13-0403

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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KANAWHA COUNTY CIRCUIT COURT

KEITH A. WOOD, WILLIAM E. WALKUP, TED M. CHEATHAM, HERBERT E. LATTIMORE, JR., and JOHNNY L. R. FERNATT,

Petitioners,

v.

Civil Action Nos. 11-AA-143 (Consolidated with 12-AA-25, 12-AA-120, 12-AA-121, and 12-AA-122)
Judge Paul Zakaib, Jr.

WEST VIRGINIA CONSOLIDATED PUBLIC EMPLOYEES RETIREMENT BOARD,

Respondent.

FINAL ORDER

On December 20, 2011, Petitioner Keith A. Wood filed an appeal to this Court from the final order issued by Respondent West Virginia Consolidated Public Employees Retirement Board on December 14, 2011. Subsequently, Respondent filed in the Kanawha County Circuit Clerk's office the complete underlying record and the parties submitted briefs and proposed orders.

On April 27, 2012, Petitioner William E. Walkup filed an appeal to this Court from the final order issued by Respondent West Virginia Consolidated Public Employees Retirement Board on March 1, 2012. Subsequently, Respondent filed in the Kanawha County Circuit Clerk's office the complete underlying record and the parties submitted briefs and proposed orders.

On September 26, 2012, Petitioners Ted M. Cheatham, John L. R. Fernatt and Herbert E. Lattimore, Jr. filed their respective appeals to this Court from the final order issued in their consolidated case by Respondent West Virginia Consolidated Public Employees Retirement Board on September 20, 2012. Subsequently, Respondent filed in the Kanawha County Circuit Clerk's

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19

office the complete underlying record and the parties submitted briefs and proposed orders. In a previous order, this Court consolidated these five administrative appeals.

These consolidated administrative appeals challenge Respondent's finding that Petitioners, who are State employees covered by the Public Employees Retirement System (PERS), are not entitled to the full five years of military service credit, under W.Va.Code §5-10-15, despite their active service in the military during several recognized "periods of armed conflict." Petitioners also challenge Respondent's denial of their motion to have each of their cases treated as a class action on behalf of all State employees who actively served in the military, were honorably discharged, and are eligible to receive military service credits toward their PERS retirement.

After considering the pleadings, exhibits, and orders, the Court hereby **ADJUDGES, ORDERS, and DECREES** as follows:

Findings of fact

1. Veterans who actively served in the United States military, were honorably discharged, and are employed by the State of West Virginia, **are entitled**, as a matter of law, to receive up to five years of military service credit toward their PERS retirement under W.Va.Code §5-10-15. To receive military service credit, the State employee must show that he or she actively served in the United States military either during a period of compulsory service or a "period of armed conflict."
2. These consolidated cases focus on the refusal of Respondent to recognize the various periods of armed conflict which occurred after July 1, 1973, when the compulsory draft ended, through September 10, 2001. The record reflects that from September 11, 2001, to the present, Respondent has recognized an ongoing period of armed conflict.

3. This case consolidates the **second, third, fourth, fifth, and sixth appeals** filed in the Circuit Court of Kanawha County challenging Respondent's denial of military service credits under W.Va.Code §5-10-15, for this time period. In the first appeal filed in the Circuit Court of Kanawha County, *Daniel Olthaus v. West Virginia Consolidated Public Employees Retirement Board*, Civil Action No. 08-AA-109, Judge Tod Kaufman concluded Respondent failed to recognize that Mr. Olthaus's service in the military from August 17, 1983, to September 30, 2003, entitled him to be awarded the full five years of military service credit under W.Va.Code §5-10-15. Respondent never appealed the *Olthaus* decision to the West Virginia Supreme Court of Appeals, so this circuit court ruling remains unchallenged.

4. There are no factual disputes between the parties with respect to Petitioners' military service and their employment by the State. The essential facts found by the Hearing Officer Jack DeBolt are, by and large, not disputed:

Petitioner Keith A. Wood

5. The hearing officer found as follows regarding Petitioner Keith A. Wood:

> 1. The Applicant, Keith A. Wood, is a member of PERS with an excess of eighteen years of contributory service credit. He was born December 7, 1955.
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> 2. The Applicant served on active duty in the U.S. Army from January 7, 1978, to September 29, 1992, as a military intelligence officer and aviator. Because his DD-214, the military document which lists his total service, was partially illegible Board staff initially thought his commencement date was January 7, 1973, as opposed to 1978.
>
> 3. The Applicant initially sought State employment as a pilot, wanting to be in this area because of his father's illness. Both former

Administration Secretary Polan and former Governor Caperton told him that he would qualify for five years military service credit should he come to work for the State. He relied upon this advice when deciding to accept employment. Until recently, each of his PERS annual statements reflected five years of military service credit. There is no substantial evidence of detrimental reliance on this now–possibly–inaccurate information.

6. Petitioner Wood served in the Army during the dates listed above as a military intelligence officer and pilot. (July 26, 2011 Tr. at p. 17). While he served in the Army, Petitioner Wood had some involvement in the events in Nicaragua, El Salvador, Honduras, Saudi Arabia, Kuwait, Lebanon, Yugoslavia, Iraq, and Iran. (*Id.* at 35-37).

7. In August, 1992, Petitioner Wood accepted a position with the State as the Aviation Services Manager. In 2005, Petitioner Wood was promoted to serve as the State Director of Aviation. During all of the years he was employed by the State, Petitioner Wood regularly received statements from Respondent advising him that based upon his military service, **he was entitled to receive the full five years of military service credit toward his retirement.** However, in 2011, after making an inquiry about some other retirement credit to which he was entitled, Petitioner Wood was advised by Respondent that his military service credit had not been calculated correctly based upon a misreading of a date, and that instead of five years of military service credit, Petitioner Wood was entitled to receive only **eight months of such credit** based upon the Persian Gulf War which lasted from August 2, 1990, through April 11, 1991, under W.Va.Code §5-10-15(b)(8).

8. Petitioner Wood exercised his right to appeal this determination and an administrative hearing was held. In connection with his administrative hearing, Petitioner Wood

filed a motion seeking to have his administrative appeal treated as a class action on behalf of all other similarly situated State employees. However, this motion was denied before the hearing.

9. At the administrative hearing, Petitioner Wood testified he was approached by former Administration Secretary Chuck Polan and former Governor Gaston Caperton regarding the position of Aviation Services Manager within the Aviation Division of the State of West Virginia. (*Id.* at p. 15, 16). Petitioner Wood expressed his reluctance to leave the military. (*Id.* at p. 17). Secretary Polan recruited Petitioner by claiming that West Virginia was very military proactive, and specifically told Petitioner that he would receive five years military credit on his first day of employment. (*Id.* at 18). Petitioner Wood was also told by Governor Caperton that he would receive five years military credit. (*Id.* at 19).

10. From the beginning of his employment, Petitioner Wood received annual statements from Respondent which reflected five years military service credit towards state retirement. (Id. at 20). Applicant's Exhibit 1. In early 2011, Petitioner Wood began an inquiry to receive additional credit toward retirement from his employment as a janitor at West Virginia State College from 1975- 1977. (*Id.* at 27). On March 29, 2011, Petitioner Wood met with Torie Williams, an employee of Respondent, regarding the credit. (*Id.* at 27). At that meeting Petitioner was informed by Ms. Williams he had mistakenly received five years of military service credit since the beginning of his employment with the State, and that her review of the records reflected eight months of credit. (*Id.* at 28).

Petitioner William E. Walkup

11. The hearing officer found as follows regarding Petitioner William E. Walkup:

    1. The Applicant, William E. Walkup, is a member of PERS with an excess of twenty-one years of contributory service credit. He presently is employed as manager of the Eastern West Virginia Regional Airport.

    2. The Applicant served on active duty as a United States Marine from May 5, 1983 to May 4, 1987. He began participation in PERS in May 1989.

12. Petitioner Walkup served in the U.S. Marine Corps during the dates listed above as a improved hawk missile system operator, and a nuclear chemical biological specialist. (Oct. 25, 2011 Tr. at p. 8) While he served in the Marine Corps, he had some involvement in the events in Lebanon, Grenada, and El Dorado Canyon (*Id.* at 18)

13. In May of 1989, Applicant was first employed by the State of West Virginia as an Interim Manager and Maintenance Director of Eastern West Virginia Regional Airport. (*Id.* at 6, 7). Applicant was then promoted to the position of Manager and Director of Eastern West Virginia Regional Airport. (*Id.* at 7). He had served in that position for twenty-two and a half years at the time of the October 25, 2011 hearing. (*Id.*). In June, 2011, Applicant wrote to the WVCPRB to request military service credit for his service. Applicant became aware of the military service credit by speaking with his friend, Keith Wood, who also served in the military during the early '80's. (*Id.* at 11, 14). Applicant requested credit for his **four years** of military service from May 1983 to May 1987. (*Id.* at 14).

14. Petitioner Walkup exercised his right to appeal this determination and an administrative hearing was held. In connection with his administrative hearing,

Petitioner Walkup filed a motion seeking to have his administrative appeal treated as a class action on behalf of all other similarly situated State employees. However, this motion was denied before the hearing.

15. At the administrative hearing, Petitioner Walkup testified he became aware of the military service credit by speaking with his friend, Keith Wood, who also served in the military during the early '80's. (*Id.* at 11, 14).

16. From the beginning of his employment, Petitioner Walkup received annual statements from Respondent showing no military service credit at all despite his four years of service in the United States Marine Corps. (*Id.* at Ex. 2).

Petitioner Ted M. Cheatham

17. The hearing officer found as follows regarding Petitioner Ted M. Cheatham:

> The Applicant, Ted M. Cheatham, is a member of PERS with 4 years, 3 months contributing service credit as of the end of 2010. He presently is employed as Director of the Public Employees Insurance Agency. He was born September 11, 1954. He served in the United States Army from May 29, 1977 through October 15, 1988. When he was first employed he was told by a former Secretary of Administration that he could get five years of military service credit. That does not appear to be a factor in his decision to accept employment because he did not anticipate his employment to last sufficiently long for him to be eligible for an annuity and enjoy the benefits of military service credit. He believes he is entitled to five years of military service credit. He was denied in the entirety of his request.

18. Petitioner Cheatham served in the Army during the dates listed above as a Battalion Motor Officer, Advanced Officer, Pilot, Briefer for the Army Aviation Center, Commander of a Combat Aviation Brigade, and Division Aviation Officer. (April 3, 2012 Tr. at p. 12-13). While he served in the Army, the United States was

involved in conflict events in Nicaragua, Somalia, Lebanon, Granada, and Panama, among others, and Petitioner Cheatham personally was involved in some of these. (*Id.* at 25).

19. In September 2006, Petitioner Cheatham accepted a position with the State as Director of the Public Employees Insurance Agency (PEIA). He has served in that position ever since. (*Id.* at 9-10) During all of the years he had been employed by the State, Petitioner Cheatham regularly received statements from Respondent advising him that based upon his military service, **he was entitled to receive military service credit toward his retirement.** However, in 2011, after submitting his DD 214 so that Respondent would have it on file, Petitioner Cheatham was advised by Respondent that instead of five years of military service credit, Petitioner Cheatham was not, per its calculations, entitled to receive **any** military service credit, despite his years of service as detailed above.

20. Petitioner Cheatham exercised his right to appeal this determination and an administrative hearing was held. In connection with his administrative hearing, Petitioner Cheatham filed a motion seeking to have his administrative appeal treated as a class action on behalf of all other similarly situated State employees. However, this motion was denied before the hearing.

21. At the administrative hearing, Petitioner Cheatham testified that he was approached by Tom Susman, former Secretary of Administration, regarding the position of Director of the Public Employees Insurance Agency (PEIA). (*Id.* at p. 17). Secretary Susman specifically told Petitioner Cheatham that he would receive five years military service credit toward retirement. (*Id.* at 18).

22. From the beginning of his employment, Petitioner Cheatham received annual statements from Respondent, which never reflected credit, Petitioner Cheatham believed, because he had never submitted a DD 214. (*Id.* at 19). Petitioner Cheatham decided to submit his DD 214 after hearing about the problems Dan Olthaus and Keith Wood had with obtaining their military service credit from Respondent. (*Id.* at 21-22) After submitting his DD 214, Petitioner Cheatham received a letter from Respondent stating he had **no** military service credit and ninety days to appeal.

Petitioner Herbert E. Lattimore, Jr.

23. The hearing officer found as follows regarding Petitioner Herbert E. Lattimore, Jr.:

> Applicant Lattimore is a member of PERS with 8 years, 3 months contributing service credit as of the end of 2010. He was born August 31, 1952. He is employed by the Office of Emergency Management. He served in the United States Army from May 4, 1975 through March 1, 2001. When he was first hired by the State he was told he would get five years of military service credit but concedes that this was not a factor in accepting his employment. He believes he is entitled to five years of military service credit. He was denied all but eight months of his request, this being for his service during the Persian Gulf War.

24. Petitioner Lattimore served in the Army during the dates listed above as a platoon leader, executive officer, company commander, personnel officer, special duty, assistant and later full professor of military science, and European foreign area officer, among other titles. (*Id.* at 70-74) While he served in the Army, the United States was involved in conflict events in the Persian Gulf, Vietnam, Mayaguez, Beirut, Panama, Grenada, Nicaragua, Libya, and Kosovo, and Petitioner Lattimore personally was involved in some of these. (*Id.* at 86).

25. At the administrative hearing, Petitioner Lattimore testified it was his understanding he was entitled to five years military service credit for his twenty-six years of service in the Army. (*Id.* at 88). Petitioner Lattimore submitted his DD 214 to Respondent when he began to consider retirement in December 2011 and was surprised to learn that Respondent only intended to credit him with **eight months** of military service credit. (*Id.* at 81-82).

Petitioner John L. R. Fernatt

26. The hearing officer found as follows regarding Petitioner John L. R. Fernatt:

> Applicant Fernatt is a member of PERS with12 years, 5 months of contributing service credit through the end of 2010. He is employed as an information systems manager by the Board of Risk and Insurance Management. He was born December 18, 1961. He served in the United States Navy from July 18, 1980 through February 16, 1990. During his hiring process he was told by someone that he would be eligible for five years of military service credit. He did not speak with anyone at this board. He believes he is entitled to five years of military service but was denied any.

27. Petitioner Fernatt served in the Navy during the dates listed above as a submarine technician instructor, navigation electronics technician, lead radar systems operator, electronic countermeasures operator and chief of the watch, among other titles. (*Id.* at 36-38) While he served in the Navy, the United States was involved in conflict events in Granada, Kosovo, Somalia, and Libya, and Petitioner Fernatt personally was involved in some of these. (*Id.* at 50-51)

28. At the administrative hearing, Petitioner Fernatt testified that he was approached by his current supervisor while employed by Union Carbide, regarding the position with BRIM. Petitioner Fernatt specifically agreed to take the position even though it meant a pay cut because of the benefits and incentives offered, including the military

service credit, which was "very enticing." (*Id.* at 43-45). Petitioner Fernatt had the understanding at the time he was hired that he would receive five years military service credit for his ten years of service in the United States Navy. (*Id.* at 45)

29. Petitioner Fernatt received contribution statements from Respondent regarding his military service credit and began the process of questioning the amount of credit he would receive in 2008, when he first received a response that he was not entitled to **any** credit, despite his ten years' service in the Navy. (*Id.* at 47)

30. An evidentiary hearing was held for Petitioners Cheatham, Lattimore, and Fernatt on April 3, 2012, in which virtually the same substantive evidence was presented as in the *Olthaus, Wood* and *Walkup* cases. Hearing Officer DeBolt issued a recommended order denying Petitioners' requests for five years of military service credit and affirming the staff decision to award these three Petitioners as follows:

Petitioner Cheatham:	Zero credit
Petitioner Lattimore:	Eight months credit
Petitioner Fernatt:	Zero credit

31. On September 20, 2012, Respondent entered a final order adopting the recommended order issued by Hearing Officer DeBolt. On September 26, 2012, pursuant to W.Va.CSR §162-2-8, and W.Va.Code §29A-5-4, Petitioners Cheatham, Lattimore and Fernatt filed their appeal of this final order to this Court. Petitioners Wood and Walkup had appeals pending before this Court at that time.

Conclusions of Law

A.

Military service credit

The issue raised in this case is straightforward–For how many years were Petitioners in the "active service of the Armed Forces of the United States...during a period of armed conflict?" The DD214 forms filed with Respondent show that Petitioner Wood served in the United States Army from January 7, 1978, through September, 29 1992; Petitioner Walkup served in the United States Marine Corps from May 5, 1983, through May 4, 1987; Petitioner Cheatham served in the United States Army from May 29, 1977, through October 15, 1988; Petitioner Lattimore served in the United States Army from May 4, 1975, through March 1, 2001; and Petitioner Fernatt served in the United States Navy from July 18, 1980, through February 16, 1990.

When W.Va.Code §5-10-15 was first enacted, State employees participating in PERS could receive military service credit only when they actively served in the military during a time of compulsory service. Under the procedures followed by Respondent, if a State employee actively served in the military for even one day when the draft was still in effect, that employee would receive the maximum five years of military service credit. Compulsory service in the military ended on July 1, 1973. In 2000, the Legislature amended W.Va.Code §5-10-15, to extend military service credits not only for active service during a time when the draft still was in effect, but also during a "period of armed conflict."

The phrase "period of armed conflict" is defined in W.Va.Code §5-10-15(b)(1), as "the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War and **any other period of armed conflict by the United**

States, including, but not limited to, those periods sanctioned by a declaration of war by the United States Congress or by executive or other order of the President." (Emphasis added). Thus, the Legislature explicitly never intended the military service credit awarded under this statute to be limited to the specific armed conflicts listed.

A period of armed conflict does not mean that an actual war has to be declared by the President or Congress. The definition of "period of armed conflict" W.Va.Code §5-10-15(b)(1), makes this point explicit because, after listing various wars or military conflicts, the Legislature further includes in very broad language "any other period of armed conflict by the United States, including, but not limited to, those periods sanctioned by a declaration of war by the United States Congress or by executive or other order of the President." Thus, there can be periods of armed conflict that were not officially declared to be wars by the President or Congress.

The Legislature did not provide any further guidance with respect to what it meant by "period of armed conflict." As such, these words should be given their ordinary meaning. Furthermore, W.Va.Code §5-10-3a, requires that the "provisions of this article shall be liberally construed so as to provide a general retirement system for the employees of the state herein made eligible for such retirement." A liberal construction would require the conclusion that unless the statute clearly excludes a particular military campaign from being considered, then all military campaigns and periods of armed conflict must be used in calculating an employee's military service credit.

For reasons not made clear either in its regulations or prior rulings, Respondent has chosen **not** to provide military service credit for **all** periods of armed conflict. The following are the only periods of armed conflict listed on Respondent's web site as justifying military service credit:

Spanish-American War ..... 04-21-1898 through 07-04-1902
Spanish-American War – Moro Province ..... 04-21-1898 through 07-15-1903
Mexican Border Period ..... 05-09-1916 through 04-05-1917
World War I ..... 04-06-1917 through 11-11-1918
World War I – Russia ..... 04-06-1917 through 04-01-1920
World War II ..... 12-07-1941 through 12-31-1946
Korean Conflict ..... 06-27-1950 through 01-31-1955
Vietnam Era ..... 02-28-1961 through 05-07-1975
Persian Gulf War ..... 08-02-1990 through 04-11-1991
Operation Noble Eagle ..... 09-11-2001 - ongoing
Operation Enduring Freedom ..... ongoing.

Before going through the various sources presented by Petitioners to define periods of armed conflict, there are two rules that must be understood. First, under W.Va.Code §5-10-14(a)(1), in calculating service credit, ten or more days of service equals one month of service credit.[1] Second, under W.Va.Code §5-10-14(a)(2), in calculating service credit, ten or more months of service equals one year of service credit.

At the administrative hearings, evidence was presented from the VFW of the United States Guide for Post Service Officers Veterans Benefits, listing various campaign medals available to veterans of foreign wars and the time periods covered by each campaign. (*Id.* at p. 34; Applicant's Exhibit 4). The following campaigns and the period of time covered by each campaign occurred while Petitioners actively served in the United States military:

El Salvador ..... 01-01-1981 through 02-01-1992
Lebanon ..... 06-01-1983 through 12-01-1987
Operation Urgent Fury–
Grenada ..... 10-23-1983 through 11-21-1983

[1]This statute applies to the calculation of all service credit. Apparently, Respondent has relied in the past on W.Va.CSR §162-5-4.1.2 and has held that service for less than one half month does not result in any service credit. This regulation is distinguishable because it is applicable only to the circumstance where the employee is working for the State and receiving a salary whereas W.Va.Code §5-10-14(a)(1), specifically applies to the calculation of all service credit. To the extent there is any conflict between this specific statute and this regulation, the statute is controlling.

Operation Earnest Will–
Persian Gulf ..... 07-24-1987 through 08-01-1990
Operation Just Cause–*Panama* ..... 12-20-1989 through 01-31-1990
United Shield–*Somalia* ..... 12-05-1992 through 03-31-1995

Another source for information regarding periods of armed conflict can be found in the West Virginia Constitution. In the Fourteenth Amendment to the West Virginia Constitution, entitled "Veterans Bonus Amendment (Persian Gulf, Lebanon, Grenada, and Panama)," cash bonuses were authorized to be paid to veterans who actively served in the military during the Persian Gulf, Lebanon, Grenada, and Panama conflicts. To the extent Respondent has asserted there is some confusion over what dates to include in the various periods of armed conflict, clearly the dates included in the Fourteenth Amendment to the West Virginia Constitution should be dispositive on this issue.

Of the foregoing list from the VFW, only the El Salvador conflict is not included in the Fourteenth Amendment. In this Amendment, the Persian Gulf conflict and Operation Desert Shield/Desert Storm began on August 1, 1990, and ended on a date to be "determined by the President or Congress of the United States as the end of involvement of the United States armed forces in the Persian Gulf conflict."

Petitioner Keith A. Wood

Since Petitioner Keith A. Wood was actively serving in the military from January 7, 1978, to September 29, 1992, recognizing the foregoing as periods of armed conflict would result in Petitioner Wood being entitled to receive **the full five years** of military service credit for El Salvador (01-01-1981 through 09-29-1992), **four and one-half years** of military service credit for Lebanon (06-01-1983 through 12-01-1987), **thirty days** for Grenada (10-23-1983 through 11-21-1983), **three years and five months** of military service credit for the Persian Gulf (07-24-1987 through 08-01-

1990), and **forty-three days** for Panama (12-20-1989 through 01-31-1990). Even after eliminating duplicative dates, during the time Petitioner Wood actively served in the military, based upon the VFW information, the United States military was engaged continuously without a break in a period of armed conflict from January 1, 1981 through September 29, 1992, more than sufficient to entitle Petitioner Wood to the full **five years** of military service credit mandated by W.Va.Code §5-10-15.

Under the Fourteenth Amendment, Petitioner Wood would be entitled to a total of **two years and one month** of military service credit for the Persian Gulf conflict (August 1, 1990 through September 29, 1992)[2], **two months** for Panama (12-20-1989 through 1-31-1990),[3] **one month** for Grenada (10-23-1983 through 11-21-1983)[4], **one year and eight months** for Lebanon (08-25-1982 through 02-26-1984).[5] Even after eliminating duplicative dates, during the time Petitioner Wood actively served in the military, based upon the conflicts listed in this Amendment to the West Virginia Constitution, Petitioner Wood is entitled to receive **four years** (two years and one month for Persian Gulf plus two months for Panama plus one year and eight months for Lebanon totaling four years) of military service credit mandated by W.Va.Code §5-10-15.[6] However, as explained

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[2]These dates for the Persian Gulf conflict differ from the dates listed above in the VFW chart and differ from the dates listed in W.Va.Code §5-10-15(b)(8).

[3]These dates for Panama are the same as listed above in the VFW chart.

[4]These dates for Grenada are the same as listed above in the VFW chart.

[5]These dates for Lebanon differ from the dates listed above in the VFW chart.

[6]Another exhibit presented at the hearing, which was provided by the Armed Services Commission, listed various military incidents, operations, conflicts, or wars where casualties were reported. (*Id.* at pp. 34-35; Applicant's Exhibit 5). In this document, various one day terrorist events are identified as well as longer periods of armed conflict. The main purpose of this document was to provide the dates when a casualty of an American citizen was reported. Thus, this listing is not as all encompassing as the dates provided either by the VFW or the Fourteenth Amendment to the

above and in the next section, Petitioner Wood is entitled to receive the full **five years** of military service credit.

Petitioner Wood: Equitable Estoppel[7]

An alternative legal theory also supporting Petitioner Wood's entitlement to five years of military service credit is through the application of collateral estoppel principles. The record shows that for over nineteen years, Respondent provided Petitioner Wood with written statements asserting that he was entitled to receive five years of military service credit. Petitioner Wood did rely on these representations as part of his motivation for remaining in State government. With his experience and skills, Petitioner Wood easily could have moved into the private sector, but the five years of military service credit made keeping his State job more desirable.

The West Virginia Supreme Court has recognized that a public employee's rights to a State pension has a contractual and constitutional dimension and the employee's detrimental reliance is a relevant factor. In Syllabus Points 5, 11, 12, and 18 of *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1994), the West Virginia Supreme Court held:

> 5. In public employee pension cases, what often concerns the court is not the technical concept of "vesting," but rather the conditions under which public employees have a property right protected under the contract clauses because of substantial detrimental reliance on the existing pension system.
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> 11. If the State (or its political subdivisions) promise to defer salary until a person's retirement from state or local

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West Virginia Constitution.

[7]Of the five Petitioners discussed herein, ***only*** Petitioner Wood asserts this theory of equitable estoppel as alternative grounds for his receipt of military service credit.

> employment and to pay that deferred salary in the form of a pension, the State (or its political subdivisions) cannot eliminate this expectancy without just compensation once an employee has substantially relied to his or her detriment.
>
> 12. The cynosure of an employee's *W.Va. Const. art III, § 4* contract right to a pension is not the employee's or even the government's contribution to the fund; rather, it is the government's promise to pay.
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> 18. Because *all* employees who contribute to a state pension fund and who have substantially relied to their detriment on specific contribution and benefits schedules have immediate legitimate expectations that rise to the level of constitutionally protected contract property rights, we overrule *Mullett v. City of Huntington Police Pension Board*, 186 W.Va. 488, 413 S.E.2d 143 (1991), and its test of reasonableness for determining the constitutionality of legislative amendments to a pension plan.

Petitioner Wood asserts that his detrimental reliance on the representations of Respondent advising him repeatedly that he was entitled to the full five years of military service credit must be enforced using the doctrine of equitable estoppel. In Syllabus Points 3 and 4 of *Folio v. City of Clarksburg*, 221 W.Va. 397, 655 S.E.2d 143 (2007), the West Virginia Supreme Court gave the following summary of equitable estoppel:

> 3. "The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice." Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956).
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> 4. "To raise an equitable estoppel there must be conduct, acts, language or silence amounting to a representation or a

> concealment of material facts." Syllabus Point 7, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956).

In Syllabus Point 4 of *Hatfield v. Health Management Associates of West Virginia, Inc.*, 223 W.Va. 259, 672 S.E.2d 395 (2008), the West Virginia Supreme Court elaborated on this doctrine:

> "Equitable estoppel cannot arise merely because of action taken by one on a misleading statement made by another. In addition thereto, it must appear that the one who made the statement intended or reasonably should have expected that the statement would be acted upon by the one claiming the benefit of estoppel, and that he, without fault himself, did act upon it to his prejudice." Syllabus Point 4, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

In Syllabus Point 7 of *Samsell v. The State Line Development Co., Inc.*, 154 W.Va. 48, 174 S.E.2d 318 (1970), the West Virginia Supreme Court cautioned that estoppel is not to be liberally applied in all circumstances:

> The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine of estoppel against the state.

In *Hudkins v State of West Virginia Consolidated Public Retirement Board*, 220 W.Va. 275, 647 S.E.2d 711 (2007), the West Virginia Supreme Court applied equitable estoppel to Respondent. In *Hudkins*, a public employee contemplating retirement sought information from Respondent on whether she could convert her unused sick leave as additional service credit, which would increase the amount of her retirement benefits. She was given assurances verbally and in writing by Respondent employees that she could freeze her unused sick leave and could use the accumulated time to extend her service credit upon applying for retirement. Based upon these assurances, this employee resigned from her job.

About two years later, this employee learned for the first time that only employees who actually retire and begin drawing retirement benefits at the time of termination could convert unused sick leave to service credit and that employees who resign, but do not retire at that time, cannot do so. This employee challenged that decision, pursuant to the same procedure followed by Petitioner Wood in the present case.

In holding that Respondent was equitably estopped from preventing this employee from having her unused sick leave converted into service credit, the West Virginia Supreme Court first noted, based upon the above-quoted Syllabus Point 7 of *Samsell*, that ordinarily estoppel does not apply to the State. However, the West Virginia Supreme Court explained:

> The general rule prohibiting the application of the doctrine is not without exceptions. This Court in its prior decisions never intended to preclude the application of equitable estoppel against the State in every case. We therefore agree with the trial court's acknowledgment that the general rule that equitable estoppel does not apply against a governmental agency is not without exceptions.
>
> *Hudkins*, 220 W.Va. at 280, 647 S.E.2d at 716.

Thereafter, the West Virginia Supreme Court further held:

> The trial court's findings are supported by *28 Am. Jur. 2d Estoppel and Waiver § 140* which states as follows:
>
> **§ 140. What must be shown to estop government.**
>
> In recognition of the heavy burden bourne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent. Likewise, courts have held an estoppel against the government may be raised only when --
>
> -- the injury to the public interest if the government is estopped is out weighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped.

-- raising the estoppel prevents manifest or grave injustice.

-- raising the estoppel will not defeat a strong public interest or the operation of public policy.

-- the exercise of government functions is not impaired or interfered with.

-- circumstances make it highly inequitable or oppressive not to estop the government.

-- the government's conduct works a serious injury and the public's interest will not be harmed by the imposition of estoppel.

Applying these same factors in the present case also supports the application of equitable estoppel to Petitioner Wood. Respondent affirmatively represented to Petitioner Wood repeatedly, over nineteen years, that he was entitled to receive five years of military service credit. Petitioner Wood relied on these representations in taking a State job in the first place, when he could have had many other opportunities either in the military or in the private sector. Any injury to the public interest is far outweighed by the personal injury suffered by Petitioner Wood, who clearly is entitled to five years of military service credit.

Estoppel under these circumstances is not inconsistent with public policy. Public employees often need to plan their future retirement well in advance of their actual retirement date. Public employees should be able to rely on the representations of Respondent with respect to their service credit because employment decisions are premised on the information provided. Thus, Respondent, which represented in statements issued over nineteen years, is estopped from denying Petitioner Wood the maximum five years of military service credit toward his retirement.

Based upon the foregoing facts and the liberal construction required, the Court finds Petitioner Keith A. Wood is entitled to five years of military service credit under W.Va.Code §5-10-15.

Petitioner William E. Walkup

Since Petitioner William E. Walkup was actively serving in the military from May 5, 1983, through May 4, 1987, recognizing the foregoing periods of armed conflict would result in Petitioner Walkup being entitled to receive **four years** of military service credit for El Salvador (01-01-1981 through 09-29-1992), **four years** of military service credit for Lebanon (06-01-1983 through 12-01-1987), and **thirty days** for Grenada (10-23-1983 through11-21-1983). Even after eliminating duplicative dates, during the time Petitioner Walkup actively served in the military, based upon the VFW information, the United States military continuously without a break was engaged in a period of armed conflict from January 1, 1981, through September 29, 1992, more than sufficient to entitle Petitioner Walkup to **four years** of military service credit mandated by W.Va. Code §5-10-15.

Under the Fourteenth Amendment, Petitioner Walkup would be entitled to a total of **one month** for Grenada (10-23-1983 through 11-21-1983)[8], and **one year and eight months** for Lebanon (08-25-1982 through 02-26-1984).[9] Even after eliminating duplicative dates, during the time Petitioner Walkup actively served in the military, based upon the conflicts listed in this Amendment to the West Virginia Constitution, Petitioner Walkup is entitled to receive one year and eight months

[8]These dates for Grenada are the same as listed above in the VFW chart.

[9]These dates for Lebanon differ from the dates listed above in the VFW chart.

military service credit mandated by W.Va.Code §5-10-15.[10] Due to the liberal construction required, Petitioner Walkup is entitled to **four years** of military service credit.

Based upon the foregoing facts and the liberal construction required, the Court finds Petitioner William E. Walkup is entitled to four years of military service credit, under W.Va.Code §5-10-15.

Petitioner Ted M. Cheatham

Since Petitioner Ted M. Cheatham was actively serving in the military from May 29, 1977, through October 15, 1988, recognizing the foregoing periods of armed conflict would result in Petitioner Cheatham being entitled to receive **seven years** of military service credit for El Salvador (01-01-1981 through 10-15-1988), **four years** of military service credit for Lebanon (06-01-1983 through 12-01-1987), **thirty days** for Grenada (10-23-1983 through 11-21-1983), and **five days** for Eldorado Canyon, Libya (04-12-1986 through 04-14-1986). Even after eliminating duplicative dates, during the time Petitioner Cheatham actively served in the military, based upon the VFW information, the United States military was engaged continuously without a break in a period of armed conflict from January 1, 1981, through February 1, 1992, more than sufficient to entitle Petitioner Cheatham to the five years of military service credit mandated by W.Va. Code §5-10-15.

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[10]Another exhibit presented at the hearing, which was provided by the Armed Services Commission, listed various military incidents, operations, conflicts, or wars where casualties were reported. (*Id.* at 14, 15; Applicant's Exhibit 7). In this document, various one day terrorist events are identified as well as longer periods of armed conflict. The main purpose of this document was to provide the dates when a casualty of an American citizen was reported. Thus, this listing is not as all encompassing as the dates provided either by the VFW or the Fourteenth Amendment to the West Virginia Constitution.

Under the Fourteenth Amendment, Petitioner Cheatham would be entitled to a total of **one month** for Grenada (10-23-1983 through 11-21-1983)[11] and **one year and eight months** for Lebanon (08-25-1982 through 02-26-1984).[12] Even after eliminating duplicative dates, during the time Petitioner Cheatham actively served in the military, based upon the conflicts listed in the Fourteenth Amendment to the West Virginia Constitution, Petitioner Cheatham is entitled to receive one year and eight months military service credit mandated by W.Va.Code §5-10-15.[13]

Based upon the foregoing facts and the liberal construction required, the Court finds Petitioner Ted M. Cheatham is entitled to five years of military service credit, under W.Va.Code §5-10-15.

Petitioner Herbert E. Lattimore, Jr.

Since Petitioner Herbert E. Lattimore, Jr., actively was serving in the military from May 4, 1975 through March 1, 2001, recognizing the foregoing periods of armed conflict would result in Petitioner Lattimore being entitled to receive **one day** of military service credit for the Mayaquez Operation, **eleven years** of military service credit for El Salvador (01-01-1981 through 02-01-1992), **four years** of military service credit for Lebanon (06-01-1983 through 12-01-1987), **thirty days** for Grenada (10-23-1983 through 11-21-1983), **five days** for Eldorado Canyon, Libya (04-12-1986

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[11]These dates for Grenada are the same as listed above in the VFW chart.

[12]These dates for Lebanon differ from the dates listed above in the VFW chart.

[13]Another exhibit presented at the hearing, which was provided by the Armed Services Commission, listed various military incidents, operations, conflicts, or wars where casualties were reported. (*Id.* at 14, 15; Petitioner's Exhibit 2). In this document, various one day terrorist events are identified as well as longer periods of armed conflict. The main purpose of this document was to provide the dates when a casualty of an American citizen was reported. Thus, this listing is not as all encompassing as the dates provided either by the VFW or the Fourteenth Amendment to the West Virginia Constitution.

through 04-14-1986), **three years** for Operation Earnest Will - Persian Gulf (07-24-1987 through 08-01-1990), **forty-two days** for Operation Just Cause - Panama (12-20-1989 through 01-31-1990), **three years** for United Shield - Somalia (12-05-1992 through 03-31-1995), **three years** for Operation Restore Hope - Somalia (12-05-1992 through 03-31-1995), **six months** for Operation Uphold Democracy - Haiti (09-16-1994 through 03-31-1995), **thirteen months** for Operation Joint Endeavor - Bosnia, Croatia, the Adriatic Sea & airspace (11-20-1995 through 12-19-1996), two years for Operation Vigilant Sentinel - Iraq, Saudi Arabia, Kuwait & Persian Gulf (12-1-1995 through 09-01-1997), **seventeen years** for Operation Southern Watch - Iraq, Saudi Arabia, Kuwait, Persian Gulf, Bahrain, Qatar U.A.E., Oman, Gulf of Oman, W of 62° E. Long., Yemen, Egypt & Jordan (12-1-1995 through Open), **seventeen years** for Operation Maritime Intercept - Iraq, Saudi Arabia, Kuwait, Red Sea, Persian Gulf, Gulf of Oman, W of 62° E. Long., Bahrain, Qatar, UAW, Omen, Yemen, Egypt & Jordan (12-1-1995 through Open), **eighteen months** for Operation Joint Guard - Bosnia, Croatia, Adriatic Sea & airspace (12-20-1996 through06-20-1998), **six years** for Operation Northern Watch - Iraq, Saudi Arabia, Kuwait, Persian Gulf W of 56° E. Long., and Incirlik AB, Turkey (only pers. TDY to ONW) (01-01-1997 through 03-17-2003), **fourteen years** for Operation Joint Forge - Bosnia-Herzegovina, Croatia, Adriatic Sea & airspace (06-21-1998 through Open), **one month** for Operation Desert Thunder - Iraq, Saudi Arabia, Kuwait, Bahrain, Qatar, U.A.E., Oman, Yemen, Egypt, Jordan, Persian Gulf, Gulf of Oman, Red Sea Support (11-11-1998 through 12-22-1998), **six days** for Operation Desert Fox - Iraq, Saudi Arabia, Kuwait, Bahrain, Qatar, U.A.E., Oman, Yemen, Egypt, Jordan, Persian Gulf, Gulf of Oman, Red Sea Support (12-16-1998 through 12-22-1998) and **eleven years** for Global War on Terrorism (9-11-2001 through Open).

Even after eliminating duplicative dates, during the time Petitioner Lattimore actively served in the military, based upon the VFW information, the United States military continuously without

a break was engaged in a period of armed conflict from January1, 1981, through February 1, 1992, more than sufficient to entitle Petitioner Lattimore to five years of military service credit mandated by W.Va. Code §5-10-15.

Under the Fourteenth Amendment, Petitioner Lattimore would be entitled to a total of **all the time frames listed above, excluding El Salvador, or the total of the twenty-six years Petitioner Lattimore spent in the military.** Even after eliminating duplicative dates, during the time Petitioner Lattimore actively served in the military, based upon the conflicts listed in this Amendment to the West Virginia Constitution, Petitioner Lattimore is entitled to receive the full five years military service credit mandated by W.Va.Code §5-10-15.

Based upon the foregoing facts and the liberal construction required, the Court finds Petitioner Herbert E. Lattimore, Jr., is entitled to five years of military service credit under W.Va.Code §5-10-15.

Petitioner Johnny L. R. Fernatt

Since Petitioner Johnny L. R. Fernatt actively was serving in the military from July 18, 1980, through February 16, 1990, recognizing the foregoing periods of armed conflict would result in Petitioner Fernatt being entitled to receive **nine years** of military service credit for El Salvador (01-01-1981 through 02-16-1990), **four years** of military service credit for Lebanon (06-01-1983 through 12-01-1987), **thirty days** for Grenada (10-23-1983 through 11-21-1983), **five days** for Eldorado Canyon, Libya (04-12-1986 through 04-14-1986), **three years** for Operation Earnest Will - Persian Gulf (07-24-1987 through 08-01-1990) and **forty-two days** for Operation Just Cause - Panama (12-20-1989 through 01-31-1990). Even after eliminating duplicative dates, during the time Petitioner Fernatt actively served in the military, based upon the VFW information, the United States military continuously without a break was engaged in a period of armed conflict from

January1, 1981, through February 1, 1992, more than sufficient to entitle Petitioner Fernatt five years of military service credit mandated by W.Va. Code §5-10-15.

Under the Fourteenth Amendment, Petitioner Fernatt would be entitled to a total of **one month** for Grenada (10-23-1983 through 11-21-1983) and **one year and eight months** for Lebanon (08-25-1982 through 02-26-1984). Even after eliminating duplicative dates, during the time Petitioner Fernatt actively served in the military, based upon the conflicts listed in this Amendment to the West Virginia Constitution, Petitioner Fernatt is entitled to receive one year and eight months military service credit mandated by W.Va.Code §5-10-15.

Based upon the foregoing facts and the liberal construction required, the Court finds Petitioner Johnny L. R. Fernatt is entitled to five years of military service credit under W.Va.Code §5-10-15.

Analysis

Under W.Va.Code §5-10-15(a)(6), the Legislature specifically gave Respondent the responsibility for determining what military actions should be included in the phrase "period of armed conflict." Specifically, W.Va.Code §5-10-15(a)(6) provides, "In any case of doubt as to the period of service to be credited a member under the provision of this section, the Board of Trustees have final power to determine the period." However, Respondent necessarily would have to make such determinations **consistent with** the broad definition of "period of armed conflict" mandated by the Legislature and with the liberal construction of this statute required by W.Va.Code §5-10-3a.

Terasa Miller acknowledged, during her testimony, that while the foregoing military actions had been considered by Respondent or a committee assigned to that task, at no point has Respondent ever articulated in writing any explanation as to why these periods of armed conflict are not being recognized by Respondent for purposes of calculating military service credits. (*Id.* at pp. 66-68).

Respondent has made no effort to explain, for example, why military service credit is given for Operation Enduring Freedom, but not for Operation Desert Storm/Operation Desert Shield. What about the years this country was engaged in an armed conflict in Lebanon? It cannot be disputed that the United States Armed Forces were engaged in armed conflicts at that time and some American soldiers sacrificed their lives or were wounded in those disputes.

Other than this general definition and specific inclusion of certain wars and military conflicts, the Legislature provided no additional specific guidance on what it meant by period of armed conflict. There is nothing in the statute, for example, to suggest either that a period of armed conflict necessarily must involve deaths in the field of battle or the firing of a single shot.

The statute also is silent on what evidence is required for a public employee to prove that he or she had actively served in the military during a period of armed conflict. Thus, the exhibits provided from the VFW and the Armed Services Commission, as well as the Fourteenth Amendment, the DD214's filed by Petitioners, and their testimony provide an adequate evidentiary basis for the Court to conclude that all three of these Petitioners are entitled to five years of military service credit.

On three different occasions–Archie Hubbard decision, September 11, 2001 event, and Daniel Olthaus decision–Respondent or a court has identified additional periods of armed conflict warranting military service credits under W.Va.Code §5-10-15. First, in 2008, Respondent approved a decision to recognize military service credit for Archie Hubbard because he actively served in the military during Grenada. (Applicant's Exhibit 9). To date, it appears Mr. Hubbard is the only employee in the State of West Virginia to have received such credits for that time period. In Mr. Hubbard's case, Respondent recognized the military action in Grenada met the very broad definition of period of armed conflict, as defined in the statute. Thus, to the extent that any of the other

military actions that occurred between roughly 1973 and 2001 are similar to what occurred in Grenada, Respondent has a fiduciary obligation owed to all State employees to recognize military service credits for those other events as well. However, in practice, Respondent has chosen to treat all other State employees after the Hubbard decision differently than Mr. Hubbard by failing to recognize any military service credits for Grenada. Thus, Respondent did not afford Petitioners the benefit of the Hubbard decision.

Second, it is well established that soon after the September 11, 2001 terrorist attack, first Betty Ireland on her own, and then later Respondent approved September 11, 2001, through the present date as a period of armed conflict. Clearly, any period of armed conflict similar to Grenada and the September 11, 2001 attack **must also be recognized** and applied for purposes of calculating military service credits for eligible State employees. Presently, as indicated by this case, Respondent has chosen to provide military service credit for some military campaigns, but not for others. The rationale for making these distinctions is not apparent in Respondent's regulations or web site and was not explained during the hearing.

Third, the Hearing Examiner specifically rejected the precedent established by the Circuit Court of Kanawha County in *Daniel Olthaus v. WVCPRB.* (Applicant's Exhibit 2). In that case, Respondent asserted and the Hearing Examiner agreed that Mr. Olthaus was only entitled to 33 months of military service credit, rather than the 60 months he believed he was entitled to based upon the statute. Mr. Olthaus served in the United States Navy from **August 17, 1983,** to **September 30, 2003.** This ruling was overturned on appeal and Mr. Otlhaus was granted the full 60 months of military service credit permitted under the statute. In reaching this decision, the court held, "(The Hearing Examiner's previous decision). . . which was adopted by Respondent, fails to

recognize Respondent's mandatory duty to award such military service credits for **all** periods of armed conflict." (Applicant's Exhibit 4 at p. 12). The court also held:

> This Court agrees that under the *ejusdem generis* rule of statutory construction, any "period of armed conflict" necessarily would need to have some similarity to the specific armed conflicts identified. However, the Examiner finds that the CPRB has failed to carry out its obligations in providing the public with a written explanation as to why the foregoing military actions somehow are so dissimilar to the military actions specifically listed in W.Va.Code §5-10-15, that they cannot be included as periods of armed conflict.

Not only did Respondent not provide a rationale for its decision to exclude certain periods of armed conflict, but according to Ms. Miller, Respondent was aware of the ambiguity in the statute and previously sought to have this statute amended, but to date, the Legislature has not altered the present language. (*Id.* at pp. 74-76).

In light of the ruling in *Olthaus*, counsel for Petitioners questioned Ms. Miller regarding Respondent's refusal to recognize Petitioners' full military service credit:

> Q. Okay. So the first one (order) is where Judge Kaufman recognized that his military service entitled him to the maximum five years of military service credit. And then the Board filed a motion seeking to be relieved from that. And then there's a second order where he, where Judge Kaufman explains that, I guess he just further explains his order.
> A: Yes, I have those.
> Q: Right. Now, you talked earlier about how the Board handles a contested case involving a member at just the Board level. How does the Board handle a case that was resolved at the Circuit Court level as far as applying those rulings or those holdings in other similar cases?
> A: Are you speaking generally?
> Q: Generally, yeah. Yes
> A: Generally, it applies to that person.
> Q: Just to that person.
> A: Yes.

(*Id.* at p.98).

In spite of the holding in *Olthaus*, Respondent acknowledges and continues to apply different standards to different State employees and continues to exclude periods of armed conflict that are not specifically mentioned in W.Va. Code §5-10-15(b). At a minimum, Respondent is not affording Judge Kaufman's final orders, which were not appealed to the West Virginia Supreme Court, the respect and deference to which they are entitled.

Since 2000, when the Legislature amended W.Va.Code §5-10-15, to include periods of armed conflict, Respondent at various times has studied the question as to what events should be included in this general phrase and has sought further clarification by the Legislature. To date, Respondent has never issued a definitive ruling accepting or rejecting specific periods of armed conflict, which are clearly provided in W.Va.Code §5-10-15, and all attempts to amend this statute have failed. The end result is more than a decade has passed since the Legislature added periods of armed conflict to W.Va.Code §5-10-15, and Respondent has failed to act to resolve any questions as to how military service credits should be awarded for these additional periods.

State employees who actively served in the military and were honorably discharged are entitled, as a matter of law, to receive the maximum amount of military service credit possible, based upon the years of their military service. The present process followed by Respondent, where State employees are forced to raise these questions on an individual basis and where Respondent sees no problem recognizing a period of armed conflict for one State employee, but not for any other State employee who served in the military at that same time, is unacceptable.

The issue in this case is much more straightforward than Respondent represents. The Legislature used mandatory language in providing military service credits to all public employees who actively served in the United States military during a period of armed conflict. Hearing Examiner DeBolt's decision, which was adopted by Respondent, fails to recognize Respondent's

mandatory duty to award such military service credits for all periods of armed conflict. As a result, many deserving veterans, including Petitioners, are being denied military service credits to which they are entitled, based upon the very clear intent of the Legislature. Denying Petitioners all of the military service credits to which they are entitled, under these facts, simply is not right.

Thus, in light of the Hubbard decision, the September 11, 2001 event, the *Olthaus* decision, the VFW list, and the Fourteenth Amendment to the West Virginia Constitution, this Court concludes Petitioners Wood, Cheatham, Lattimore, and Fernatt are entitled to receive the maximum five years of military service credits mandated by W.Va.Code §5-10-15, based upon the periods of armed conflict that occurred during this time, as identified in the VFW of the United States Guide for Post Service Officers Veterans Benefits and the Fourteenth Amendment to the West Virginia Constitution, and Petitioner Walkup is entitled to receive four years of military service credit.

B.

Denial of class action status

Finally, this Court holds that the Hearing Examiner properly denied the Petitioners' Motion to proceed with their appeals as a class action, as well as their associated request for production of records. The Petitioners' appeals are subject to W. Va. Code R. § 162-2-7. This rule allows an "Applicant" to file an administrative appeal, clearly contemplating that only individualized appeals involving claims for retirement benefits are available. W. Va. Code R. § 162-2-7.2. There is no provision in this or any other rule governing the Board that permits an Applicant to pursue his appeal on behalf of a class of similarly situated individuals in addition to his individual capacity.

The decision in *Greyhound Lines-East v. Geiger*, 179 W.Va. 174, 366 S.E.2d 135 (1988), in which the West Virginia Human Rights Commission was permitted to pursue a class action lawsuit against an employer, was based upon the Commission's statutory authority to bring a

complaint and the broad remedial powers afforded to the Commission by statute, as well as precedent from other jurisdictions specific to Human Rights Commissions. *Id.* at pp. 7-8. In the absence of any such statute or precedent applicable to the CPRB, the *Greyhound* case offers no support for the Petitioners' position. The objections of Petitioners to this application are noted.

Therefore, the Court hereby adjudges, orders, and decrees that Respondent is ordered to take all actions necessary to carry out this **ORDER**.

In light of this **ORDER**, in which Petitioners prevail, counsel for Petitioners must file within thirty-five (35) days from the date of this **ORDER** any motion, affidavits, or other supporting documents in connection with his request to have this Court consider awarding attorneys' fees and costs. *See, e.g., West Virginia Education Association v. Caperton*, 194 W.Va. 501, 460 S.E.2d 747 (1995). Respondent will have fourteen (14) days from the date such documents from Petitioners are filed to file its response. Petitioners can then file any reply within five (5) days thereafter. Unless the Court decides otherwise, a ruling on this possible award of attorneys' fees and costs will be resolved based upon the documents submitted without a hearing.

The objections and exceptions of all Petitioners to this Court's denial of class action certification and the objections and exceptions of Respondent West Virginia Consolidated Public Employees Retirement Board to the rulings herein are noted.

The Clerk is ordered to mail a certified copy of this **FINAL ORDER** to all counsel of record.

ENTERED this 20th day of March, 2013

Paul Zakaib Jr.

PAUL ZAKAIB, JR., CIRCUIT JUDGE

Date: 3/20/13
Certified copies sent to:
counsel of record
parties
other L. Chambers L. Simms
(please indicate)
By
certified/1st class mail
fax
hand delivery
interdepartmental
Other directives accomplished
Deputy Circuit Clerk

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 4 DAY OF April 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA