. Myers' wife and beneficiary.

2. Following graduation from high school, Mr. Myers became employed by the Division of Highways through a cooperative education (co-op) program. The Division of Highways operated the co-op program for students pursuing a college degree in engineering. Through this program, students were eligible to work for the Division of Highways during the summers, provided that they enroll and continue in an undergraduate engineering program and maintain requisite grades and adequate scholastic performance. Students participating in the program could then become eligible for an offer of employment in a full-time, permanent position with the Division of Highways upon graduating with an engineering degree. Mr. Myers recalls that he was required to major in civil engineering, submit his grades before each period of employment, and that the Division of Highways communicated with his school to ensure he remained in good standing.

3. During the first summer he participated in the co-op program, Mr. Myers worked from June 5, 1972, through August 15, 1972, but was paid through August 21, 1972 as a result of accumulated annual leave. Although employed through the co-op program, Mr. Myers was erroneously designated as a permanent employee on Division of Highways records, and retirement system contributions to PERS were mistakenly made on his behalf by his employer and withheld from his pay. As a result, Mr. Myers was credited with two months of service credit. At the conclusion of the summer, Mr. Myers commenced undergraduate studies in engineering at West Virginia University.

4. Mr. Myers continued in the co-op program and again worked for the Division of Highways in the summers of 1973, 1974 and 1975. No retirement system contributions were made on his behalf or withheld from his pay during these summers, and he accrued no service credit for these periods.

5. Mr. Myers became employed with the Division of Highway in a full-time, permanent position from June 1, 1976, upon graduating from West Virginia University with a civil engineering degree, and he remained in that employment until retirement. During this time, Mr. Myers accumulated more than thirty (30) years of contributing service credit in PERS.

6. In 1999, Mr. Myers requested that the Board credit him with service credit for his 1973, 1974, and 1975 summer employment, as well as an additional month of service credit for his 1972 summer employment. Board staff denied Mr. Myers' request and he appealed to the Board's Hearing Officer. The Hearing Officer, in a March 31, 2000 Recommended

Decision, concluded that Mr. Myers had not been eligible for PERS membership during those periods because, as a participant in a co-op program, his employment was neither permanent nor full-time as required by W.Va. Code § 5-10-2 and W.Va. Code R. § 162-5-7, which establishes conditions for membership in PERS, but instead was temporary and provisional.

7. The Hearing Officer's Recommended Decision concluded that Mr. Myers' request to purchase retroactive service credit for these periods should be denied. In the Recommended Decision, the Hearing Officer observed that Mr. Myers had been erroneously credited with two (2) months of service credit for his 1972 summer employment as a result of the mistakenly-withheld contributions, but also made a suggestion with respect to Mr. Myers:

Although it is clear that Mr. Myers' participation in the system in 1972 was in error, equity suggests that he be permitted to retain this two-months service credit. The error, however, should not, now that the actual circumstances of his employment are known, be compounded by awarding an additional one-month's service credit, for which he would be entitled under Rule § 162-5-5.1.2 had he been legally eligible for membership. However, should Mr. Myers not wish to receive only two months' service credit for the contributions made, he should be permitted to withdraw these contributions, with interest.

8. The Hearing Officer's actual Recommendation to the Board, however, addressed only the request that was actually made by Mr. Myers: "It is recommended that the request of Rodney A. Myers for additional service credit for 1972 and to acquire service credit for employment in 1973, 1974 and 1975 be denied."

9. The Board of Trustees of the West Virginia Consolidated Public Retirement Board (Board of Trustees) considered the March 31, 2000 Recommended Decision during its May 10, 2000 meeting. The Hearing Officer summarized the facts in issue and then recommended that Mr. Myers' request for additional service credit be denied, and made a "sub-recommendation" that he be permitted to retain the two months of service credit erroneously awarded to him. The Chairman of the Board of Trustees and the Board's Executive Director questioned the Hearing Officer regarding this "sub-recommendation," and in the course of the discussion, the Hearing Officer stated that his Recommended Decision did not actually make a recommendation on the erroneously awarded two (2) months of credit. The Board of Trustees then voted to adopt the Recommended Decision of the Hearing Officer. Mr. Myers did not appeal the Board of Trustees' adverse decision, and the Board of Trustees took no further action in the matter.

10. Upon applying for retirement in 2007, Board staff, pursuant to standard practice, conducted an audit of Mr. Myers' account, and upon learning that Mr. Myers remained credited with the two months of erroneously awarded service credit, issued a check to the Division of Highways for the mistaken employee and employer contributions and notified that entity that it should refund Mr. Myers' mistaken contributions to him. The Division of Highways did so, issuing a check to Mr. Myers in the amount of \$39.72, which constituted the erroneous contributions made by Mr. Myers in 1972, without interest. Mr. Myers was informed of this action and the reason for it, by letter, dated February 6, 2008.

11. Mr. Myers appealed the Board's decision to remove the two (2) months of service credit from his account, and in a Recommended Decision issued May 20, 2008, the Hearing Officer recommended that his request be denied. The Board of Trustees adopted the Recommended Decision and issued the September 3, 2008 Final Order denying Mr. Myers' request, from which Mr. Myers now appeals.

12. By the date of his retirement, Mr. Myers had accumulated 512 hours of unused annual leave. As is permitted by West Virginia Code § 5-5-3, in the course of retiring, Mr. Myers requested and received from his employer a lump sum payment of \$17,490 for his unused annual leave. No retirement system contributions were withheld from this payment.

13. In 1987 the West Virginia Legislature enacted a statutory provision (which became effective in 1987) permitting certain state employees to elect a lump sum payment and which provided as follows:

Every eligible employee, as defined in section one [§ 5-5-1] of this article, at the time his or her active employment ends due to resignation, death, retirement or otherwise may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular payday had his employment continued. In determining the amount of annual leave entitlement, weekends, holidays or other periods of normal, noncountable time shall be excluded, and no deduction may be made for contributions toward retirement from lump sum payments for unused, accrued annual leave, since no period of service credit is granted in relation thereto, and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending unit.

W.Va. Code § 5-5-3 (1987).

14. In 1988, the West Virginia Legislature amended West Virginia Code § 5-5-3 and provided that the lump sum payments would be included in the computation of a retiring member's final average salary by adding a statement that "such lump sum payment is to be part of final average salary computation."

15. In 1988, when West Virginia Code § 5-5-3 was amended to provide that the lump sum payments for unused annual leave would be included in the computation of a retiring member's final average salary, Mr. Myers had been a full-time employee for the Division of Highways for twelve (12) years.

16. Mr. Myers received and turned down offers for other employment prior to the 1988 amendment to West Virginia Code § 5-5-3.

17. In 1989 the West Virginia Legislature again amended West Virginia Code § 5-5-3, removing the language permitting lump sum payments to be part of the final average salary computation and substituting instead a provision that "lump sum payment for unused, accrued leave of any kind or character may not be a part of final average salary computation...." This provision remains in force and unchanged today.

W.Va. Code § 5-5-3.

18. Mr. Myers received and turned down offers for other employment during the 1988 amendment to W.Va. Code § 5-5-3, allowing employees to include their lump sum

payment for unused annual leave into the computation of a member's final average salary, and after the amendment to W.Va. Code § 5-5-3 in 1989 removing the language permitting lump sum payments to be part of the final average salary computation.

19. In 1988, the year in which West Virginia Code § 5-5-3 would have given him the opportunity to elect to include a lump sum payment for unused leave in calculating his retirement annuity, Mr. Myers was not eligible to retire from his employment with the State.

20. Mr. Myers was an employee of the West Virginia Division of Highways and has worked continuously for the State of West Virginia for thirty-one (31) years.

### CONCLUSIONS OF LAW

1. The West Virginia Administrative Procedures Act governs the review of contested administrative decisions issued by a circuit court and specifically provides that:

(g) The Court may affirm the... decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the... decision of the agency if the substantial rights of the petitioner... have been prejudiced because the administrative... decisions are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g).

2. Pursuant to West Virginia Code § 5-10-2(11), an individual is an "employee" for purposes of eligibility for membership in the Public Employees Retirement System if such individual is employed full-time and his or her tenure is not restricted as to temporary or provisional appointment. Full-time employment is defined as "employment of an employee by a participating public employer in a position which normally requires twelve (12) months per year service and/or requires at least 1,040 hours per year service in that position."

W.Va. Code R. § 162-5-2.3

3. With respect to Mr. Myers' first request, the Court concludes that the Board did not clearly err or abuse its discretion in concluding that he is not entitled to reinstatement of the two (2) months of service credit for his 1972 co-op employment because he was not eligible for membership in PERS during that tenure. There is substantial evidence in the record to support the Board's finding that the employment was not full-time. It is clear that the co-op position did not require Mr. Myers to work twelve (12) months per year or at least 1,040 hours per year as required by West Virginia Code R. § 162-5-2.3. The Court also concludes that there is substantial evidence in the record to support the Board's finding that the employment was provisional and temporary because Mr. Myers' employment with the Division of Highways was conditioned upon events such as his continuing school as an engineering major, maintaining a minimum grade level, and working for the Division of Highways when not enrolled in school.

4. Mr. Myers asserts that he should have been permitted to retain the service credit in question on the basis of *res judicata*. To that end, Mr. Myers argues that the administrative appeal he brought in 2000 awarded him the credit and now prohibits the Board from correcting the error. With respect to his request, the Court concludes that the Board did not clearly err or abuse its discretion in concluding that Mr. Myers is not entitled to reinstatement of the two months of service credit for his 1972 co-op employment under the doctrine of *res judicata*. A key element which must be established to support a claim based on *res judicata* against an administrative agency is that the prior decision must be rendered pursuant to the agency's adjudicatory authority. See, *Rowe v. Grapevine Corp.*, 206 W.Va. 703, 527 S.E.2d 814 (1999). Another key element is that the issues litigated in the prior and subsequent proceeding must be identical. *Id.*

5. The Court concludes that the Board of Trustees did not have any adjudicatory authority in the prior appeal to determine whether or not Mr. Myers should be permitted to retain the two months of service credit erroneously awarded to him in 1972. The Board's Benefit Determination and Appeal Legislative Rules contemplate that appeals other than those for disability retirement benefits must first be considered by Board staff, who must notify the applicant in writing of their decision, stating the reasons for the denial, and that it is from Board staff's written denial that an applicant may appeal to the Hearing Officer and Board of Trustees. W.Va. Code R. § 162-2-7.1, -7.2. The 2000 administrative appeal was the result of a request by Mr. Myers to purchase additional service credit for 1972, 1973, 1974, and 1975; no request with respect to the erroneously awarded 1972 service credit was made by Mr. Myers at that time, and no action with respect to that credit by Board staff occurred. Based upon these

facts, the Court also concludes that Mr. Myers cannot meet the identity of issues requirement that is necessary to establish relief under the doctrine of *res judicata*. Mr. Myers' inability to establish each of these elements independently renders the Board's decision fully correct and supported by the law.

6. The Court also concludes that upon auditing Mr. Myers' account and learning again of the mistakenly awarded service credit, the Board was required by West Virginia Code § 5-10-44 to correct the error. This provision does not allow the Board to avoid correction due to the passage of time or for any other reason.

7. With respect to Mr. Myers' second request to include the amount of a lump sum payment for unused annual leave in calculating his final average salary, the Court concludes that the Board's denial was improper.

8. In *Dadisman v. Moore*, the Supreme Court of Appeals of West Virginia examined the relationship between the State and its employees regarding retirement benefits, and held that a public employee's rights under the statutorily created pension scheme are contract rights which are constitutionally protected by Article III, section 4, of the West Virginia Constitution. The Court stated that "[r]etired and active PERS plan participants have contractually vested property rights created by the pension statute, and such property rights are enforceable and cannot be impaired or diminished by the State." Syl. pt. 16, *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988).

9. The Court then clarified its position in *Booth v. Sims* with respect to the respective rights of active and retired members and held, with respect to active members, that the State cannot adversely amend or alter the statutes creating an employee's pension plan where the state employee continues with their employment such that the decision is made in reliance on the statutorily provided pension benefits. Syl. pt. 19, *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1995).

10. The Court has recognized that the Legislature may change public employee pension statutes, but that such alterations must not adversely affect the contractual rights of existing state employees who relied upon the statute to their detriment. *Adams v. Ireland*, 207 W.Va. 1, 528 S.E.2d 197 (1999). The Court has held that: “[a]lthough the legislature may augment pension property rights, the legislature cannot simply reduce a participating employee's pension property rights once it establishes the system unless the employee acquiesces in the change to the pension plan or unless the employee has so few years in the system that he or she has not detrimentally relied on promised pension benefits.” Syl. pt. 21, *Booth*; Syl. pt. 3, *Adams*.

11. To that end, “[c]hanges can be made with regard to employees with so few years of service that they cannot be said to have substantially relied to their detriment. Line drawing in this latter regard must be made on a case-by-case basis, but after ten years of state service detrimental reliance is presumed.” *Booth*, 193 W.Va. at 340.

12. In *Adams* the Court considered an appeal by Petitioner, who sought to invoke the 1988 version of West Virginia Code § 5-5-3. The Court stated that its holdings in *Booth* and *Dadisman* would apply and concluded that:

The length of time that a public employee pension statute was in effect is not the controlling factor in determining whether a subsequent statutory amendment has unconstitutionally impaired a public employee's contract.

The determinative factor, as we held in *Booth*, is whether the employee may be said to "have substantially relied to their detriment" on the statute.

*Adams*, 207 W.Va. at 8. Because the circuit court had dismissed Mr. Adams' complaint without taking any evidence, the Court remanded the case for further factual development to determine whether he substantially participated in the public employee's retirement system, or whether he relied to his detriment on the 1988 version of West Virginia Code § 5-5-3. *Id.*

13. Citing these cases, Mr. Myers contends that he has shown detrimental reliance because he had participated in the system for more than ten years and he had foregone other employment offers in the year prior to the 1989 amendment that eliminated his ability to include a lump sum payment in calculation of his final average salary. However, the Board contends that Mr. Myers' argument ignores the fact that the provision in which he argues to rely did not exist until 1988. It is clear to the Court that Mr. Myers did substantially participate in the system, but he did not substantially participate in a system that promised him the benefit of including a lump sum payment in calculating his final average salary. Although Mr. Myers was substantially participating in the system for twelve (12) years before the 1988 amendment to

W.Va. Code § 5-5-3, when the 1989 amendment to W.Va. Code § 5-5-3 removed the provision allowing inclusion of a lump sum payment in calculating an employee's final average salary, Mr. Myers had only substantially participated in that system for one year.

14. Mr. Myers detrimentally relied on the 1988 amendment to W.Va. Code § 5-5-3 when he chose to forego other employment opportunities and continue his employment with the Division of Highways. The West Virginia Supreme Court of Appeals reasoned that: “[s]ubstantial employee participation in the system *does* create an employee's reliance interest in pension benefits. An employee's membership in a pension system and his or her forbearance in seeking other employment prevents the legislature from impairing the obligations of the pension contract once the employee has performed a substantial part of his or her end of the bargain and relied to his or her detriment.” Syl. pt. 7, *Booth*.

15. Because Mr. Myers has shown actual detrimental reliance on the 1988 version of West Virginia Code § 5-5-3 which allowed inclusion of a lump sum payment for unused annual leave in calculating an employee's final average salary, the Court concludes that Mr. Myers' request was improperly denied.

16. For the reasons discussed above, this Court finds that the decision of the Board regarding reinstatement of service credit were not contrary to law or a lawfully adopted rule or policy, did not exceed the Board's statutory authority, were not the result of fraud or deceit, were not clearly wrong, and were not arbitrary and capricious.

17. For the reasons discussed above, this Court finds that the decision of the Board regarding inclusion of a lump sum payment for unused annual leave in calculation of final average salary was contrary to law and "clearly wrong in view of the reliable, probative and substantial evidence on the whole record."

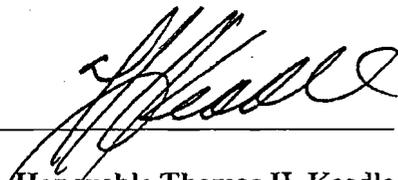
WHEREFORE, this Court **AFFIRMS** part of the September 3, 2008 Final Order of the West Virginia Consolidated Public Retirement Board which found Petitioner Rodney A. Myers was not entitled to the reinstatement of service credit. This Court **REVERSES** part of the September 3, 2008 Final Order of the West Virginia Consolidated Retirement Board which found Petitioner Rodney A. Myers was not entitled to the inclusion of a lump sum payment for unused annual leave in calculation of final average salary. Furthermore, the Court **ORDERS** the West Virginia Consolidated Public Retirement Board to include Petitioner Rodney A. Myers' lump sum payment for unused annual leave in calculating his final average salary for purposes of determining his retirement annuity.

The Court **FURTHER ORDERS** that a certified copy of this **FINAL ORDER** be sent to all parties or counsel of record:

- a. Mr. Rodney A. Myers, 2737 Lifes Run Road, Jane Lew, West Virginia 26378,  
*Petitioner;*
- b. Mrs. Diane M. Myers, 2737 Lifes Run Road, Jane Lew, West Virginia 26378,  
*Petitioner;* and

c. Ms. Lenna R. Chambers, Bowles Rice McDavid Graff & Love LLP, 600 Quarrier Street, PO Box 1386, Charleston, West Virginia 25325-1386, *Counsel for Respondent.*

Entered this 2 day of July, 2009.



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Honorable Thomas H. Keadle

Twenty-Sixth Judicial Circuit

STATE OF WEST VIRGINIA, COUNTY OF LEWIS, TO-WIT:  
I, JOHN B. HINZMAN, Clerk of the Circuit Court of Lewis County, do hereby certify that the foregoing is a true copy of an Order entered in the above styled action on the 2 day of July, 2009.  
Given under my hand and official seal this the 6 day of July, 2009.

**JOHN B. HINZMAN**

Clerk of the Circuit Court of  
Lewis County, West Virginia

