



State of West Virginia  
Office of the Attorney General

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Blair M. Taylor  
Executive Director  
Municipal Pensions Oversight Board  
301 Eagle Mountain Road  
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Charleston, WV 25311

Dear Mr. Taylor:

You have asked for an Opinion of the Attorney General regarding what steps the Morgantown Policemen's Pension and Relief Fund ("Fund") must take to comply with West Virginia Code § 8-22-27a, which requires municipal pension funds to correct errors in the administration of municipal pensions, in light of the Fund's longstanding errors in calculating pension amounts. This Opinion is being issued pursuant to 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, board or commission." To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of the Attorney General.

In your letter, you explain that for almost three decades the Fund has used internal procedures to calculate the retirement pensions for police officers and firefighters that violate West Virginia law. In particular, for retirees hired prior to January 1, 2010, the Fund does not calculate pension retirements using the definition of "salary or compensation" contained in West Virginia Code § 8-22-16(d). In relevant part, Section 8-22-16(d) provides that the amount of "salary or compensation" for purposes of calculating a fund member's pension is the amount of "remuneration received by the member during any twelve-consecutive-month period," except that "any amount which is in excess of an amount which is twenty percent greater than the 'average adjusted salary' received by the member in the two consecutive twelve-consecutive-month periods" immediately prior to the calculation period "shall be disregarded." *Id.* In other words, for purposes of calculating a pension, the statute caps "salary or compensation" at 120% of the member's average adjusted salary for the two years prior to retirement—even if the member's total remuneration in their *final year* was greater (such as, for example, where a member "cashes in" unused leave in their final year of active employment).

This statutory provision—the “twenty-percent rule”—became effective on July 11, 1981. The Fund admittedly did not comply with the twenty-percent rule for almost thirty years. Instead, the Fund has represented to you that it learned of the twenty-percent rule sometime during 2008. At that time, the City of Morgantown (“City”) retained outside counsel to review the Fund’s existing practices and advise the Fund concerning its responsibilities with respect to Section 8-22-16. The City received written advice from outside counsel in 2009. Although this advice specifically advised the City and the Fund to seek a formal Attorney General’s opinion regarding its statutory duties, neither the City nor the Fund sought an Attorney General’s opinion at that time.

Instead, in response to the advice of outside counsel, the City and the Fund entered into an oral agreement not to apply the twenty-percent rule to “anyone hired prior to January 1, 2010.” According to your letter, the Fund’s Trustees also adopted measures that appear intended “to potentially offset some of the impact of member pensions that exceed the 20% limiter.” First, the Trustees capped the amount of unused leave that members may apply toward their last year’s total “salary or compensation.” Second, in 2014, the Trustees passed a resolution to increase member contributions to the fund from 7% to 9.5% for all members hired before January 1, 2010.<sup>1</sup>

Earlier this year, the Legislature passed HB2601, now codified at West Virginia Code Section 8-22-27a, which became effective on July 7, 2017. Section 8-22-27a generally provides that a municipal police or firefighter pension fund “shall” correct any over- or underpayment to or from a pension plan “in a timely manner” after the error is discovered. W. Va. Code § 8-22-27a(a). The statute is modeled on West Virginia Code § 5-10-44, which contains similar error-correction provisions for pension plans operated by the Consolidated Public Retirement Board.

On June 26, 2017, the Fund contacted the Municipal Pensions Oversight Board (“Oversight Board”) to ask how it should comply with Section 8-22-27a. Specifically, the Fund asked whether it must apply the twenty-percent rule to all future pensions and readjust all current pensions consistent with that rule, or whether its oral agreement with the City in 2009 could be construed as sufficient to comply with the law. Consistent with the Oversight Board’s responsibility to monitor and improve performance for municipal police and firefighter pension funds—as well its authority under Section 8-22-27a to order noncompliant pension funds to correct errors—the Oversight Board requested this Opinion.

Your letter raises the following specific legal question:

*Whether Section 8-22-27a requires the Fund to apply the twenty-percent rule to all pensions, including existing pensions and future pensions, and including pensions for members hired both before and after January 1, 2010?*

We conclude that Section 8-22-27a requires the Fund to apply the twenty-percent rule to all current and future pensions, regardless of a member’s date of hire. The Fund is therefore required to calculate all new pensions consistent with the twenty-percent rule. The Fund must also

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<sup>1</sup> The Fund’s assets are comprised of member contributions, municipal contributions, interest on assets, and a yearly allocation from the State.

recalculate all existing pensions that were calculated under the incorrect standard to ensure that future payments are correct. We also conclude that Section 8-22-27a was not intended to have retroactive effect, and thus the Fund is not required to correct historic over- or underpayments made before the statute was enacted.

### *Discussion*

Section 8-22-27a's "[g]eneral rule" provides that, "[u]pon learning of errors, the municipal policemen's pension and relief fund board of trustees . . . shall correct errors in the plan in a timely manner." W. Va. Code § 8-22-27a(a). This rule applies "whether the individual, municipality or board of trustees was at fault for the error." *Id.* The "intent" of correcting errors is to "plac[e] the affected individual, municipality and pension board of trustees in the position each would have been in had the error not occurred." *Id.* If the Fund's board of trustees "fail[s] to correct discovered errors," the statute gives the Oversight Board "authority to order the pension fund board of trustees to correct such errors," and provides that "[a]ny order issued by the Municipal Pensions Oversight Board shall be enforceable by an action at law." *Id.*

The statute also details four types of errors—over- and underpayments to pension plans, and over- and underpayments from pension plans, W. Va. § 8-22-27a(b)-(e)—and instructs funds how to correct each type of error. For over- or underpayments to a member, the statute provides that the "board of trustees after learning of the error shall correct the error in a timely manner." *Id.* § 8-22-27a(d), (e). Where "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." *Id.* The statute also provides that, in the case of underpayments, "the board of trustees shall pay the amount of such underpayment to the member, retirant, beneficiary or other individual in a lump sum." *Id.* § 8-22-27a(e). In the case of overpayment, "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 . . . in any manner permitted by the board of trustees of that fund. Interest shall not accumulate on any corrective payment made to the plan pursuant to this subsection." *Id.* § 8-22-27a(d).

Section 8-22-27a thus contains two distinct requirements: First, in subsection (a), it requires a fund's board of trustees to timely correct errors after they are discovered. Second, in subsections (b)-(e), it requires correction of over- or underpayments made to or from the plan as a result of any error described in subsection (a).

### *Correcting Erroneous Pension Amounts*

With respect to the first requirement to correct errors in a plan, under the plain language of Section 8-22-27a, a fund's board of trustees is required to correct any and all errors after the Plan learns of the error or errors. As applied to the specific facts your letter raises, we conclude that this language requires the Fund to immediately recalculate any member's pension amount that does not comply with the twenty-percent rule, regardless of the member's date of hire.

As an initial matter, “[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.” Syl. pt. 2, *State ex rel. DeCourcy v. Dent*, No. 17-0572, 2017 WL 5559239 (W. Va. Nov. 17, 2017). Subsection (a) states that “[u]pon learning of errors” the Fund “shall correct errors in the plan in a timely manner.” W. Va. § 8-22-27a(a) (emphasis added). “Shall” is nondiscretionary: Where, as here, the Legislature uses the term “shall” without “language in the statute showing a contrary intent,” the term “should be afforded a mandatory construction.” Syl. pt. 2, *Peyton v. City of Lewisburg*, 182 W. Va. 297, 387 S.E.2d 532 (1989) (citation omitted). Subsection (a)’s emphasis that funds must correct errors “in a timely manner” and regardless “whether the individual, municipality or board of trustees was at fault” further underscores the Legislature’s intent that all errors be corrected in short order after they are discovered. Based on the Fund’s communications with the Oversight Board that you described, it is apparent that the Fund knows that “errors” exist in every pension where the twenty-percent rule was not applied when calculating the member’s final year “salary or compensation.” The Fund must timely correct those errors.

We further conclude that under Section 8-22-27a the Fund may not decline to correct errors in some pensions based on the date a particular member was hired. You explained that in 2009, based at least in part on the advice of outside counsel, the Fund made an oral agreement with the City not to apply the twenty-percent rule to members hired before January 1, 2010. Regardless of the merit of the legal advice the Fund received in 2009 under then-current law, Section 8-22-27a makes clear that the Fund may not continue to pay pensions it knows were calculated inconsistent with the twenty-percent rule.

We reach this conclusion even though the Fund has taken measures that may have mitigated, in part, the consequences of its failure to comply with the twenty-percent rule for members hired before 2010 (*i.e.*, for those members, capping the amount of unused leave that can be used in calculating a pension, and increasing member contributions to the Fund from 7% to 9.5%). Section 8-22-27a(a)’s mandatory language provides no exceptions to the error-correction requirement. Further, we are aware of no cases where a court approved failure to comply with a nondiscretionary statute on the basis that the regulated party took *other steps* than those the Legislature directed, even if those alternate measures could be viewed as achieving rough compliance with the statute’s goals.

Neither is a court likely to determine that potential equitable concerns, if any, alter the Fund’s duties under Section 8-22-27a. In at least two cases, the Supreme Court of Appeals has interpreted the statute on which Section 8-22-27a is modeled, W. Va. Code § 5-10-44, and determined that equitable considerations do not diminish the statutory error-correction mandate. First, in *Myers v. W. Va. Consol. Pub. Ret. Bd.*, 226 W. Va. 738, 754, 704 S.E.2d 738, 754 (2010), the Supreme Court of Appeals affirmed a decision of the Consolidated Public Retirement Board (“Board”) not to reinstate two months of service credit that had been awarded to an employee in error. *Id.* at 754, 704 S.E.2d at 754. The Court reached this result even though the employee “may have relied on the Board’s erroneous representation that he would receive service credit for those two months,” because the Board was “statutorily bound” by Section 5-10-44 to correct errors. *Id.* at 754 n.7, 704 S.E.2d at 754 n.7. Specifically, the Court held that “[t]he statute does not limit this [error-correction] requirement for equitable reasons.” *Id.* at 754 n.7, 704 S.E.2d at 754 n.7.

Similarly, in *Lanham v. W. Va. Consol. Pub. Ret. Bd.*, No. 11-0778, 2012 WL 2948558 (W. Va. Mar. 9, 2012), the Supreme Court of Appeals upheld the Board's decision to correct an earlier decision to grant service credit to an employee where the employee was not eligible for the credit. Because the employee "was not entitled to service credit . . . because he did not meet the statutory eligibility requirements," the Board was accordingly "required to correct its error" under Section 5-10-44. *Id.* at \*2. Notably, the Court reached this conclusion even though the employee had a contract with the Board regarding the initial (erroneous) grant of service credit. *Id.*

Based on these decisions, we conclude that the Fund may not refuse to correct errors in pensions for members hired before 2010, despite the unique policies that the Fund has adopted with respect to these members. Just as in *Myers*, the fact that members may have relied on the Fund's erroneous pension calculations will likely not be availing because the Fund is "statutorily bound" to correct errors once they come to light. And just as in *Lanham*, the existence of any previous agreements or contracts with the Fund memorializing errors in pension calculation will not excuse a failure to correct those errors now.

### ***Correction of Over- and Underpayments***

The second requirement in Section 8-22-27a is to correct any over- or underpayments made to or from the Fund as a result of an error in how a pension is calculated. W. Va. Code § 8-22-27a(b)-(e). We conclude that this requirement is not retroactive, and accordingly the Fund is not required to "claw back" overpayments made in the years before the statute was enacted.<sup>2</sup>

Section 8-22-27a(b)-(e) set forth detailed instructions for correcting over- and underpayments. With respect to overpayments from the Fund, subsection (d) provides that the board of trustees "shall" correct, "in a timely manner," "any error" that "results in any member, retiree, beneficiary, entity or other individual receiving from the plan more than he would have been entitled to receive had the error not occurred." W. Va. Code § 8-22-27a(d). That subsection further directs that, where the error occurs "after annuity payments to a retiree or beneficiary have commenced, the board of trustees shall prospectively adjust the payment of the benefit to the correct amount." *Id.* The subsection also specifically directs that the retiree or beneficiary "shall repay the amount of any overpayment" to the Fund "in any manner permitted by the board of trustees of the fund," and that "[i]nterest shall not accumulate on any corrective payment made to the plan pursuant to this subsection." *Id.* Subsection (e), which addresses underpayments from the Fund, contains materially similar requirements, except that the board of trustees must correct underpayments "in a lump sum" to the retiree or beneficiary, with interest. *Id.* § 8-22-27a(e).

The plain meaning of this statutory text makes clear that, after an error is corrected, Section 8-22-27a requires adjusting prospective payments and correcting past overpayments. Nevertheless, the statutory text and precedent from the Supreme Court of Appeals regarding

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<sup>2</sup> We note that a different analysis may apply for erroneous payments made after Section 8-22-27a's effective date. That separate question is beyond the scope of this opinion.

statutory retroactivity strongly indicate that the duty to correct past erroneous payments does not extend to payments made before Section 8-22-27a was enacted.

The West Virginia Code contains a strong presumption against statutory retroactivity: “A statute is presumed to be prospective in its operation unless expressly made retrospective.” W. Va. Code § 2-2-10(bb). This presumption is overcome only “by clear, strong and imperative words or by necessary implication” showing “that the Legislature intended to give the statute retroactive force and effect.” Syl. pt. 2, *Martinez v. Asplundh Tree Expert Co.*, 803 S.E.2d 582 (W. Va. 2017) (quoting Syl. pt. 4, *Taylor v. State Compensation Comm’r*, 140 W. Va. 572, 86 S.E.2d 114 (1955)); see also *Cassella v. Mylan Pharm., Inc.*, 234 W. Va. 485, 489, 766 S.E.2d 432, 436 (2014) (“Nowhere in the statute at issue are there clear, strong, and imperative words indicating that the statute applies retroactively, nor does such appear by necessary implication.”). Nothing in Section 8-22-27a’s direction about correcting over- or underpayments satisfies this standard. The statute contains no language whatsoever regarding retroactivity, much less “clear, strong and imperative words,” and nothing in Section 8-22-27a’s structure or language would necessarily imply that the Legislature intended it to apply retroactively.

To be sure, Section 8-22-27a requires correcting errors that result from *miscalculations* in a member’s pension amount that occurred prior to the statute’s enactment. A law, however, “is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment,” but rather “when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage.” Syl. pt. 5, *Martinez*, 803 S.E.2d 582. An individual does not “acquire[]” “rights” in the mere calculation of benefits—particularly when conducted contrary to operative law. On the other hand, individual over- or underpayment are “transactions which have been completed,” and members gain a property right to the money obtained through these transactions. It is accordingly very likely that a court would find that the requirements in Section 8-22-27a(b)-(e) to correct specific payments made as a result of a miscalculation in a plan are the type of statutory requirements to which the presumption against retroactivity applies.

We note, however, that a court may disagree with this retroactivity analysis on the basis that it deems subsections (b)-(e) to be “procedural or remedial,” as “the general rule of prospective application may be relaxed” for such statutes. *Pub. Citizen v. First Nat’l Bank*, 198 W. Va. 329, 335 n.7, 480 S.E.2d 538, 544 n.7 (1996). Specifically, because subsections (b)-(e) sets forth the requirements to correct errors in existing pensions—and does not, for example, change the standards for calculating pensions in the first place—a court may view these provisions as “remedial,” or “purely procedural in nature.” Syl. pt. 3, *Martinez*, 803 S.E.2d 582. Nevertheless, we conclude it more likely a court would hold that these provisions affect “substantive rights,” and thus that the ordinary, strong presumption against retroactivity applies. *Id.* at syl. pt. 4.

Where the Supreme Court of Appeals has deemed statutes procedural, they typically alter the methods of litigating preexisting rights. For example, *Martinez* held that a statute changing the procedures for awarding back pay or front pay in employment disputes was remedial because it affected the calculation of damages, not the nature of the underlying cause of action. 803 S.E.2d at 587–88. Similarly, in *Joy v. Chessie Employees Fed. Credit Union*, 186 W. Va. 118, 411 S.E.2d

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261 (1991), the Court held that a statute changing the procedure by which a creditor could foreclose on a deed of trust was procedural. *Id.* at 121, 411 S.E.2d at 264. In contrast, subsections (b)-(e) create new rights for members and the Fund to receive money to correct erroneous payments, and imposes new obligations to return money received in error. Further, subsection (a) grants new power to the Oversight Board “to order the pension fund board of trustees to correct . . . errors,” and creates a new cause of action to enforce the Oversight Board’s orders under this provision. W. Va. Code § 8-22-27a(a) (“Any order issued by the Municipal Pensions Oversight Board shall be enforceable by an action at law.”). In our view, these characteristics set Section 8-22-27a outside the realm of a “purely procedural” statute. Thus, absent the clear statement from the Legislature that would be required to give it retroactive effect, we conclude that Section 8-22-27a does not require the Fund to correct over- or underpayments made before the statute was enacted.

Sincerely,

A handwritten signature in black ink that reads "PATRICK MORRISSEY". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey  
Attorney General