

IN THE COURT OF APPEALS OF MARYLAND

NO. 138

SEPTEMBER TERM, 1994

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BOARD OF TRUSTEES OF THE MARYLAND  
STATE RETIREMENT & PENSION SYSTEMS

V.

HARRY R. HUGHES

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Murphy, C. J.  
Eldridge  
Chasanow  
Karwacki  
Bell  
Raker  
Fischer, Robert F. (Specially  
assigned)

JJ.

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DISSENTING OPINION BY BELL, J., in  
which Fischer, J. joins.

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FILED: September 19, 1995

I do not share the majority's opinion that former Governor Hughes was properly denied his State pension during his tenure as Governor. Indeed, it is my considered judgment that the legislative scheme under review makes perfectly clear that, during that time, he was entitled to receive both his State pension and his State salary. Therefore, I dissent.

It is the application of Maryland Code (1957, 1978 Repl. Vol.), Art. 73B, § 11(12) that is at the heart of this case<sup>1</sup>, as there are few, if any, disputed facts. Section 11(12) provides in pertinent part:

Should such beneficiary be appointed or elected to any office, the salary or compensation of which is paid by the State, his retirement allowance shall cease, and he may again become a member of the retirement system and shall contribute thereafter at the same rate he paid prior to his retirement....

I agree with the majority that the issue in this case is one of statutory interpretation. Nor is there much disagreement between the majority and myself as to the process by which that issue is to be resolved.

It is well settled that the search for legislative intent begins with, and ordinarily ends with, the words of the statute, City of Baltimore v. Cassidy, 338 Md. 88, 93, 656 A.2d 757, 760 (1995); Harris v. State, 331 Md. 137, 145, 628 A.2d 946, 950 (1993), considered in light of their plain and ordinary meaning. Dickerson v. State, 324 Md. 163, 170-71, 596 A.2d 648, 651-52

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<sup>1</sup>Presently codified at Maryland Code (1993, 1994 Repl. Vol.), State Personnel and Pensions Article, § 22-404.

(1991). An exception to this canon of statutory interpretation, however, is that when the language of the statute is clear and unambiguous, the result achieved by applying the plain language may be confirmed by the use of extraneous interpretive aids, such as legislative purpose, history, context, etc. State v. Thompson, 332 Md. 1, 7, 629 A.2d 731, 734 (1993). When the words of the statute are not clear - the statute is ambiguous - those interpretive aids inform the meaning of the enactment as well as the search for the Legislature's real intention. In that regard, in addition to considering context, which "may include related statutes, pertinent legislative history and 'other material that fairly bears on the ... fundamental issue of legislative purpose or goal...,'" GEICO v. Insurance Commissioner, 332 Md. 124, 132, 630 A.2d 713, 717 (1993) (quoting Kaczorowski v. City of Baltimore, 309 Md. 505, 515, 525 A.2d 628, 632-33 (1987)), we must endeavor to avoid giving a statute a nonsensical, illogical or unreasonable construction, a point that the majority also recognizes. \_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ [Slip op. at 6] (quoting Frost v. State, 336 Md. 125, 137, 647 A.2d 106, 112 (1994)). But the statute under review also must be read so that no word or portion thereof is rendered surplusage, superfluous, nugatory or insignificant.<sup>2</sup> GEICO, 332

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<sup>2</sup>To be sure, it is appropriate to consider the contemporaneous interpretation given a statute by the agency charged with its administration. Baltimore Gas & Electric v. Public Service Commission, 305 Md. 145, 161, 501 A.2d 1307, 1315 (1986); see Embrey v. Motor Vehicle Administration, \_\_\_ Md. \_\_\_, \_\_\_ n. 10, \_\_\_ A.2d \_\_\_, \_\_\_ n. 10 (1995) [Slip op. at 10 n.10].

Md. at 132, 630 A.2d at 717.

The relevant portion of § 11(12), to be sure, does provide for, as the majority posits, the cessation of retirement payments to a beneficiary upon that beneficiary's being elected or appointed to an office, the salary of which is paid by the State. It goes further than that, however. It also, quite clearly, contemplates that the beneficiary be able once again to become a member of the Employee's Retirement System ("ERS") and thereby enhance those same retirement benefits. Section 11(12) does not, in express terms, specifically condition the cessation of retirement payments on the beneficiary's membership, potential or actual, in the ERS. That absence, however, is a function of draftsmanship. Section 11(12), considered in its entirety, does present the issue of whether actual or potential membership is a condition precedent to cessation of retirement benefits. Hence, the provision is at best ambiguous. It is necessary, therefore, to look to interpretative aids, other than the words the Legislature used, to find the answer.

The majority concludes, without reference to membership status, that § 11(12) is clear and unambiguous and requires cessation of retirement payments whenever a beneficiary of the ERS is elected or appointed to State office. That conclusion

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What weight to give that interpretation, however, depends upon its persuasiveness and, at bottom, whether it is correct. In this case, the appellant's interpretation is simply wrong.

disregards the conjunctive phrase, "and he may again become a member of the retirement system and shall contribute thereafter at the same rate he paid prior to his retirement." That phrase addresses renewal of ERS membership and its effect, i.e. an enhanced pension at the conclusion of the elective or appointed service; nevertheless, the majority fails to give it any effect.

I suspect that it was by reference to that conjunctive phrase that the Attorney General concluded, in his 1988 opinion, see 73 Op. Att'y Gen. at 306-07, that a beneficiary of the ERS who becomes a judge is entitled to receive both the pension benefits and the judge's salary, the latter of which, is, like the Governor's salary, payable by the State. Taking the conjunctive phrase into consideration, the Attorney General opined that the beneficiary's status as an employee for purposes of the ERS is critical. While I do not agree with the Attorney General's analysis of the appellee's situation, it at least takes into account every aspect of the relevant statutory provision.

By Chapter 239 of the Acts of 1971, the Legislature enacted the Gubernatorial Retirement Plan ("GRP"). Captioned as "Governor and Surviving Spouse of Governor" and codified under § 11, "Benefits; Maryland Employees Retirement Review Board," as subsection (18) (later renumbered as subsection (19)), it provides, as relevant:

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(b) Notwithstanding anything to the contrary

in any other law, retirement allowances and benefits for persons serving in the office of Governor after January 17, 1979, and their spouses shall be payable in accordance with this subsection. A person serving in the office of Governor after January 17, 1979, shall be eligible to receive a retirement allowance equal to one-third the annual salary received during his last term of office, provided that the Governor has served at least one full term and has attained age 55. The retirement allowance so determined shall continue for the life of the retiree. This retirement allowance or pension shall be suspended and not paid during any period when the former Governor is employed by any agency of the State of Maryland.

Section 11(12) was a part of the Maryland law long before subsection (19) was enacted. Prior to 1971, therefore, Governors were members of the ERS. Consequently, and not unexpectedly, a Governor's retirement allowances and benefits were funded, and paid, pursuant to its provisions. There simply was no other pension system in which Governors belonged or from which their pensions were to be paid.

Accordingly, in 1971, an ERS beneficiary elected Governor necessarily would have had to look to the ERS for any retirement benefits he would receive as a result of that service. There was no other pension or source for such a pension. Thus, § 11(12) clearly would have applied and, pursuant to its requirements: the pension benefits would have ceased and the beneficiary would be required to elect whether once again to become a member of the ERS; if he chose to renew ERS membership, the pension payable at the end of the beneficiary's term as Governor would have been enhanced.

A different scenario obtained after 1979. An ERS beneficiary elected Governor after 1979 could not renew his or her membership in the ERS and, thereby, enhance his or her pension, even if he or she were of a mind to do so. Instead, as prescribed by § 11(19), the beneficiary automatically became a member of the GRP, from which he or she would be paid retirement benefits upon the completion of his or her term as Governor. Accordingly, beginning in 1979, an ERS beneficiary who served as Governor would have received, in respect of his or her service as Governor, a pension which was not dependent upon membership or potential membership in the ERS.<sup>3</sup>

I agree with the appellee, whether his retirement benefits were improperly suspended does not depend solely upon whether he was a present beneficiary of the ERS. Rather, it depends as much upon whether he is, or potentially is, a member of that system from the standpoint of accruing additional pension benefits. Stated differently, what is critical is whether the ERS will be looked to

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<sup>3</sup>The majority suggests that the GRP is merely a "plan" within the overall Employees Retirement System. The majority does not explain the difference between a system and a plan. In that regard, Black's Law Dictionary defines "plan" as, among others, "a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. Method of putting into effect an intention or proposal." (Citation omitted) Black's Law Dictionary 1150 (6th ed. 1990). That source defines "system" as "[o]rderly combination or arrangement, as of particulars, parts, or elements into a whole; especially such combination according to some rational principle. Any methodic arrangement of parts. Method; manner; mode." *Id.* at 1450.

for pension payments in respect to the State employment - the appointed or elected office - in which the beneficiary is presently engaged. Thus, while I do not agree with the appellee that it is the beneficiary's membership in the ERS that causes the pension payments to cease, read in its entirety, § 11(12) ties cessation of ERS pension payments to whether a present ERS beneficiary's occupation of an elected or appointive office would qualify him or her for enhanced pension benefits from the ERS. Therefore, although the appellee need not have been a member of the ERS at the time that he became Governor, it was necessary that, because of that position and the pension it would generate, he could have been. In this case, the appellee could not have renewed his membership in the ERS, the Legislature having previously enacted legislation creating the GRP and prescribing its membership and the benefits to which its members are entitled.

I think it is patent that it was perfectly proper for the appellee to have received both his ERS retirement payments and his State salary as Governor. The pension benefits the appellee accrued as Governor<sup>4</sup> will be paid from a different pot than the

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<sup>4</sup>At the risk of restating the obvious, it should, nevertheless, be noted that a pension "is not a windfall." Hargrove v. Board of Trustees, 310 Md. 406, 431, 529 A.2d 1372, 1384 (1987) (McAuliffe, J., dissenting) (discussing judicial pensions), cert. denied, 484 U.S. 1027, 108 S.Ct. 753, 98 L.Ed.2d 766 (1988). Rather, a pension "'is a form of deferred compensation which is attributable to the entire period in which it was accumulated.'" Kuchta v. Kuchta, 636 S.W.2d 663 (Mo. 1982) (en banc) (quoting Shill v. Shill, 599 P.2d 1004 (Idaho 1979)).

pension payments received from the ERS.

My reading of § 11(12) is confirmed by looking at it in its historical context. Before 1971, when the Legislature enacted the GRP, there was neither a State policy against "double dipping" nor a general prohibition against a pensioner receiving both a pension and a salary from the State at the same time. The record at the administrative hearing confirms that this was so. This lack of policy was also confirmed by Legislative action taken during the 1972 session.

Spurred by the reality that, under the law as then written, anyone could receive a salary for full time State employment and, at the same time, draw a State pension for former employment, the Legislative Council proposed Bill No. 368(1). That bill would have prohibited that occurrence and, at the same time, authorized a single payee to receive payments from two separate pensions, so long as the service forming the basis for each was rendered at different times. To accomplish the former result, Bill 368(1) was introduced in the 1972 General Assembly as Senate Bill 34. As proposed it provided:

During any period a person is receiving compensation as either an employee or an elected or appointed official, whether or not he is a member of the Retirement System, he is not entitled to receive any pension or retirement allowance supported wholly or in part by the State of Maryland, except benefits from Social Security; (Emphasis added).

Senate Bill 34 was not enacted as proposed. See Chapter 382 of the

Acts of 1972. It was amended to delete the "double dipping" provision, the above quoted language. It was also amended in tone, from prohibitory to enabling legislation. As passed, it provided:

At the time of retirement as a judge in one of the listed courts, the member is eligible to receive benefits from both the Retirement System and the Judges' Pension System. Upon retirement, no salaried State employee, judge, legislator, or Executive official may receive benefits under more than one pension system for the same period of service.

See § 3(2)(e). Coupled with the repeal and reenactment of §§ 3(1)<sup>5</sup> and 3(5),<sup>6</sup> Chapter 382, Acts of 1972 permitted one person to receive benefits under more than one pension, provided they did not

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<sup>5</sup>That section provided before repeal and reenactment:

Any person who shall become an employee as herein defined after the date of establishment may become a member of the Retirement System . . . , and shall not be entitled to receive any pension or retirement allowance from any other Retirement System if that pension or retirement allowance is supported wholly or in part by the State of Maryland, anything to the contrary notwithstanding, except benefits from Social Security. (Emphasis added).

The italicized portion was deleted upon reenactment.

<sup>6</sup>That section provided before repeal and reenactment:

If any such official is entitled to a pension or retirement allowance under the provisions of any other law, and such pension or retirement allowance is supported wholly or in part by the State of Maryland, except benefits from Social Security, such official shall be deemed to have waived the benefits thereof by accepting the payment of benefits under this article.

cover the same period of service. Indeed, the purpose of the statute, as passed, was "to enable a person with separate years of service in two State-supported pension systems, upon retirement, to receive the benefits to which he is entitled under both systems." Chapter 382 of the Acts of 1972. Contrary to the Attorney General's Opinion issued in 1988, see 73 Op. Att'y Gen. 304, 308-09, therefore, at that time, no such policy against "double dipping" was evident in the pension law. On the contrary, the Legislature rejected an effort to institute just such a policy. Instead, as noted, it recognized, that under certain circumstances, double payments from separate state-supported pensions are permissible.

Because there was no policy, in 1972, against the receipt of both a State salary and a State pension, as the Legislative Council recognized, it then was possible for a State employee drawing a pension under the ERS to obtain employment covered by a different pension program and receive the benefits of both, i.e. a salary and, later, a pension from the employment. Thus, the State generally agrees, for example, that because judicial pensions are governed by a separate pension system, a beneficiary of the ERS who becomes a judge may receive both a judicial salary, payable by the State, and the ERS pension; the pension payments continue despite the employee's continued employment with the State of Maryland. The decisive factor is not whether the pension and salary the beneficiary is receiving are, respectively, State-supported and

funded, but rather whether the pension pursuant to which the retirement benefits are being made is separate from the one in which the beneficiary is earning future pension benefits.

The majority denies that the GRP is a separate pension system. Although it acknowledges that the GRP "is not comparable with other plans within the ERS ... because it is non-contributory, and the benefits and determination of eligibility are distinctly dissimilar," it asserts that those differences do not render it separate and apart from the ERS. \_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ [Slip op. at 14] (quoting from the Board's decision). In addition, the majority finds it significant that, rather than placing the GRP provisions in a section of the statute not addressing the ERS, the Legislature chose to place them in § 11, a section dealing generally with the ERS benefits. It also notes the lack of provisions providing for funding separate from the ERS and the fact that the GRP is administered by the ERS, and that "the specific language of the GRP ... never states or even intimates that the GRP is a separate retirement system." \_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ [Slip op. at 14].

The Governor's Salary Commission proposed the establishment of a separate retirement plan for Governors, rather than one that was tied to the ERS. Consistent with that approach, Chapter 239 of the Acts of 1971 was enacted. It prescribed, as the majority concedes, a plan with dissimilar eligibility and benefit criteria: only one term had to be served as Governor; it was non-contributory; and it

was payable at age 55 at the rate of one-third of the Governor's salary. It was unnecessary, in my view, that the Legislature use explicit language indicating its intention to establish a separate system. The mere fact of enactment of the GRP is, I believe, sufficient evidence of that intention. Furthermore, the majority's reasoning with respect to the funding or administration of the plan is not persuasive. Because it is non-contributory and its coverage so narrow, it was not necessary either to provide for contributions or to prescribe detailed eligibility requirements. The only contributions required are those from the State and it is that source of funds, the State as employer, not the ERS, from which the benefits are paid.

That there is no provision made in § 11(19) for the administration and management of the GRP does not render the GRP a part of the ERS, rather than a separate, discrete plan for Governors. Indeed, § 13, "Management of funds," made clear that "[t]he board of trustees shall be the trustees of the several funds created by this article ... and shall have full power to invest and reinvest such funds ...." See also Maryland Code (1993, 1994 Repl. Vol.) § 21-123 of the State Personnel and Pensions Article (placing responsibility for managing assets of the several systems under the supervision of the Board of Trustees of the State Retirement Pension System). Thus, for example, the provisions of § 73B pertaining to judicial retirements and pensions do not address administration and management of that pension fund; there are no

special provisions in §§ 55-63A for the separate administration and management of the judicial pension. Even though the Correctional Officers' Retirement System, and perhaps others, may now be handled differently does not in any way undermine the logic or the persuasiveness of the appellee's position. The Legislature certainly could have provided for separate management and administration for the GRP. It was not required to do so, however.

The majority asserts that, because Governors, as a class, were not excluded from the definition of "employee" in § 1(3), the Legislature must have intended that Governors be included within the class of appointed or elected "employees" "under the ERS definition and are thus covered under the provisions of the ERS." \_\_\_ Md. at \_\_\_, \_\_\_ A.2d at \_\_\_ [Slip op. at 11]. I do not agree. While I concede that a Governor may fall within the definition of employee under the ERS, that does not mean that a Governor necessarily is a member or is covered under the provisions of the ERS. What the nonexclusion does mean is that, but for some other provision, a Governor would be covered. In this case, there is a provision, i.e., § 11(19), that effectively excludes Governors; indeed, it precludes even those who might wish to be members, from becoming members of the ERS. Thus, no matter how comfortably the definition of employee may apply to one who occupies the office of governor, § 1(3) does not, in light of § 11(19), mandate that Governors be covered by the ERS.

Having concluded that the appellee was entitled to receive his ERS benefits while receiving his salary as Governor, I would affirm the judgment of the Circuit Court for Baltimore City remanding the case to the ALJ. The purpose of the remand would be to allow the ALJ to consider, in the first instance, the amount of interest to which the appellee is entitled.

Judge Fischer joins in this opinion.