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Blair Taylor
Executive Director
Municipal Pensions Oversight Board
301 Eagle Mountain Road, Suite 251
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Dear Executive Director Taylor:

The Municipal Pensions Oversight Board ("the Board") has asked for an Opinion of the Attorney General about whether certain pension payments made by the Beckley Firemen's Pension and Relief Fund and Beckley Policemen's Pension and Relief Fund ("the Beckley Funds" or "the Funds") comply with West Virginia Code § 8-22-25. This Opinion is issued under West Virginia Code § 5-3-1, which provides that the Attorney General shall "give written opinions and advice upon questions of law … whenever required to do so, in writing, by … any … state officer [or] board." To the extent this Opinion relies on facts, it is based solely on the factual assertions in your correspondence with the Office of the Attorney General.

Your letter explains that the Board conducted compliance reviews of the Beckley Funds in late 2020. During that review, the Board observed that the Beckley Funds were using "fractional years" of service—that is, months—to calculate pension benefits. The Board believes that these calculations are inconsistent with West Virginia Code § 8-22-25(b), which provides that pension funds must calculate benefits for eligible police and fire personnel using a member's "years of service completed."

Your letter therefore raises two legal questions:

(1) Does West Virginia Code § 8-22-25 allow pension funds to use fractional years in calculating pension benefits?

(2) If covered funds cannot use fractional years, what steps must the Beckley Funds take to rectify their benefit calculations?

As the Board did, we too conclude that West Virginia Code § 8-22-25(b) does not permit covered funds to include fractional years in their calculations. Thus, the Beckley Funds cannot continue using fractional years to calculate pension benefits. Further, with certain fact-specific caveats explained below, the statute requires the Beckley Funds to make prospective adjustments to annuity payments that have already begun and recoup amounts reflecting overpayments. We also conclude, however, that plan beneficiaries *might* be entitled to recoup any contributions made into the Funds during the fractional year—but that matter is an open question without clear statutory direction.

Discussion

I. West Virginia Code § 8-22-25(b) prevents the Beckley Funds from using fractional years to calculate benefits.

We start with the language of the relevant statute. *See In re R.S.*, 244 W. Va. 564, 855 S.E.2d 355, 361 (2021). Here, Section 8-22-25(b) reads:

> Any member of any such department who is entitled to a retirement pension under the provisions of subsection (a) of this section and who has been in the honorable service of such department for more than twenty years at the time of the member's retirement shall receive, in addition to the sixty percent authorized in said subsection (a):
>
> (1) Two additional percent, to be added to the sixty percent for each of the first five additional *years of service completed* at the time of retirement in excess of twenty years of service up to a maximum of seventy percent; and
>
> (2) One additional percent, to be added to such maximum of seventy percent, for each of the first five additional *years of service completed* at the time of retirement in excess of twenty-five years of service up to a maximum of seventy-five percent.
>
> The total additional credit provided for in this subsection may not exceed fifteen additional percent.

(emphases added).

Your questions center on the meaning of "years of service completed." The Beckley Funds read the statute to say that a beneficiary can be credited for less than a full year, such that benefits could be increased by fractional percentages. Under that view, for example, an employee who works for three months past his or her twentieth year of service would receive an additional 0.5% increase in retirement benefits.

But because the statute refers to "completed" years, it does not permit the Beckley Funds to take a fractional-year approach. "[T]he words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 145, 107 S.E.2d

353, 358 (1959). To "complete" something means "to bring to an end and especially into a perfected state," "to make whole or perfect," or "to mark the end of." Merriam-Webster.com, https://perma.cc/UW9F-DFUD (last visited Jan. 21, 2022). A year of service has not been "brought to an end" or "made whole" when the employee worked for part of the year, and the public employee cannot "mark the end of" the service year. Thus, in referring to "completed," the statute directs that the employee must finish a full year of service.[1]

Other parts of the statute that refer to months, not years, confirm this understanding. For example, both West Virginia Code §§ 8-22-16(d) and 8-22-25(a) use "twelve-consecutive-month periods." As a rule, the Legislature's "use of certain language in one part of the statute and different language in another can indicate that different meanings were intended." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 156 (2013) (cleaned up). And when a statute speaks to units of time, the law generally ignores fractional units. *See, e.g., Steeley v. Funkhouser*, 153 W. Va. 423, 427, 169 S.E.2d 701, 703 (1969) (explaining that, as to statute of limitations, "the law disregards fractions of a day in the computation of time"). The Legislature has also expressly directed other pension systems to include fractional years, but it did not do so here. *Compare* W. Va. Code § 8-22-25(b), *with id.* § 5-10-14 (crediting periods of days and months as service time), *and id.* § 15-2A-6 (calculating based on the number of full years and fraction of last year).

Further, both the Legislature and the Supreme Court of Appeals have said that pension-related provisions like Section 8-22-25(b) are designed to "control[] the amounts paid in retirement benefits and to thereby ensure continued adequate funding of the [fund]." *Summers v. W. Va. Consol. Pub. Ret. Bd.*, 217 W. Va. 399, 404, 618 S.E.2d 408, 413 (2005); *see also* W. Va. Code § 8-22-16a ("[M]aintenance of an actuarially sound pension system is incumbent upon the administrators of the various funds and is also incumbent upon the Legislature when it enacts changes to the benefit structure."). The Board's position[2] is consistent with that purpose, as it prevents overpayments that could otherwise deplete the Funds.

Although the Funds correctly observe that the statute does not expressly *prohibit* fractional benefit increases, the law does not permit us to draw meaning from that silence here. The Funds were established by way of the City of Beckley's municipal powers. "A municipal corporation has no powers save those expressly conferred by the legislative department or clearly implied as an integral part of those granted by its charter or general statute." *State ex rel. Crouse v. Holdren*, 128 W. Va. 365, 367, 36 S.E.2d 481, 482 (1945). When in doubt, "the power is to be denied." *Id.*

[1] Courts agree. *See, e.g., Capozzi v. Russo*, No. CV000162404, 2003 WL 21040561, at *3 (Conn. Super. Ct. Apr. 28, 2003) ("The phrase 'completed years of service' suggests, therefore, that the calculation of the pension benefit shall be based only on completed years of service, not fractional years as claimed by the plaintiff."); *Cooper v. United States*, 81 F. Supp. 734, 735-36 (Ct. Cl. 1949) (contrasting a statute that awarded retirement benefits based on "years of service" with other statutes that expressly limited payments to "'complete years' of service"); *cf. Scott v. Okla. State Bd. of Educ.*, 618 P.2d 410, 410 (Okla. Civ. App. 1980) (finding that teachers had not "completed" a third year of teaching when teachers had, at relevant time, worked only part of their third year).

[2] The Board's position is another reason to conclude that a West Virginia court would likely construe the statute to bar calculations premised on fractional years. "When a government agency issues an interpretation of a statute, it is entitled to some deference by the court." *Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 726, 791 S.E.2d 168, 172 (2016).

Here, because Section 8-22-25(b) does not confer or clearly imply the right to credit fractional years of service, statutory silence cannot lead to a different result.

We also do not expect that equitable considerations would lead a court to take a different view. We explained in a December 2017 Opinion to the Board that the relevant statutes do not leave room for such considerations. Since then, the Supreme Court of Appeals has reiterated that plan beneficiaries cannot claim an equitable-reliance interest in state retirement funds paid out on terms that the statute does not permit, as "no promise [was] made" by the Legislature in that circumstance "upon which Respondents—active or retired—could have relied." *W. Va. Consol. Pub. Ret. Bd. v. Clark*, 245 W. Va. 510, 859 S.E.2d 453, 466 n.73 (W. Va. 2021) (applying analogous provisions from the Public Employee Retirement System). Further, the members' obligation to contribute and the Funds' obligation to pay benefits are distinct. *See id.* ("The cynosure, then, 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*." (emphasis in original)). So we do not expect that a court would find inequity solely because the employee contributed during a period for which he or she did not receive service credit.

Thus, the structure the Legislature created in Section 8-22-25(b) does not leave room for the Funds to include fractional years.

II. Under West Virginia Code § 8-22-27a, the Beckley Funds may need to make corrections to annuity payments and member contributions.

The next question, then, is what the Beckley Funds must do to address payments premised on fractional-year calculations.

W. Va. Code § 8-22-27a requires covered funds to correct overpayments to fund beneficiaries:

> If any error results in any member, retirant, beneficiary, entity, or other individual receiving from the plan more than he or she would have been entitled to receive had the error not occurred, the board of trustees, after learning of the error, shall correct the error in a timely manner.

As we explained in our December 2017 Opinion, this overpayment provision is written in non-discretionary terms; funds must correct the overpayment. *See M.H. v. C.H.*, 242 W. Va. 307, 313, 835 S.E.2d 171, 177 (2019) ("The word 'shall,' in the absence of language, showing a contrary intent, should be afforded a mandatory connotation.").

The statute then explains that, with certain exceptions, funds must prospectively and retrospectively correct the overpayments:

> Unless otherwise authorized by the governing body of the city in which the fund was established as provided herein, if correction of the error occurs after annuity payments to a retirant or beneficiary have commenced, the board of trustees shall

> prospectively adjust the payment of the benefit to the correct amount. In addition, the member, retirant, beneficiary, entity, or other person who received the overpayment from the plan shall repay the amount of any overpayment to the municipal policemen's pension fund or municipal firemen's pension fund in any manner permitted by the board of trustees of that fund.

W. Va. Code § 8-22-27a(d).[3]

There are, however, two limitations on this requirement. *First*, the statute requires the Funds to make corrections in a "timely" manner. *See id.* § 8-22-27a(a). "Timeliness" is often hard to define, and it usually depends on the facts of a given case. In *Clark*, for example, the Supreme Court of Appeals held that a seventeen-year delay seeking correction of an overpayment by the Public Employees Retirement System was *not* timely. 859 S.E.2d at 468. But the Supreme Court of Appeals has not otherwise offered clear direction on this issue. It has merely noted the statute's direction that the board "shall correct errors in a timely manner," such that "the Board's ability to correct overpayments made to Respondents depends on whether the correction effort is timely." *Clark*, 859 S.E.2d at 467-68.

We lack the facts to say whether a request for correction from the Funds would be "timely" here. Your letter does not state, for example, how long these overpayments have occurred, when they were first discovered, and what circumstances might justify any delay in failing to identify the problem sooner. That said, if the correction is deemed "untimely," then the Beckley Funds could not request beneficiaries to repay the mistakenly paid amounts *or* prospectively adjust overpayments to those persons. *Clark*, 859 S.E.2d at 469.

Second, the Legislature provided that "the governing body of the city in which the fund was established"—namely, the Common Council for the City of Beckley—may allow for continuing overpayments to certain beneficiaries. W. Va. Code § 8-22-27a(d). The statute explains:

> The governing body of the city in which the overpaying municipal fund is established may, by majority vote, authorize continued overpayment of retirement benefits for any member, retirant, beneficiary, entity, or individual who retired prior to the effective date of this section as enacted during the regular legislative session of 2017.

[3] In our December 2017 Opinion, we concluded that "Section 8-22-27a does not require the Fund to correct over- or underpayments made before the statute was enacted." We so concluded because we thought the 2017 enactment requiring repayment affected a "substantive right," such that it was presumed that the statute was not substantive. But we noted at the time that "a court may disagree" and deem the statute "procedural" or "remedial"—in which case it would apply retroactively. Sure enough, in *Clark*, the Supreme Court of Appeals held that an analogous amendment to the statute governing the Public Employee Retirement System was "remedial and can be applied to correct errors in PERS occurring before the amended statute's effective date." 859 S.E.2d at 466. Thus, *Clark* compels us to conclude that a reviewing court almost certainly *would* deem Section 8-22-27a retroactive and conclude that it applies to over- or underpayments made before the statute was enacted.

In other words, for fund members who retired before July 7, 2017 (the effective date of the enactment), the Common Council for the City of Beckley may authorize continued payment based on the incorrect fractional-years calculation. No repayment or prospective adjustment would then be required. Note, however, that the Common Council would also need to "authorize continued payment into the fund in an amount equal to that which it would be responsible to pay under the applicable actuarial method used by the city without reduction to any retirement benefit." *Id.*

Together, these potential exceptions show that if the Funds timely request correction, and if the Common Council for the City of Beckley does not authorize continuing overpayment, then Section 8-22-27a(d) would require the Beckley Funds to correct future payments and seek repayment of amounts paid out that reflected credit for fractional years.

Finally, the Beckley Funds suggest that if beneficiaries are not entitled to credit for fractional years, then those persons should be refunded any amounts paid into the fund during fractional years. West Virginia Code 8-22-27a(c) discusses "overpayments to the plan by the employee":

> When mistaken *or excess* employee contributions or overpayments have been made to the plan, the municipal policemen's or municipal firemen's pension and relief fund board of trustees shall have sole authority for determining the means of return, offset or credit to or for the benefit of the individual making the mistaken or excess employee contribution of the amounts.

(emphasis added). The amounts members pay during partial years are not mistaken, as they were obliged by law to pay them. But because the statute refers to "excess" contributions by employees as well as mistaken ones, we believe the Beckley Funds *may* be correct in reading the statute to allow for a limited return of contributions. "[T]he Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning," and "it is necessary to give effect to every word and part of a statute in order to effectuate its true meaning." *Jackson v. Belcher*, 232 W. Va. 513, 518, 753 S.E.2d 11, 16 (2013). A court might therefore read "excess" to embrace situations like this one, where an employee does not receive a benefit reflecting credit for a period during which non-mistaken contributions were made. *See, e.g., Olski v. Olski*, No. A-1436-06T3, 2007 WL 2580541, at *1 (N.J. Super. Ct. App. Div. Sept. 10, 2007) (referring to "excess employee contributions over and above the total accumulated pension payments received by him"). We also observe that some public retirement systems permit employees to obtain refunds of their contributions in exchange for forfeiting any retirement benefits tied to the specific period of service the refund covers.[4]

On the other hand, although one West Virginia statute permits members to obtain refunds of *all* their contributions when they leave their positions before benefits vest, it does not expressly contemplate refunds of *some* contributions once the benefits vest. *See* W. Va. Code § 8-22-19a. And as explained above, in at least some contexts, the Supreme Court of Appeals views members'

[4] *See, e.g., Whitby v. Off. of Pers. Mgmt.*, 417 F. App'x 967, 969 (Fed. Cir. 2011) (describing such a refund request under a federal retirement system); *Fontenot v. La. State Employees' Ret. Sys.*, 186 So. 3d 163, 166 (La. Ct. App. 2015) (same under state system).

obligation to pay separately from their entitlement to receive benefits. *See Clark*, 859 S.E.2d at 466 n.73. So, in West Virginia, it is an open legal question whether an employee may seek a refund of payments made during a specific period that does not then give rise to any attendant benefit. We find no available authority sufficient to resolve whether a reviewing court would conclude that "excess" for purposes of Section 8-22-27a(c) covers partial-year payments.

* * * *

The Legislature has the power to change any of these provisions and grant whatever relief it decides is appropriate. The Legislature could, for instance, decide that no repayment of inappropriately paid benefits is necessary in circumstances like these. But until the Legislature acts, the Executive Branch must respect and apply the law as written. And currently, the governing statutes do not permit the Beckley Funds to calculate benefits based on fractional years.

Sincerely,

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