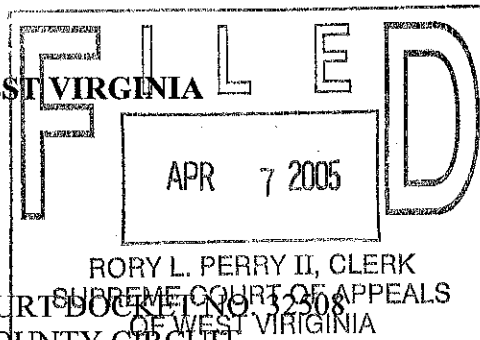


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



GEORGE B. SUMMERS and
RONALD FERTILE,

Appellants,

v.

SUPREME COURT DOCKET NO. 32508
KANAWHA COUNTY CIRCUIT COURT
COURT CASE NO. 04-AA-32

The WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Appellee.

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

The Appellants – despite the Board's assertion to the contrary – never have argued that West Virginia Code of State Regulations § 162-8-5.4 are clear and unambiguous. Indeed, what the Appellants argue is that the Board should not have promulgated and passed a clear **change** to the legislature's enactment of West Virginia Code § 18-7A-14 and the pattern and practice of schools boards that is contrary to the statute. Employing the reasoning of the Kanawha County Circuit Court in Stull v. West Virginia Consolidated Public Retirement Board, Civil Action No. 04-AA-118 (2005), a Court has a duty to give substantial deference to an agency's interpretation of a statute when the statute is silent or ambiguous. A Court reviews such interpretations *de novo* and owes no deference when it determines that the statute is not silent or ambiguous, and cannot limit its consideration to any single part, provision, or section, sentence, phrase, or word, but rather it must review the statute in its entirety to ascertain the legislature's intent. See Fruehauf Corp. v. Huntington Moving & Storage Co., 159 W.Va. 14 (1975).

After reviewing Chapter 18, Article 7A of the West Virginia Code, in its entirety, it is clear that the legislative use of terms, salary and earnable compensation does not cause the

statute to suffer from ambiguity. Whereas the terms may be given different definitions in other contexts, the legislature clearly intended for and actually used the terms interchangeably in West Virginia Code, Chapter 18, Article 7A. Reading West Virginia Code § 18-7A-14 shows this intent, as the statute provides, in pertinent part, the following:

At the end of each month every member of the retirement system shall contribute six percent of that member's monthly earnable compensation to the retirement board[.] The aggregate of employer contributions, due and payable under this article, shall equal annually the total deductions from the earnable compensation of members required by this section.

Section 18-7A-14 makes it very clear: The employee and employer contributions are based on earnable compensation, which is the full compensation the employee receives, regardless of which entity provides the funding. *See* West Virginia Code § 19-7A-3.

In addition, the employer is also responsible for remitting the employee's personal contributions to the retirement board. *See* West Virginia Code § 18-7A-15. Here, it becomes evident that the Legislature intended to use the terms salary and earnable compensation interchangeably. Section 14 sets an employee's contribution at six percent of his or her earnable compensation, the very next section of the West Virginia Code § 18-7A-15, states that the employer must remit the employee's contribution to the retirement board, but it refers to the contribution as being six percent of the employee's salary. Specifically, West Virginia Code § 18-7A-15, provides the following:

Each employer shall each month deduct six percent from the salary of each employee who is a member of the retirement system....and shall at the end of each month remit to the retirement board the amounts so deducted.

Thus, if one were to accept the retirement board's conclusion that the Legislature intended salary and earnable compensation to mean different amounts, then the amount deducted from the employee's pay would be different from the total amount of employee's contributions that the employer remits to the retirement board. The difference results from the fact that six percent of earnable compensation may be a different amount than six percent of the salary, if the terms are not synonymous as the Board determined. It would be absurd for the Legislature to intend that the employer should not remit the entire amount of the employee's contribution. A reading of the entire Article shows a clear legislative intent that contributions from each member are deducted from the employee's earnable compensation and that the employer is thus required to submit the entire amount of the employee's contribution to the retirement board.

Therefore, the Legislature's clear intent was that the term "salary" in W.Va. Code § 18-7A-15 was meant to be synonymous with earnable compensation, as defined by the statute. Any other interpretation would result in the employer deducting certain amounts that it was not required to remit to the board. Just as the word salary was used for earnable compensation in section 15, the statute which sets forth the computation of retirement annuity (W.Va. Code § 18-7A-26(a)) uses the term salary instead of earnable compensation. If the Legislature did not intend that the words be used interchangeably in this section, the use of the word salary would mean that the Legislature intended employees to contribute retirement contributions on compensation that, in the end, is not being counted toward the employee's annual salary for annuity computation purposes. Apparently, just as the Legislature intended the terms to be synonymous in W.Va. Code § 18-7A-14 and § 18-7A-15, the Legislature intended the word salary, in W.Va. Code § 18-7A-26(a), to mean the same as earnable compensation.

Other indications of the proposed Legislative intent are found in West Virginia Code

§18-7A-18. In that section, the Legislature provides that member contributions are accumulated in a “teachers accumulation fund” and the employers contributions are placed in a “employers accumulation fund.” Additionally, the Legislature goes on to require that employers deposit, in the employers accumulation fund, a certain percentage of “all salary paid in excess of that authorized for minimum salaries in (§18A-4-5) or any county supplement equal to the amount distributed for salary equity among the counties.” W.Va. Code § 18-7A-18(b). This section is evidence that the Legislature knew when it drafted Article 18 that the term salary could mean different amounts, so far as Article 18A was concerned. For example, W.Va. Code § 18A-4-1 defines salary by two separate definitions: basic salaries and advanced salaries and W.Va. Code § 18A-4-5 defines a third salary term, which is “salary equity.” The fact that the Legislature did not define or otherwise specify which definition the term salary refers to in Article 18 is further evidence that the legislature intended, for purposes of Article 18, that salary should be interpreted as synonymous with earnable compensation. If the Legislature had intended that the retirement annuity computations be based on only the basic salaries or advance salaries, the Legislature would have used those terms or otherwise defined the term used (salary) in Article 18. The fact that the Legislature uses the term salary interchangeably with earned compensation in other sections of Article 18 makes it clear that the terms were intended to be read as synonyms in the computation statute, which is in the same Article, and which is ultimately at issue in this action. Thus the statute in question, W.Va. Code § 18-7A-26, and Article 18, considered in its entirety, are not ambiguous. Therefore, the Legislature clearly intended that terms salary and earnable compensation be read synonymously.

Consequently, as there is no ambiguity in the statute, a Court does not owe any deference to the agency’s interpretation of the statute and the resulting legislative rule. Even though the

legislative rule clearly addresses the issue at hand, the Legislature has directly spoken to the precise question at issue by the unambiguous statute. **The legislative rule at issue here is, therefore, in conflict with the clear intent of the Legislature found in Article 18.** The legislative rule was in effect at the time of Mr. Summers and Mr. Fertile's retirement. However, to the extent that it conflicts with the statute, this Court should reverse the Board's determination that the legislative rule has any effect.

GEORGE B. SUMMERS and
RONALD FERTILE,

By Counsel,



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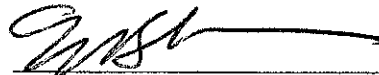
The WEST VIRGINIA CONSOLIDATED
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Appellee.

CERTIFICATE OF SERVICE

I, William B. Summers, do hereby certify that on April 4, 2005, I served a true copy of the hereto annexed **RESPONSE TO APPELLE'S RESPONSE OF THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD IN OPPOSITION TO PETITION FOR APPEAL** to all parties in the above referenced matter by United States Mail, first class, certified mail, return receipt requested, postage prepaid, at the following address:

Susan Saxe, Esquire
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William B. Summers