

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 32508
Civil Action No. 04-AA-32 (Circuit Court of Kanawha County)

GEORGE B. SUMMERS and RONALD FERTILIZERS

Appellants,

v.

THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Appellee.

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

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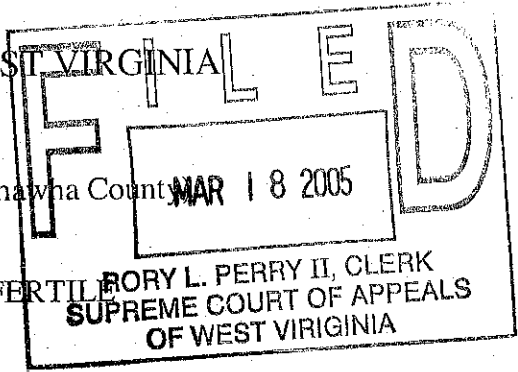


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**I. KIND OF PROCEEDING AND NATURE OF RULING
IN LOWER TRIBUNAL**

This Petition for Appeal arises from a February 25, 2004, final administrative order and decision of the West Virginia Consolidated Public Retirement Board (hereinafter "Board" or "Appellee") which adopted in its entirety a recommended decision issued by Hearing Examiner Jack W. DeBolt. In the appellate proceedings below, the Board denied the administrative requests of George Summers and Ronald Fertile (hereinafter "Appellants") to have lump sum payments which they each received for unused "vacation" days in their last month of employment included as "salary" for "final average salary" and benefit calculation purposes in the West Virginia Teachers Retirement System ("TRS").

In denying the Appellants' administrative request, the Board and its hearing officer concluded that applicable TRS plan regulation WVCSR §162-8-5.4 clearly and unambiguously precludes the inclusion of lump sum payments for accrued leave within retiring TRS members' final average salaries. Moreover, the Board and its hearing officer concluded that the controlling regulation is not constitutionally infirm, having been promulgated and passed by the Legislature in order to preclude a practice which artificially inflates retiring plan participants' reported final average salaries for pension calculation purposes. Finally, the Board and its hearing officer rejected the Appellants' argument that the constitutional principles enunciated in *State ex rel. Booth v. Sims*, 193 W. Va. 323 (W. Va. 1995), form a basis for their requested relief.

By final order dated August 17, 2004, the Circuit Court of Kanawha County (Judge Berger, presiding), affirmed the Board's denial of the Appellants' administrative request.

In affirming the Board's decision, Judge Berger concluded that the Board's decision is not affected by error of law, and is neither arbitrary, capricious nor an abuse of discretion. See Order of the Kanawha Circuit Court, August 17, 2004. Moreover, the Circuit Court correctly held that "West Virginia courts have consistently held that interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight," and that such judicial deference is, under the facts and law of this case, dispositive of the Appellants' claims.

It is from the August 17, 2004, decision of the Circuit Court of Kanawha County, which affirmed the Board's administrative decision, that the Appellants now appeal.

II. STATEMENT OF FACTS OF THE CASE

The West Virginia Consolidated Public Retirement Board is a public body established pursuant to W. Va. Code §5-10D-1 to serve as the statutory administrator and fiduciary for the State's several pension plans, including the West Virginia Teachers Retirement System ("TRS"). See W. Va. Code 5-10D-1(d). See also *State ex rel. WV Deputy Sheriffs' Assn., Inc. v. Sims*, 513 S.E.2d 669 (W. Va. 1998). The members of the Board include the highest officials of the executive and legislative branches of our State's government, and the Board and its members have the "highest fiduciary duty to maintain the terms of the [TRS] trust, as spelled out in the statute." See, e.g., *State ex rel. Dadisman v. Moore*, 384 S.E.2d 816, at 822 (W. Va. 1988).

As pension trustee and fiduciary, the Board has broad powers to administer and manage the State's various pension trust funds. *Id.*, at p. 826. The Board's fiduciary duties include all those activities necessary to protection of the trust funds for the interests of all

beneficiaries thereof, the duty to ensure that the plans are administered according to their terms, and the duty to act in an "informed, pro-active and independent manner." *State ex rel. WV Deputy Sheriffs' Association, Inc., v. Sims*, 513 S.E.2d 669 (W. Va. 1998).

Critical to the Board's proper administration of the State's pension plans, and to fulfillment of its obligation to protect plan assets, is its ability to effectively address any perceived ambiguities or "loopholes" in plan provisions which could be used by participating employers and participants in order to enhance lifetime pension plan benefits in a manner neither contemplated nor intended by the Legislature. The Board's obligation and ability to address and resolve any arguable ambiguities in plan provisions, through clarifying legislation or otherwise, is particularly critical where, as here, the Unfunded Accrued Actuarial Liability of the entire TRS plan will be increased significantly without such remedial action. See Affidavit of Harry Mandel, attached as Exhibit 1.¹

In the present case, and contrary to what the Board believes to be clear legislative intent and general pension jurisprudence to the contrary, the Appellants seek to require the Board to include certain lump sum payments which they each received for unused "vacation leave" at the conclusion of their employment as part of their "salary" for TRS final average salary and lifetime pension benefit computation purposes. The Appellants' motivation is clear. If they are permitted to have their reported salaries inflated by the inclusion of non-salary lump sum

¹ Mr. Mandel, an Enrolled Actuary with the Joint Board for the Enrollment of Actuaries, has concluded that if the Appellants are found to be entitled to have their final average salaries and annuitized pension benefits enhanced by the receipt of lump sum payments for vacation leave at the conclusion of employment, and if such a benefit is extended to all other similarly situated but still active TRS members, the TRS Unfunded Accrued Actuarial Liability will be increased by \$43,127,000. That figure, Mr. Mandel opines, will increase significantly if the same relief is also found to be owing to similarly situated TRS participants who are already in retirement status.

payments they received for unused leave in the waning days of their employment, they will enjoy enhanced retirement annuity payments for the balance of their lives and the lives of their designated beneficiaries.

Following is a summary of the probative facts relating to each of the Appellants, and their claimed entitlement to enhanced TRS retirement benefits.

A. Factual Information

The Appellant, George B. Summers, was an employee of the Wood County School System ("Wood County") for thirty-five (35) years in a variety of capacities. He was a teacher from 1967 to 1973, was the Director of Purchasing/Assistant Finance Director from 1974 to 1971, and was the Assistant Superintendent from 1991 to 2002. Mr. Summers retired on June 30, 2002. See Adm. Rec. Exh. 12.

The Appellant, Ronald Fertile, was an employee of Wood County for thirty-seven (37) years in a variety of capacities. He was a teacher from 1965 to 1972, and was Assistant Principal, Principal and Assistant Director of Transportation from 1973 to 2002. Mr. Fertile retired on June 30, 2002. See Adm. Rec. Exh. 12.

At the time of their retirements on June 30, 2002, each Appellant had accumulated forty-eight (48) days of unused "vacation." The accrual of the Appellants' vacation days occurred as a result of a Wood County policy which affords the County's 261 day contract employees the right to accrue vacation at a rate of two (2) days per month, up to a maximum of forty-eight (48) days, and to be paid for such unused days in a lump sum upon cessation of

service. See Hearing Transcript, Adm. Rec. Exh. 13, at pp. 19, 24-25. The policy does not, however, purport to promise or even address the issue of whether the payments made to an employee in a lump sum for such accrued and unused days may be treated as salary for retirement benefit calculation purposes. See Adm. Rec. Exh. 13, at pp. 27.²

For more than four decades preceding school year 1996-97, Wood County paid its retiring 261 day contractual employees in a lump sum for their accrued and unused vacation pay pursuant to the vacation policy described supra. See Adm. Rec., Exh. 13, at pp. 15, 17, 20, 24-25. Contrary to the Appellants' suggestions, however, Wood County did not withhold retirement contributions from such lump sums, nor otherwise report such sums to the Board as having been a part of their retiring employees' salary, until approximately 1996-97. Id.

Commencing in approximately 1996-97, without communicating its decision to the Board and without the Board's knowledge, Wood County began to withhold retirement system contributions from the lump sums which it paid to retiring 261 day contract employees for accrued vacation days. See Adm. Rec. Exh. 13, at p. 17-18. At that time, the County also began to report such sums to the Board as if they had been part of the retiring employees' "salary" for their last year of employment, again without communicating the true character of such payments to the Board. Id., at pp. 15, 17, 18-19.

When Wood County commenced its practice of reporting the lump sums which it paid to retiring 261 day contract employees as having been part of the employees' "salary" in

² Each of the Appellants were paid, in a lump sum, for their 48 days of unused vacation in a manner consistent with the Wood County policy at the time of their respective retirements. See Adm. Rec. Exh. 13, p. 10, 13; Adm. Rec. Exh. 36; Exh. 37. See discussion, *infra*, p. 9.

approximately in 1996-97, the County was well aware that its actions would result in a “spiking” of each such employees’ final year of salary, a corresponding increase in such employees’ TRS final average salary calculations and, in turn, an enhancement of the retiring employees’ and their beneficiaries’ lifetime pension benefits. See Adm. Rec., Exh. 13, at p. 18. Despite the County’s actual knowledge in that regard, it opted to proceed in a covert fashion with the practice, choosing not to address the issue openly with the Board, and without communicating to the Board the true character of the financial figures it was reporting as salary for pension calculation purposes. See Adm. Rec. Exh. 13, at p 18.³

B. The “Kiser” Case and Subsequent Legislative Response

The Board first became aware of Wood County’s practice of reporting lump sums for accrued “vacation” days as “salary” in conjunction with the retirement and administrative appeal of another former Wood County employee, Richard Kiser. See Adm. Rec. 13, p. 78. In the *Kiser* matter, the retiring member sought to have a \$10,662.23 lump sum payment which he had received for unused vacation days included as salary for TRS final average salary and retirement benefit calculation purposes. Consistent with the Board’s longstanding position as plan administrator, the Board denied Kiser’s request, and administratively held that lump sums received for unused “vacation” days are not includable as salary for TRS final average salary

³ Because Wood County did not identify the true character of the “salary” figures it was reporting to the Board after it began to include lump sum payments for vacation within its salary reports to the Board in 1996-97, and because the Board did not discover the practice until the *Kiser* matter discussed, *infra*, there were some employees who retired from Wood County between 1996-97 and the passage of WVCSR §162-8-5.4 whose retirement benefits were calculated on the basis of the County’s reports which included such lump sums. See Discussion, *infra* pp. 4-10. See also Adm. Rec. Exh. 13, at 78, 86.

purposes.⁴ Mr. Kiser appealed the Board's administrative decision to the Circuit Court of Wood County. Id.

The Wood County Circuit Court reversed the Board's administrative decision in the *Kiser* matter, concluding in its final order that the TRS plan statutes and regulations in effect at the time did not specifically preclude the inclusion of such lump sums for pension benefit calculation purposes. The Wood County Circuit Court then held that "to the extent that payment for unused vacation appears to artificially inflate an employee's final average salary . . . [such] is a matter that must be addressed, and remedied if need be, by the legislature, not by a hearing examiner, or even by a court." See Wood County Circuit Court Order, CA-00P-118, dated December 21, 2000.

Each of the Appellants in the current matter was aware of the *Kiser* ruling. See Adm. Rec. Exh. 13, p. 30, 39, 47, 59. Moreover, each Appellant had, prior to their retirements in June, 2002, actual knowledge that the Wood County Circuit Court had opined and had held in its order that the "lump sum" issue was one which should be ultimately addressed and resolved by the Legislature rather than the courts.⁵ Id., pp. 47, 59.

⁴ The Board's decision in *Kiser* was predicated, *inter alia*, upon the absence of any provision within the TRS plan to permit such lump sums from being included as "salary" for final average salary calculation purposes, as well as the numerous judicial decisions which have consistently held that such lump sum payments should not be considered "salary" for pension benefit calculation purposes. See, e.g., *Chancellor v. Dept. of Retirement Systems*, 12 P.3d 164 (Wa. App. 2000); *International Association of Firefighters v. City of Kansas City*, 24 Kan.App.2d 98, 942 P.2d 45 (1997); *Tooley v. McCall*, 676 N.Y.S.2d 259 (1998); *Gilmore v. Burks*, 325 So.2d 455 (Fla. 1976); *Hay v. Highland Park*, 134 Mich. 624, 351 N.E.2d 622 (1984); *Hessel v. N.Y. City Employee's Retirement System*, 353 N.Y.S.2d 169, 308 N.E.2d 688 (1974); *Weber v. Levitt*, 359 N.Y.S.2d 39 (1974), cert. den. 419 U.S. 997, 42 L. Ed. 2d 271, 95 S. Ct. 311.

⁵ Rather than pursuing a judicial appeal of the Wood County Circuit Court's ruling, the Board

Significantly, at no time prior to resolution of the *Kiser* matter did the Board or its staff ever knowingly permit, for Wood County employees or otherwise, the inclusion of one-time, non-recurring lump sums for accrued leave within a retiring TRS member's final average salary and related benefit calculations. Prior to the judicial decision in *Kiser*, however, the Board's staff had become generally aware of the potential for abuse on the issue, and had commenced the process of preparing a proposed legislative rule in order to clearly and unambiguously preclude the inclusion of such lump sum payments from final average salary calculations.⁶

Following reversal of the Board's decision in *Kiser*, and in a manner entirely consistent with the suggestion of the Wood County Circuit Court, the Board sought passage of a legislatively approved rule to address the lump sum/final average salary issue. In 2002, such a rule was passed by West Virginia's Legislature. That Rule, WVCSR §162-4-5.4, now clearly and unambiguously provides that lump sums paid to retiring employees for accrued leave may not be included as salary for final average salary and pension benefit calculation purposes. WVCSR §162-8-5.4 not only codifies the Board's longstanding position on the issue, but also constitutes the very sort of legislative intervention on the issue as was suggested by the Wood County Circuit Court in *Kiser*.

chose to pursue a legislative remedy, inasmuch as the Court had suggested that the Legislature was the appropriate source of clarification on the issue. Until the passage of WVCSR §162-8-5.4 in 2002, those employees from Wood County who retired between the issuance of the *Kiser* decision and the corrective legislation were given the benefit of the Kiser ruling.

⁶ The Board's proposal of a legislative rule on the issue was delayed until after the *Kiser* case was decided, due to the transition of the Board's administrative leadership from James L. Sims, the Board's former Executive Secretary, to its next Executive Director, Betty S. Ireland.

C. Appellants' Administrative Efforts to Avoid Application of WVCSR §162-8-5.4

When each of the Appellants in this case filed the necessary paperwork to commence their retirements in 2002, the Board forwarded a form to Wood County which requested that the employer verify each of the Appellants' last dates of work, and the salary paid to them during their final year of employment. In Mr. Summers' case, Wood County returned the required form to the Board and reported that Mr. Summers had received \$87,686.82 in salary for school year 2001-02. See Adm. Rec. Exh. 36; Exh. 37. Inasmuch as Mr. Summers' reported salary for the preceding school year had been \$74,488.10, the salary reported by Wood County for 2001-02 was \$13,198.72 higher than the salary which he had reportedly earned during the preceding school year. In Mr. Fertile's case, Wood County returned the required form to the Board and reported that Mr. Fertile had received \$71,257.25 in salary for school year 2001-02. Inasmuch as Mr. Fertile's reported salary for the preceding year had been \$60,281.57, the salary reported by Wood County for 2001-02 was \$10,965.68 higher than the salary which he had reportedly earned during the preceding school year. Id.⁷

Upon receipt of the forms from Wood County, the Board's staff noted the sharp increase in the salary figures which had been reported for each Appellant between school years 2000-01 and 2001-02. Upon inquiry to Wood County, the Board's staff was informed that the reported salaries for each Appellant included not only their regular salaries but also the lump

⁷ Interestingly, the Appellants characterize the lump sum payments they received for the "cash in" of accrued vacation leave as having resulted in only a "small increase" in their final year of salary as reported to the Board. See Appellants' Brief, at p. 4. The Board respectfully submits, however, that increases of \$13,198.72 (on a \$74,488.10 salary), and \$10,965.68 (on a \$60,281.57 salary) are not "small increases." Moreover, the relief sought here would, if all current TRS participants similarly situated are afforded the same benefit, result in a \$43,127,000 increase in the TRS Unfunded Actuarial Accrued Liability. See Mandel Affidavit, Exhibit 1.

sums which they had been paid for accrued and unused vacation days. See Adm. Rec. Exh. 13, at pp. 10-13. The staff of the Board then instructed the County to amend the document in order to exclude the lump sums from the reported salary figures for each of the Appellants, and to return the amended form back to the Board for processing of their respective retirements. Id. at p. 10-11.

Upon learning of the Board's rejection of the inflated salary figures, the Appellants each wrote to the Board's then Interim Executive Director, Terasa L. Robertson (now Terasa L. Miller), to request an explanation for the required reduction of their reported salary figures. See Adm. Rec. Exh. 33 and 34. Each Appellant was thereafter informed of the staff's position that WVCSR §162-8-5.4 precludes the inclusion of the lump sum payments for unused vacation within a retiring member's TRS retirement benefit calculations. Each Appellant was also provided with written instructions on how to appeal the staff's position to the Board's hearing officer. See Adm. Rec. Exh. 31 and 32. Requests for appeal by and on behalf of each of the Appellants followed. Id., at Exh. 28 and 30.⁸

II. SUMMARY OF ADMINISTRATIVE AND JUDICIAL DECISIONS BELOW

On July 23, 2003, this matter was brought on for hearing before the Board's administrative hearing officer, Jack W. DeBolt. See Adm. Rec. Exhibit 13. The Petitioners were present and were afforded the right to participate in the hearing, to present evidence and

⁸ Wood County tendered retirement contributions on the lump sum payments to the Board before the Board realized that part of the reported "salary" for each Petitioner included the lump sum payments for unused vacation days. The Board has expressly agreed to return such monies to the employer or the Petitioners upon their request, or at the conclusion of these proceedings, whichever first occurs. The Petitioners' counsel's suggestion that the Board has improperly failed to return those monies, or that it refuses to do so, is completely false. See Adm. Rec. Exh. 13, at pp. 21, 61, 77.

argument in support of their appeal, and to cross-examine witnesses. Also present and testifying on the issues relevant to the appeals was Thomas Little, Director of Finance and Treasurer for the Wood County Board of Education, and the Board's then Interim Executive Director, Ms. Robertson. Id. Following the administrative hearing, counsel for each party was permitted to file proposed findings of fact and conclusions of law for the hearing officer's review and consideration. See Adm. Rec., Exh. 9 and 10.

Thereafter, on January 16, 2004, the Board's hearing officer issued an initial Recommended Decision which concluded that the Appellants' administrative appeals should be denied by the Board. In support of the recommended denial, the hearing officer noted that WVCSR §162-8-5.4 clearly and unambiguously precludes the inclusion of lump sum payments for accrued leave within retiring TRS members' final average salaries and that, having been passed prior to the Appellants' retirements, the hearing officer concluded that the regulation is at least facially dispositive of their claims. See Adm. Rec. Exh. 4, Recommended Decision of Hearing Officer, at pp 5-6.

The hearing officer then also analyzed and rejected the Appellants' constitutional equal protection challenge, finding that the position which the Appellants were asserting would "virtually preclude the establishment or amendment of any statute or Legislative rule" Id., at p. 6. The hearing officer further reasoned that, "even if the Legislature had created a [constitutionally suspect] classification by approval of CSR §162-8-5.4," it is a rational one, in that the Rule operates to preclude a practice which artificially inflates retirement benefits and adversely affects the Board's ability to control, within established rules, the amount and type of benefits which may be included in retirement benefit calculations. See Adm. Rec. Exh. 4, at p. 6.

Finally, in an Amended Recommended Decision, the Hearing Officer also analyzed and rejected the Appellants' argument that the constitutional principles enunciated in *Booth v. Sims* form a basis for their requested relief. See, Adm. Rec. Exh. 2, pp 7-8. See also *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995). Noting that the Booth decision stands principally for the proposition that the "government cannot take away contractual promises of pension benefits after an employee has relied thereon to his detriment," the hearing officer concluded that, under the circumstances extant here, "there has just never been such a promise upon which the applicants could have relied." See Adm. Rec. Exh. 3, at p. 7-8. Instead, the hearing office correctly reasoned, "all that occurred with the adoption of CSR §162-8-5.4 was to render certain that which had never been promised in the first place." Id., at p. 8

At its meeting on February 25, 2004, the Board heard and considered the hearing officer's Amended Recommended Decision, and adopted the recommendation in its entirety. A final administrative order was thereafter forwarded to the Appellants which communicated the Board's adoption of the hearing officer's Amended Recommended Decision. See Adm. Rec. Exh. 1. An appeal was then initiated by the Appellants in the Circuit Court of Kanawha County pursuant to the judicial review provisions of West Virginia's Administrative Procedures Act.

On August 17, 2004, the Circuit Court of Kanawha County entered an order affirming the administrative decision of the Board. In denying the relief sought by the Petitioners, Judge Berger reviewed, *de novo*, the statutory and regulatory provisions applicable to this matter, and concluded that the Board's decision is not affected by error of law. Moreover, Judge Berger determined that the Board's final administrative decision is not clearly wrong

based upon the substantial, reliable and probative evidence of record, and is neither arbitrary or capricious, nor characterized by an abuse of discretion. See Order of August 17, 2004, at p. 1.

III. APPELLEE'S BRIEF RESPONSES TO THE ASSIGNMENTS OF ERROR ASSERTED BY APPELLANTS

A. *The Circuit Court afforded appropriate deference to the Board's reasonable and permissible construction of controlling pension plan statutes and regulations as the administrative body charged with enforcing such statutes and regulations.*

B. *The TRS plan does not permit a retiring member to utilize accrued leave for the enhancement of final average salary and related retirement benefits.*

C. *WVCSR §162-8-5.4 is neither facially, nor in application, violative of constitutional equal protection principles.*

D. *The principles of Booth v. Sims do not support the relief sought by Appellants.*

E. *Legally sufficient notice of the promulgation of WVCSR §162-8-5.4 was provided prior to its passage in 2002.*

F. *The Board's decision denying the Appellants' requested relief is consistent with the clear majority of courts from other jurisdictions which have consistently held that lump sum payments for accrued leave should not be included in final average salary calculations for pension benefit purposes.*

**IV. POINTS AND AUTHORITIES RELIED UPON,
A DISCUSSION OF THE LAW, AND RELIEF PRAYED FOR**

A. The Standard for Judicial Review of Administrative Agency Decisions is, in the Absence of Clear Legislative Intent to the Contrary, Deferential to the Decisions of the Agency.

Section §29A-5-4(g) of the West Virginia Administrative Procedures Act governs the review of contested administrative decisions and issues 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.

See W. Va. Code §29A-5-4(g).

The Supreme Court of Appeals has consistently held that 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). For example, questions relating to the amount of service standing to a member’s credit at the time retirement, and questions relating to whether or

not a member has substantially relied upon prior plan provisions to his or her detriment, are factual questions which are subject to the deferential, "arbitrary and capricious" standard of factual review.

Statutory interpretive issues, on the other hand, constitute questions of law which are generally subject to *de novo* review. However, with respect to judicial review of an administrative agency's interpretations of the statutes which it administers, and notwithstanding the general rule of *de novo* review of issues of law, this 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). In Sniffen v. Cline, this Court explained:

The circuit court's adjudicatory interpretation of [the controlling statute] is entitled to no special deference and is subject to our independent review. However, absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of the statute by [the administrative agency] because it has policymaking authority with regard to the statute. Consistently, this Court has held that interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight. [An agency's] construction of these statutes must be given substantial deference.

Sniffen, 456 S.E.2d at 455, citing Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 258 (4th Cir. 1991); 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 Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975).

As set forth more fully in the discussion to follow, the Board's interpretation of the relevant TRS plan statutes and regulations at issue here was both reasonable and in no way inconsistent with legislative intent. Consequently, the Circuit Court's affirmation of the Board's final administrative order was appropriate and should be affirmed.

B. The TRS Plan Does Not Permit a Retiring Member to Utilize Accrued Leave for the Enhancement of Final Average Salary and Related Retirement Benefit Calculations.

The Appellants bear the burden of demonstrating that the TRS plan provisions entitle them to the relief they are seeking, namely the inclusion of non-regularly recurring, non-salary lump sum payments in the calculation of their TRS final average salary and related annuity benefits.

When a TRS member retires, the member's retirement annuity is determined through the calculation set forth in W. Va. Code §18-7A-26(a). That statute states, in relevant part, that:

Upon establishment of eligibility for a retirement allowance, a member shall be granted an annuity which shall be the sum of the following: (a) Two percent of the member's average salary multiplied by his total service credit as a teacher. In this paragraph 'average salary' shall mean the average of the highest annual salaries received by the member during any 5 years contained within his last 15 years of total service credit. (emphasis added).

See W. Va. Code §18-7A-26(a) (emphasis added).

The TRS plan also provides a definition of "average final salary," stating that:

Average final salary means the average of the 5 highest fiscal year salaries earned as a member within the last 15 fiscal years of total service credit, including military service as provided herein, or if total service is less than 15 years, the average annual salary for the period on which the contributions were made. (emphasis added).

See W. Va. Code §18-7A-3 (emphasis added).

The term “salary” is not expressly defined in the TRS plan. However, well recognized canons of statutory construction dictate that, in the absence of a precise statutory definition, “words employed in a legislative enactment are to be given their common, ordinary, and accepted usage.” See *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 198 W. Va. 563, 482 S.E.2d 180 (1999).⁹

In the *Kiser* case which was decided by the Circuit Court of Wood County in December, 2000, Judge Hill held that, in the absence of specific provisions within TRS to prohibit the inclusion of lump sum payments for vacation within a member’s reported “salary,” the Board could not prevent Mr. Kiser from having the lump sum payment he received for unused “vacation” in the final month of his employment excluded from his TRS final average salary and related annuity benefit calculations. Had there been a specific statutory or regulatory provision in TRS to preclude that practice, the *Kiser* decision would, presumably, have been decided differently.

In light of the *Kiser* ruling, a Legislative Rule was passed in the 2002 legislative session which clearly and unambiguously provides that lump sum payments for accrued leave, of

⁹ The term “salary” has been defined generally by the United States Supreme Court as “a fixed amount of periodical payment for services.” *Benedict v. United States*, 176 U.S. 357 (1900).

whatever kind or character, may not be utilized to enhance a retiring TRS member's final average salary. See WVCSR §162-8-5.4, discussed, *infra*. That regulation is, the uncontroverted evidence has established, entirely consistent with the Board's pre-*Kiser* position that non-salary lump sum payments may not be included in a retiring member's "salary" for "final average salary" calculation purposes. See also, Adm. Rec. Exh. 13, at pp. 78, 86. As the hearing officer aptly concluded in the administrative proceedings below, WVCSR §162-5-4 clarifies any arguable ambiguity in the TRS statutes, and "render[s] certain that which had never been promised in the first place." See Adm. Rec. Exh. 2, at pp. 7-8.

C. **WVCSR §162-8-5.4 is Not, Either Facially or in Application, Violative of Constitutional Equal Protection Principles**

As suggested by the Circuit Court of Wood County in the *Kiser* matter cited and discussed, *supra*, a legislatively approved rule was promulgated and passed in 2002, in a manner entirely consistent with the Board's longstanding position on the issue, to make it clear that lump sum payments for accrued leave are not properly included as "salary" in a retiring TRS member's final average salary computation. The controlling rule states, in relevant part:

5.4 Lump Sum Payment for Accrued Leave. – If the member is paid in a lump sum for accrued unused leave at the conclusion of the member's employment, the Board shall not consider the lump sum as compensation or salary in computing a member's final average salary.

See WVCSR §162-8-5.4.

The Appellants in this case do not dispute that the provisions of WVCSR §162-8-5.4 are clear and unambiguous and, absent certain alleged constitutional infirmities, operate to exclude lump sum payments from retiring TRS members' final average salary calculations.

Instead, the Appellants seek to convince the Court that WVCSR §162-8-5.4 unconstitutionally violates their right to equal protection under the law. They argue in that regard that application of the Rule results in some TRS retirees having been permitted in the past to have lump sum payments for accrued vacation included in their annuity calculations, while TRS members who retire on or after April 10, 2002, are precluded from doing so.

What the Appellants fail to acknowledge, of course, is the fact that it was Wood County's decision in 1996-97 to include lump sum payments for unused vacation in its salary reports to the Board, without the Board's knowledge, that has resulted in some Wood County employees receiving retirement benefits which include such lump sum payments in the computation of final average salary. Under the circumstances, the Board and its hearing officer properly rejected the Appellants' constitutional equal protection challenge, with the hearing officer aptly concluding that, "if the premise of the applicants' argument was viable, it would virtually preclude the establishment or amendment of any statute or legislative rule." See Adm. Rec. Exh. 2, at p. 6.

When addressing claims that any given piece of legislation is unconstitutional, courts must start with the fundamental principle that the powers of the legislature are almost plenary, and that reviewing courts must approach their review of allegedly offensive legislation with a presumption of constitutionality. See State ex. Rel. Boan v. Richardson, 198 W. V. 545, 482 S.E.2d 162 (1996)(citations omitted). This Court has, in fact, specifically cautioned that:

. . . [C]ourts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain

constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond a reasonable doubt.

See Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965); *WV Public Employees Retirement System v. Dodd*, 396 S.E.2d 725 (W. Va. 1990).

With respect to equal protection challenges such as the one advanced by the Appellants here, the Supreme Court of Appeals has held that such challenged classifications, including those involving economic rights, “are subjected to a minimum level of scrutiny.”

This Court has explained:

Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.

See Syl. Pt. 4, *Gibson v. WV Dept. of Highways*, 406 S.E.2d 440 (W. Va. 1991). See also, e.g. Syl. Pt. 7, *Atchison v. Erwin*, 302 S.E.2d 78 (W. Va. 1983).

In applying these jurisprudential principles to the instant case, the hearing officer and Board have correctly concluded that there is no constitutionally offensive “classification” created by the passage of WVCSR §162-8-5.4. To the contrary, the regulation, as drafted, applies uniformly to all participants in the retirement systems administered by the Board and, on

a prospective basis, precludes all such individuals from having lump sum payments for unused leave included as "salary" for final average salary and pension calculation purposes. All persons who are active participants in the retirement systems are subject to the rule and no classification has been drawn whereby, prospectively, some individuals are treated differently than others.

Even assuming, *arguendo*, that a constitutionally suspect classification has been created by passage of WVCSR §162-8-5.4, such classification is in no way constitutionally offensive, inasmuch as any such classification is "reasonably related to the achievement of a legitimate state purpose." Indeed, and as the Board and its hearing officer properly concluded, the Rule serves to close a perceived loophole in plan provisions which has been used by Wood County and possibly other participating public employers in order to inflate their retiring employees' final average salaries and, in turn, to inflate such retirees' lifetime annuity benefits to the ultimate financial detriment of the entire TRS plan. See Adm. Rec. 2, p. 6-7; Exh. 13, pp. 96-99.¹⁰

Moreover, and as the Board and its hearing officer have also correctly concluded, passage of WVCSR §162-8-5.4 clearly serves a legitimate governmental purpose. To that end, the Rule enables the Board, as the governmental agency charged with administration of public retirement systems, "to control within established rules, the amounts which will be paid in benefits, and to project the ultimate cost of operating such systems and thereby, ideally, to provide for adequate funding of such systems." See Adm. Rec. Exh. 2, p. 6-7. Otherwise, the hearing officer correctly noted, "the amount of benefits is . . . left to the caprice of the multiple

¹⁰ The Appellants' witness, Mr. Little, testified that there are at least two other counties which may also be reporting lump sum payments for unused vacation to the Board as having been "salary" for their retiring employees. See Adm. Rec. Exh. 13, at pp. 97-99.

employers whose employees participate in the system and, as here would have been occasioned, to the members themselves by virtue of their ability to decide whether or not to accumulate vacation days.” Id.

Because the Legislature’s approval and enactment of WVCSR §162-8-4 was and is both rational and in furtherance of a legitimate governmental purpose, the Appellants’ constitutional equal protection challenge clearly fails as a matter of law. *Lambert v. County Comm’n*, 192 W. Va. 448, 452 S.E.2d 906 (1994), *Gibson v. W. Va. Dept. of Highways*, 406 S.E.2d 440 (W. Va. 1991); *Cimino v. Board of Education* 210 S.E.2d 485 (W. Va. 1974).

D. The Principles of *Booth v. Sims* Do Not Support the Relief Sought by Appellants

In addition to their equal protection challenge, the Appellants also argue that the constitutional principles enunciated by West Virginia’s Supreme Court of Appeals in the 1994 case of *Booth v. Sims* apply here and entitle them to the relief they are seeking. See *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (W. Va. 1994). Appellants argue in that regard that, in making their retirement decisions, they relied upon their perceived right to have the lump sums which they would receive for unused vacation days included within their TRS final average salary calculation.

In *Booth*, this Court considered whether certain 1994 amendments to the West Virginia State Police pension plan could be constitutionally applied to those trooper participants who had already been plan participants for an extended period of time and who may have relied, to their detriment, on the pre-amendment plan provisions. 456 S.E.2d 167. The *Booth* Court concluded, in relevant part, that whether pension plan amendments may be constitutionality

applied to persons already employed and participating in the retirement system turns upon “whether the employee has sufficient years of service in the system that he or she can be considered to have relied substantially to his or her detriment on the existing pension benefits and contribution schedules.” *Id.*, at Syl. Pt. 3. The *Booth* Court further held that, after ten years of state service, detrimental reliance upon such existing benefits and contribution schedules will be presumed. 456 S.E.2d 167, at Syl. Pt. 15.

The Appellants misapprehend the instructions of *Booth*, however, and erroneously suggest that their total length of service to the State, and their erroneous and unreasonable reliance upon a perpetual application of the *Kiser* decision, warrants a finding of “detrimental reliance” within the meaning of the *Booth* decision. The central flaw in the Appellants’ logic is aptly explained in the Amended Recommended Decision of the hearing officer in the administrative proceedings below:

Booth principally stands for the proposition that [the] government cannot take away contractual promises of pension benefits after an employee has relied thereon to his detriment, such detrimental reliance being presumed after ten years of service while the promise shall have been made. That which is lacking in the present circumstance, at least, is the contractual promise as enunciated by the statutes and Legislative Rules defining the [TRS] pension plan. There has just never been such a promise upon which the applicants could have relied. All that occurred with the adoption of CSR §162-8-5.4 was to render certain that which had never been promised in the first place. *Booth*, it is concluded, has no proper application here.

See Adm. Rec., Exh. 2, pp. 7-8 (emphasis supplied).

Consistent with the hearing officer’s analysis cited *supra*, it is analytically significant to note that the TRS plan has never contained any provisions to permit lump sum

payments to be included in a retiring member's final average salary calculation. See Adm. Rec. 13, p.78; W. Va. Code §18-7A-1, et seq., WVCSR §162-4-1, et seq. Moreover, and although WVCSR §162-6-5.4 which now clearly and unequivocally precludes such a practice did not become effective until April 10, 2002, the provisions of that Rule are entirely consistent with the Board's pre-*Kiser* interpretive position and its policy of excluding lump sum payments for accrued leave from retiring members' final average salary calculations in all cases in which the true character of such payments was properly disclosed to the Board by the retiring employee's payroll location. See Adm. Rec. Exh. 13, p. 78, 80-81, 92-94.

The recency of Wood County's decision to begin reporting lump sum vacation payments to the Board as "salary," when viewed in relationship to the total duration of the Petitioners' careers, further militates against any finding of detrimental reliance within the meaning of the *Booth v. Sims*. See Adm. Rec., p. 15, 17, 20, 24-25. In that regard, Wood County's Director of Finance testified in the proceedings below that, after more than four decades of excluding lump sums from retiring employees' salary reports to the Board, Wood County only began to include such lump sums within its salary reports to the Board in 1996-97. Id., at p. 17, 20. By that time, each of the Appellants had been employed by Wood County for more than thirty years.¹¹ Since Wood County's practice of reporting lump sum vacation payments as "salary" was in effect only for the last 4-5 years of the Appellants' three-plus decades of employment service, the Petitioners' assertion of "detrimental reliance" under the *Booth* decision is specious at best.

¹¹ As noted previously, Mr. Summers commenced employment as a teacher in Wood County in 1967, and Mr. Fertile commenced employment as a teacher in Wood County in 1965.

The Appellants' claim of "detrimental reliance" is rendered even more suspect given that Wood County commenced its practice of including lump sum vacation payments to the Board as "salary" in 1996-97 without disclosing to the Board the true character of the figures being reported for pension benefit calculation purposes, and without eliciting the Board's position or its agreement on the legality of that practice as the TRS plan administrator and plan fiduciary. The covert nature of the County's practice, standing alone, renders any reliance allegedly placed upon it by the Appellants legally untenable.

Finally, the Appellants have each acknowledged that, prior to their retirements, they neither requested nor received any benefit estimates from the Board which included their anticipated lump sum payments for unused vacation days, and made no inquiries to the Board regarding the status of any such legislative intervention on the issue. See Adm. Rec. Exh. 13, p. 47, 59. Their failure to have made these relevant inquiries despite having actual knowledge that remedial legislation was suggested by the Wood County Circuit Court in *Kiser* renders any reliance placed upon continuation of the *Kiser* ruling clearly unreasonable.

E. Legally Sufficient Notice of the Promulgation of WVCSR §162-8-5.4 Was Provided Prior to its Passage in 2002

Appellants' counsel also incorrectly asserts, in summary fashion, that WVCSR §162-8-5.4 was "without notice . . . promulgated, proposed and passed in the 2001-2002 legislative session." That argument overlooks, however, the undisputed fact that the rule in question was proposed to and ultimately passed by the Legislature pursuant to all technical requirements of the State's legislative rulemaking process.

W. Va. Code §29A-3-1, et seq. sets forth the technical requirements and processes which must be followed in the proposal, presentation and ultimate passage of legislatively approved rules. That process includes, in relevant part, the requirement that notice of proposed rulemaking shall be given by publication of proposed legislative rules in the State Register. See W. Va. Code §19A-3-5. Individual notice is neither required nor even arguably realistic.¹²

The Board's former Interim Executive Director, Terasa L. Robertson (now Terasa L. Miller), testified in the administrative proceedings below that all requisite requirements of the legislative rulemaking process were followed prior to the passage of WVCSR §162-8-5.4, and her testimony in that regard is unrefuted. See Adm. Rec. Exh. 13, p. 79. The notification process followed by the Board included not only the minimum required notice by publication of the proposed Rule in the State Register, but also the transmittal of the proposed rule to the State's professional teachers organizations for their constituents' review and public comment. The Appellants have not suggested, nor can they identify, any procedural flaws or irregularities in the legislative rulemaking processes which preceded passage of WVCSR §162-8-5.4. Consequently, their claimed lack of notice is wholly without merit.

F. Courts from Other Jurisdictions have Consistently Held that Lump Sum Payments for Accrued Leave Should Not Be Included in Final Average Salary Calculations.

In addition to the provisions of WVCSR §162-8-5.4 which the Board submits is dispositive of the Appellants' request for relief, it is also significant that application of general principles of pension jurisprudence lead to the same result. Indeed, numerous courts which have

¹² The Board administers seven pension plans for the State. In the TRS plan alone, there are approximately 21,000 participants. See Adm. Rec. 13, p. 79.

considered the issue presented here have consistently held that lump sum payments for accrued and unused leave should not be included as "salary" in the calculation of a retiring member's final average salary. See, e.g., *Gilmore v. Burks*, 325 So.2d 455 (Fla. 1976); *Hay v. Highland Park*, 134 Mich. 624, 351 N.W.2d 622 (1984); *Hessel v. New York City Employees' Retirement System*, 353 N.Y.S.2d 169, 308 N.E.2d 688 (1974).

Lump sum payments for unused leave, the clear majority of courts have recognized, do not constitute the type of "fixed amounts of periodical payment for services" as the term "salary" is ordinarily understood to mean. See, e.g., *Benedict v. United States*, 176 U.S. 357 (1900)(holding that "salary" means a fixed amount of periodical payment for services); *Cox v. Beverly Hills Retirement System, et. al.*, 1998 Mich. App. LEXIS 593 (1998)(lump sum payments for unused vacation are "not of the same 'nature' as *annual* compensation for services rendered); *Chancellor v. Dept of Retirement Systems*, 12 P.2d 164 (Wash. App. 2000); *International Assn. of Firefighters v. City of Kansas City*, 24 Kan. App.2d 98, 942 P.2d 45 (1997); *Tooley v. McCall*, 676 N.Y.S.2d 259 (1998); *Hoffman v. New York State Policemen's and Firemen's Retirement System*, 142 A.D.2d 854, 531 N.Y.S.2d 141, 1988 N.Y. App. Div. LEXIS 7975 (1988). See also, Footnote 4, *supra*, and cases cited therein.

The Appellants' unused vacation in this case was clearly accumulated over more than one year and the payments they received for that leave were not fixed in advance, thus rendering the lump sum payments in question not part of any year's annual salary as contemplated by the relevant TRS pension calculation provisions. See W. Va. Code §18-7A-26. Moreover, Wood County's payment to them for their unused vacation days at the cessation of employment is clearly an employer-based benefit which is provided over and above their annual

salaries. The right to accrue and to be paid for such days at the time of retirement is, in substance, reimbursement for an unused "fringe benefit" or "perk" rather than a "fixed amount of periodical payment for services." See, e.g., *Abbatiello et al., v. Regan*, 205 A.D.2d 1027, 614 N.Y.S.2d 451, 1994 N.Y. App. Div. LEXIS 7019 (1994) (holding that manipulations of final average salary by extra compensation to those who elect to perform extra work in their last year prior to retirement cannot increase "final average salary" for pension calculation purposes); *Hohensee v. Regan*, 138 A.D.2d 812, 525 N.Y.S.2d 733, 1988 N.Y. App. Div. LEXIS 2351 (1988) (holding that lump sum vacation payments are not regular compensation, are in addition to regular compensation and thus extraordinary, and are properly excluded in arriving at the amount of petitioner's final average salary).

Consequently, and consistent with the persuasive majority of cases decided on this issue from other jurisdictions, the lump sum payments at issue in this case should not be considered as "salary" for final average salary computation purposes.

CONCLUSION

The Board's denial of the Appellants' administrative requests to include non-salary lump sum payments for unused vacation days within their TRS final average salary calculation is not affected by error of law. To the contrary, the Board's decision is entirely consistent with the clear and unambiguous provisions of WVCSR §162-8-5.4 which was passed by West Virginia's Legislature prior to each of the Petitioners' retirements.

Moreover, the controlling legislatively approved rule, WVCSR §162-8-5.4, is not unconstitutionally violative of the principles of equal protection of the law, either on its face or

in application. To the contrary, the Rule applies uniformly to all active retirement system participants and, on a prospective basis, precludes all such participants and their employers from reporting to the Board lump sum payments for unused leave as "salary" for pension calculation purposes. Even assuming, *arguendo*, that a constitutionally suspect class has been created by passage of WVCSR §162-8-5.4, the Rule precludes the artificial spiking of retiring employees' salary figures for pension calculation purposes, and is, as such, a rational classification which is reasonably related to the achievement of a legitimate governmental purpose.

Finally, the principles of *Booth v. Sims* do not justify the relief sought by the Appellants. To the contrary, there has never been any contractual promise within the TRS plan statutes or regulations which have permitted the inclusion of lump sum payments as "salary" for final average salary and benefit calculation purposes which could have been reasonably relied upon by the Appellants, and which was "taken away" by WVCSR 162-8-5.4. Instead, as the Board and its hearing officer correctly concluded, "all that occurred with the adoption of CSR §162-8-5.4 was to render certain that which had never been promised in the first place."

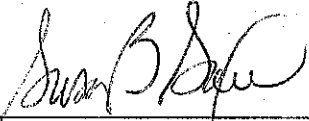
RELIEF PRAYED FOR

ACCORDINGLY, and for all the foregoing reasons, the undersigned respectfully submits that the Board's Final Order of February 25, 2004, which adopted the Amended Recommended Decision of the Board's Hearing Officer in its entirety is not affected by error of law, and that the Board's factual findings set forth therein are supported by the substantial, reliable and probative evidence of record. Consequently, and pursuant to the provisions of W. Va. Code §29A-5-4, the Court is urged to affirm the decision of the West Virginia Consolidated Public Retirement Board denying the Appellants' request to have lump sums which they

received for unused vacation days included within their final average salaries for pension benefit calculation purposes.

Respectfully submitted,

THE WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Appellee, by Counsel



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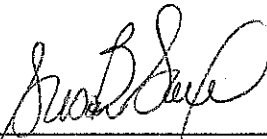
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 18, 2005, a true copy of the foregoing RESPONSE OF THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD IN OPPOSITION TO PETITION FOR APPEAL was served upon the Respondent's counsel and to the following individuals, by United States mail, first-class postage prepaid as follows:

William B. Summers, Esquire
3301 Dudley Avenue
Parkersburg, West Virginia 26104

Anne Werum-Lambright, Esquire
Special Assistant Attorney General
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The Honorable Darrell V. McGraw, Jr.
Attorney General
State Capitol Complex
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Building 1, Room E-26
Charleston, West Virginia 25305



Susan B. Saxe

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 32508
Civil Action No. 04-AA-32 (Circuit Court of Kanawha County)

GEORGE B. SUMMERS and RONALD FERTILE

Appellants,

v.

THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

Appellee.

AFFIDAVIT OF HARRY W. MANDEL

County of Kanawha,

State of West Virginia, to-wit:

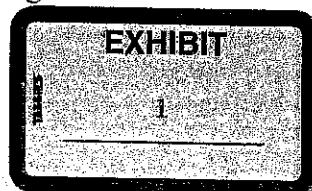
I, Harry W. Mandel, upon my oath, do hereby solemnly swear and affirm as follows:

1. I am a licensed professional actuary, having received a B.S. degree in Mathematics from Sacramento State College. I am an Enrolled Actuary with the Joint Board for the Enrollment of Actuaries, and a professional Member of the American Academy of Actuaries.

2. I was first employed in the actuarial profession in 1970, and have been employed as an actuary for private and public retirement and employee benefit plans since 1974.

3. I am presently employed as an actuary by the West Virginia Consolidated Public Retirement Board (hereinafter "Board"), and have held such position since December 1, 2001.

4. As a professional actuary, I am routinely required to provide estimates of the financial impact of particular statutes and court decisions upon the funding status of the State's several pension plans, including but not limited to the Actuarial Accrued Liability for



past service and Normal Cost for current service for benefits provided under such plans. The results of my determinations are also utilized in order to determine the amount and/or adequacy of the contributions being made to those plans.

5. I have reviewed and am familiar with the legal issues which have been raised by the administrative and judicial appeals of George Summers and Ronald Fertile.

6. I am specifically aware that George Summers and Ronald Fertile, former participants of, and now retirants from, the West Virginia Teachers Retirement System ("TRS") are seeking to have lump sum payments which they each received for unused vacation leave at the conclusion of their employment included as salary for the purpose of calculating their TRS final average salaries and related lifetime annuitized pension benefits.

7. I have been asked by the West Virginia Consolidated Public Retirement Board to analyze the financial impact to TRS and the State of West Virginia in the event of a final judicial decision awarding the relief sought by George Summers and Ronald Fertile, and which assumes that all other similarly situated TRS participants who have not yet entered retirement status are found to be eligible, at the time of retirement, for the same relief as that being sought in the present appeal.

8. My calculations of the financial impact of a judicial decision favoring Mr. Summers and Mr. Fertile and, in turn, all other similarly situated active TRS participants is based upon the following facts and assumptions: a) That Mr. Summers and Mr. Fertile were not ten month contract employees; b) That only employees who are not employed on a ten month contractual basis are eligible to accrue vacation leave; c) That out of 20,818 active TRS participants, 5,973 of such participants are employed on contracts other than ten month contracts; d) That TRS final average salary is based upon the highest five years of salary in the last 15 years, not necessarily consecutive years; e) That all calculations made to determine the actuarial impact of a decision favoring Mr. Summers and Mr. Fertile and all other similarly situated TRS participants are based on averages and actuarial assumptions currently used to determine the TRS Actuarial Accrued Liability and Normal Cost.

9. I have concluded from the calculations I have performed, which are based upon the facts and assumptions stated in paragraph 8 of this Affidavit, that a final judicial decision which affords the relief sought by Mr. Summers and Mr. Fertile and which would, in turn, benefit all other similarly situated TRS employees will: a) increase the unfunded actuarial accrued liability of TRS by \$43,127,000; b) increase the State of West Virginia's annual Normal Cost for TRS funding by under the School Aid Formula (SAF) Appropriation by \$941,000, and c) further increase the SAF Appropriation for the next 7 years by an additional \$7,853,000 to fund the Actuarial Accrued Liability.

10. The costs shown above are for active TRS members only. If current retirees who are already receiving monthly benefits from TRS are found to be entitled to a retroactive recalculation of their monthly benefit on the basis of the relief sought by Mr. Summers and Mr. Fertile, then additional millions of dollars in Actuarial Accrued Liabilities are expected to result.

11. I am over the age of eighteen (18), am of sound mind, and am otherwise competent to make this affidavit.

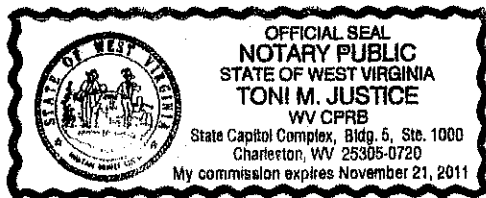
And further Affiant saith not.

Harry W. Mandel
Harry W. Mandel

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Toni M. Justice, a notary public in and for the State of West Virginia and county as aforesaid, do hereby affirm that the affiant, Harry W. Mandel, did sign this Affidavit before me on this the 17th day of March, 2005.



Toni M. Justice
Notary Public

My Commission Expires: November 21, 2011