Circuit Court for Harford County
Case No. 12-C-10-002273

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1221

September Term, 2020

BRIAN J. ROWE, ET AL.

v.

BALTIMORE COUNTY, MARYLAND, ET AL.

Arthur,
Leahy,
Zic,

JJ.

Opinion by Arthur, J.

Filed: July 5, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The State of Maryland and its political subdivisions maintain retirement systems for their employees. Some of the systems are "noncontributory," meaning that the benefit is funded entirely by the employer. Other systems are "contributory," meaning that the benefit is funded in part by the employer and in part by contributions that are deducted from the earnings of the employees (or "members"). In a contributory system, the members' contributions accumulate in an annuity savings fund, where they earn interest at a rate set by law.

When members leave a job with one State agency or political subdivision and take another job with another State agency or political subdivision, they may sometimes transfer their "service credit" (i.e., their credit for their years of service) from a noncontributory system to a contributory system. When these members retire and become entitled to benefits, they receive the benefits from the contributory system. The contributory system is, however, entitled to reduce the amount of the benefits to account for the time during which the members were members of the noncontributory system and thus were not contributing to the funding of their benefits. The shortfall in contributions is called the "contribution deficiency."

Section 37-203(f)(2) of the State Personnel and Pensions Article ("SPP") governs the computation of the contribution deficiency. Before July 1, 2007, § 37-203(f)(2) provided:

> If an individual transfers from a non-contributory system to a contributory system, on retirement the individual's retirement allowance shall be reduced by the actuarial equivalent of the accumulated contributions that would have been deducted if the individual had earned the transferred

> service credit under the new system, including interest on those contributions.

In other words, under SPP § 37-203(f)(2) as it stood before July 1, 2007, the contributory system would calculate the reduction in benefits by: (1) quantifying the contribution deficiency by identifying the "accumulated contributions" that would have been deducted from the members' pay had they been members of the contributory system from the outset of their employment, "including interest on those contributions"; and then (2) ascertaining the "actuarial equivalent" of the accumulated contributions plus interest – i.e., "translat[ing] the contribution deficiency into a reduction of the amount of monthly retirement benefits." 91 Md. Op. Att'y Gen. 219, 220 (2006), 2006 WL 5939692, at *1.[1] The statute did not expressly identify the rate of interest that the contributory system should employ in calculating the contribution deficiency.

In the 2007 legislative session, the General Assembly made what it called "technical and clarifying" amendments to SPP § 37-203(f)(2). The amended statute, which took effect on July 1, 2007, states, in pertinent part:

> [I]f an individual transfers from a non-contributory system to a contributory system, on retirement the individual's retirement allowance shall be reduced by the actuarial equivalent of the member contributions that would have been deducted if the individual had earned the transferred service credit under the new system, including *regular* interest on those contributions.

(Emphasis added.)

[1] This opinion is available online at https://www.marylandattorneygeneral.gov/Opinions%20Documents/2006/91oag219.pdf.

Thus, the 2007 amendments made it clear that, in computing the contribution deficiency, the contributory system should employ the "regular" rate of interest. The "regular" rate is the rate at which a member's contributions accrue interest in the annuity savings fund or its equivalent. 91 Md. Op. Att'y Gen. at 220, 2006 WL 5939692, at *1. In most systems, the regular rate is five percent per annum, compounded annually.

This class action principally concerns the interest rate that a contributory system must employ in computing the contribution deficiency for members of a contributory system who earned some of their service credit in a noncontributory system before the clarifying amendments to SPP § 37-203(f)(2) took effect on July 1, 2007.

In substance, the class members contend that the 2007 amendments did not change the law. Thus, they contend that the retirement system was required to use the regular rate both before and after July 1, 2007.

The employer, Baltimore County, responds that before July 1, 2007, it had the discretion to select the applicable rate. The County selected and employed the "valuation interest rate," which is the assumed rate of return on its pension investments. Because the valuation rate is considerably higher than the regular rate, the use of the valuation rate increases the amount of a member's contribution deficiency and thus reduces the amount of the benefits that the member will receive.

Although this case was filed in Baltimore County, it proceeded to judgment in Harford County, because all of the judges in the Circuit Court for Baltimore County recused themselves. On the principal issue in this case, the court concluded that

Baltimore County was entitled to use the valuation rate for all members who retired before July 1, 2007. The court, however, also concluded that the County was required to use the regular rate for all members who retired on or after July 1, 2007. The court rejected the assertion that the County had violated the members' State and federal constitutional rights by employing the valuation rate.

For the reasons stated herein, we disagree with the circuit court's conclusion that the County was entitled to use the valuation rate in calculating the deficiency for any members, regardless of when they retired. In our judgment, SPP § 37-203(f)(2) required a retirement system to employ the regular rate both before and after the clarifying amendments that took effect on July 1, 2007. We agree with the circuit court, however, that the County did not violate the members' constitutional rights by employing a colorable interpretation of an ambiguous statute in calculating the deficiency. Consequently, we shall affirm the judgment in part, reverse it in part, and remand the case for further proceedings consistent with this opinion.

THE PRE-HISTORY OF THIS CASE

Appellant Brian J. Rowe worked for the State of Maryland from 1975 until 1995. During that time, he was a member of the State's noncontributory retirement system.

In 1995 Mr. Rowe became the Baltimore County Auditor. At that time, he transferred his vested service credit from the State's noncontributory retirement system to the Baltimore County Employees' Retirement System ("BCERS"), a contributory system.

Before Mr. Rowe took the job with Baltimore County, BCERS's auditors had advised the system to use the higher valuation rate rather than the regular rate in calculating the contribution deficiency for members who had transferred from a noncontributory system to BCERS. BCERS, however, did not implement this so-called "transfer policy" until 1998, when Mr. Rowe, as the Baltimore County Auditor, suggested that it do so.

In 2000, while he was employed as the Baltimore County Auditor, Mr. Rowe wrote to the Board of Trustees of BCERS. Although Mr. Rowe had previously suggested that BCERS should use the valuation rate in calculating a contribution deficiency, he apparently changed his mind. He now asserted that BCERS was incorrectly calculating his contribution deficiency, because it was not employing the regular rate. The Board of Trustees declined to change the calculation.

In 2003 Mr. Rowe sought the advice of the State Pension and Retirement System as to whether BCERS should calculate his contribution deficiency by using the valuation rate or the regular rate. In a letter dated August 26, 2003, the Special Assistant to the Retirement Administrator agreed with Mr. Rowe that the valuation rate was not the correct rate to use. He wrote:

> [P]ursuant to SPP § 37-203(f)(2), in calculating the reduction in the individual retirement allowance when there is a transfer from a non-contributory system to a contributory system, the interest on the unpaid contributions is based upon the interest rate that would have been payable on those contributions had the transferred service credit been earned in the "new system," and not on the "valuation" rate.

Because BCERS paid regular interest on member contributions at the rate of five percent compounded annually, the Special Assistant asserted that BCERS should calculate Mr. Rowe's contribution deficiency using that rate, and not the higher valuation rate. In support of his conclusion, the Special Assistant cited 81 Md. Op. Att'y Gen. 196, 197 (1996), 1996 WL 98952, at *1, which states that the contribution deficiency should be calculated using the "interest that would have been made by the member under the new system" – i.e., the "regular rate" that the new, contributory system would have credited to the member's contributions in the annuity savings fund, and not the higher valuation rate, which reflects the system's assumed earnings on member contributions.[2]

In 2004 the Baltimore County Attorney offered his opinion on the matter. Despite the published opinion of the Attorney General and the advice of the State Pension and Retirement System, the County Attorney opined that the governing statute, SPP § 37-203(f)(2), did not specify which interest rate the system should apply. Hence, the County Attorney concluded that the General Assembly had left the decision to BCERS.[3]

[2] This opinion is available online at https://www.marylandattorneygeneral.gov/Opinions%20Documents/1996/81oag196.pdf.

[3] In a letter to two members of the House of Delegates in 2012, the incumbent County Attorney asserted that Mr. Rowe had requested the opinion.

The County Attorney's opinion was not the last word on the subject. In 2006 the Chairman of the Baltimore County Council referred the question to the Office of the Attorney General. In a careful, comprehensive opinion, the Attorney General concluded that, even though SPP § 37-203(f)(2) did not explicitly identify the rate of interest that a contributory system should use in calculating the contribution deficiency for a member who had transferred from a noncontributory system, the statutory scheme, the legislative history, and the consistent administrative practice of the State Retirement Agency demonstrated that the system should use the regular rate of interest, and not the higher valuation rate. 91 Md. Op. Att'y Gen. 219 (2006), 2006 WL 5939692. Because of the importance of that opinion to our conclusions in this case, we shall discuss it in some detail, below.

As previously stated, the General Assembly amended SPP § 37-203(f)(2) in 2007. Among other things, the 2007 legislation, which was titled "Alternate Contributory Pension Selection – Clarifications," changed the phrase "including interest on those contributions" to "including regular interest on those contributions." 2007 Md. Laws ch. 337.[4] In a 2013 report to the General Assembly's Joint Committee on Pensions by the State Retirement Agency and the Department of Legislative Services, the authors wrote that "[t]hese changes are consistent with the interpretation stated in the 2006 Attorney

[4] The 2007 legislation also changed the phrase "accumulated contributions" to "member contributions."

General Opinion and are assumed to have been intended as clarifying and in direct response to the 2006 Attorney General Opinion."

Mr. Rowe retired from his employment with Baltimore County on March 31, 2007. Upon his retirement, BCERS used the valuation rate, compounded monthly, to calculate his contribution deficiency. By using the valuation rate rather than the lower, five-percent regular rate to compute the contribution deficiency, BCERS increased the amount of the contribution deficiency and reduced the amount of pension benefits that Mr. Rowe would receive. BCERS increased the amount of the deficiency even further and reduced the amount of Mr. Rowe's benefits even further still, by compounding the interest on a monthly basis rather than an annual basis.

Mr. Rowe appealed BCERS's computation to the Baltimore County Board of Appeals. In an opinion and order dated June 3, 2008, the Board of Appeals concluded that BCERS had miscalculated the amount of Mr. Rowe's contribution deficiency. The Board specifically concluded that, even before the 2007 amendments, SPP § 37-203(f)(2) required BCERS to employ the regular rate of interest in computing the contribution deficiency. In support of its conclusion, the Board cited other parts of the statute, which specify the use of regular interest; the Attorney General's opinions, which conclude that, even before the amendments, the statute required the use of regular interest; the advice from the State Retirement Agency in 2003, which expressed the same conclusion; and BCERS's own practice until 1998. In addition, the Board observed that the General Assembly described the 2007 amendments to SPP § 37-203(f)(2) as a "clarification,"

which the Board took to mean that the legislature had always intended to require the use of regular interest. The Board directed BCERS to recalculate Mr. Rowe's contribution deficiency by using the regular interest rate of five percent, compounded annually.

BCERS did not petition for judicial review within 30 days of the order, as required by Title 7 of the Maryland Rules. Instead, on the twenty-fourth day after the Board issued its order, BCERS moved for reconsideration. About three months later, the Board denied the motion. Only then did BCERS petition for judicial review.

BCERS's petition was transferred from Baltimore County to the Circuit Court for Harford County. Because BCERS had filed a timely petition for judicial review only from the denial of the motion for reconsideration and not from the Board's decision on the merits, the circuit court concluded that the only issue before it was whether the Board abused its discretion in declining to reconsider its decision. The court found no abuse of discretion.

BCERS appealed to this Court. In an unreported opinion, this Court affirmed the circuit court's decision. *Baltimore County Ret. Sys. v. Rowe*, No. 721, Sept. Term, 2011 (Oct. 3, 2012). The Court of Appeals denied BCERS's petition for a writ of certiorari. *Employees' Ret. Sys. of Baltimore County v. Rowe*, 430 Md. 345 (2013).

In the meantime, while the County's petition for judicial review was pending, the Baltimore County Council passed Bill 30-10, part of which is now codified in § 5-1-220.1 of the Baltimore County Code. Among other things, that bill changed the County's pension legislation to require the use of the valuation rate in calculating the contribution

deficiency for periods of service before July 1, 2007, and to require the use of the regular rate only for periods of service on or after that date. In other words, the 2010 legislation required the use of the valuation rate in calculating the contribution deficiency for service credit earned in a noncontributory system before July 1, 2007. By contrast, the legislation required the use of the regular rate in calculating the contribution deficiency only for service credit earned in a noncontributory system before July 1, 2007. If a member had earned service credit in a noncontributory system both before and after July 1, 2007, the legislation required the use of a hybrid rate: the valuation rate applied before July 1, 2007, and the regular rate applied thereafter.

In effect, Bill 30-10 attempted to ratify BCERS's previous practice even after the Board of Appeals had ruled that that practice was legally incorrect and that BCERS was required to use the regular rate for periods of service before and after July 1, 2007.[5]

THIS LITIGATION

This case began on February 19, 2010. On that date, Mr. Rowe and another retired County employee, David Willis, filed a complaint for declaratory and injunctive relief and for a writ of mandamus in the Circuit Court for Baltimore County. Among other things, they requested that the court certify a class of all persons who are retirees or active members of BCERS, and who transferred service credit from a noncontributory system to BCERS before July l, 2007. As defendants, they named Baltimore County,

[5] In its petition for judicial review of the Board of Appeals' ruling, BCERS asked the circuit court to remand Mr. Rowe's case for further consideration of the new legislation. The court declined. This Court affirmed that decision.

BCERS, the Board of Trustees of BCERS, and the director of the County's Office of Budget and Finance. We shall refer to the defendants, collectively, as the "County."

On June 15, 2010, the Circuit Court for Baltimore County transferred the case to the Circuit Court for Harford County. We are told that the transfer occurred because all of the judges on the Circuit Court for Baltimore County recused themselves.

The operative complaint is the second amended complaint, which was filed on August 21, 2014. That complaint has three named plaintiffs: Mr. Rowe; Mr. Willis; and a third retiree, Joanne Wachter. Like the original complaint, the second amended complaint requests the certification of a class, but it expands the proposed class to include persons who transferred service credit to BCERS before July 1, 2012 (rather than July 1, 2007). Like the original complaint, the second amended complaint names Baltimore County, BCERS, the Board of Trustees of BCERS, and the director of the County's Office of Budget and Finance as defendants. At its core, the second amended complaint challenges the use of the valuation rate in the calculation of the contribution deficiency.

The second amended complaint contains eight counts: four on behalf of the individual plaintiffs and four on behalf of the prospective class. Count I requested the issuance of an injunction and a writ of mandamus to require the County and its agents to use the regular rate in the calculation of contribution deficiencies for the three named plaintiffs; Count II requested the same relief on behalf of the class. Count III alleged that the named plaintiffs had been deprived of their property rights in violation of the Maryland Constitution and the Maryland Declaration of Rights; Count IV made the same

allegations on behalf of the class. Count V alleged that the named plaintiffs had been deprived of substantive due process in violation of 42 U.S.C. § 1983; Count VI made the same allegation on behalf of the class. Count VII requested a declaration that the named plaintiffs had been deprived of their property rights in violation of the Maryland Constitution; Count VIII (incorrectly designated as Count VI) made the same allegation on behalf of the class.

In addition to declaratory and injunctive relief, the issuance of a writ of mandamus, and the certification of a class, the second amended complaint contained an omnibus request for relief, which included an award of damages equal to the amount "wrongfully withheld" from the class, as well as prejudgment interest on that award. The second amended complaint also requested the establishment of a common fund, from which class counsel presumably would be paid.

The case was stayed, at the County's request from June 14, 2012, until May 10, 2017.[6]

Once the court lifted the stay, the County consented to the certification of a class. The circuit court formally certified a class on February 5, 2020. Subject to a number of exclusions that are not pertinent to this case, the class consisted of:

[6] According to MDEC, the court stayed the case in 2012 for two reasons: first, the County's appeal of the Board of Appeals' decision in Mr. Rowe's case was still pending; and second, because the other named plaintiffs were challenging the calculation of their contribution deficiencies before the Board of Appeals. Based on a filing by the County on October 21, 2016, it appears that the Board of Appeals expected to hear the cases of the other named plaintiffs in late 2016. It is unclear whether that occurred.

> those persons who transferred service credit to [BCERS] from a noncontributory retirement plan or system whose deficiency under [SPP § 37-302(f)(2)] (or its predecessor statutes) was calculated or under County law will be calculated based on the "valuation rate" established by BCERS and not the "regular rate of interest" applied by BCERS to member contributions.

We are told that the class consists of 171 members.

The court divided the class into three subclasses. Subclass 1 consisted of the members who retired before July 1, 2007. Subclass 2 consisted of the members who retired on or after July 1, 2007, but before July 1, 2010, the effective date of Bill 30-10. Subclass 3 consisted of the members who retired on or after July 1, 2010.

The court designated Mr. Rowe as the representative for Subclass 1; it designated Mr. Willis and Ms. Wachter as the representatives of Subclass 2; and it designated one Patrick Roddy as the representative of Subclass 3.[7]

The County moved for summary judgment, asserting that, as a matter of law, it was entitled to prevail on all claims in the second amended complaint. The class members opposed the County's motion and advanced a more limited cross-motion for summary judgment. They contended that, as a matter of law, the County was required to use the regular rate in calculating the contribution deficiency for service credit earned in a

[7] When it stayed the case in 2012, the circuit court asserted that if Mr. Rowe prevailed in the County's appeal of the Board of Appeals' ruling (as he did), he would get the benefit of the recalculation of his deficiency and would not be an appropriate class representative. In its brief in this appeal, the County asserts that it complied with the Board's direction to recalculate Mr. Rowe's contribution deficiency by using the regular interest rate of five percent, compounded annually. Thus, the County asserts that it has fully compensated Mr. Rowe. The County, however, does not contend that Mr. Rowe is an inappropriate class representative. Hence, we do not consider that issue.

noncontributory system both before and after July 1, 2007. They asked the court to allow them to conduct additional discovery to quantify the damages, including prejudgment interest, for each individual class member.

In a written opinion, the circuit court issued a split decision. It concluded that BCERS must use the regular rate of five percent per annum in computing the contribution deficiency for the members of Subclasses 2 and 3, who retired on or after July 1, 2007. Thus, the court concluded that BCERS may not use the higher valuation rate in computing the contribution deficiency for members who retired on or after July 1, 2007, even if they had earned their service credit in a noncontributory system before July 1, 2007. The court also ruled, however, that BCERS may use the valuation rate in computing the contribution deficiency for the members of Subclass 1, such as Mr. Rowe, who retired before July 1, 2007. The court reasoned that, until the 2007 amendments to SPP § 37-203(f)(2), the statute was "silent" as to which interest rate applied.

The class members had argued that, under principles of collateral estoppel, the 2008 decision of the Board of Appeals was preclusive on the issue of whether BCERS must use the regular rate for periods of service before July 1, 2007. Although the court rejected that contention, it did not expressly discuss the principles that govern the application of collateral estoppel.

The court did discuss the 2006 opinion of the Attorney General, which had responded to an inquiry from the Chairman of the Baltimore County Council concerning the meaning of the unmodified term "interest" in the pre-2007 version of SPP § 37-

203(f)(2). The court wrote that until the 2006 opinion "there was no guidance as to how to calculate the rate of interest." The court recognized that, according to the Attorney General, the term "interest" had always meant "regular interest." The court noted, however, the County Attorney had expressed a different opinion.

In the court's view, "the 2007 amendment *conformed* the statute to the opinion of the Attorney General." (Emphasis added.) The court's choice of words seems to imply that, in its view, the General Assembly changed the meaning of the statute by adding the adjective "regular" in the 2007 amendments. The court found it significant that the 2007 legislation did not say that it was retroactive and that statutes generally apply prospectively only.

Turning to the language of the statute before the 2007 amendments,[8] the court observed that the computation of the contribution deficiency is to occur "on retirement." Using "retirement" as the triggering event, the court reasoned that the regular rate applies to every member who retired after July 1, 2007, regardless of when they earned their service credit. Thus, in the court's opinion, BCERS was prohibited from using the

[8] Before the amendments, the statute provided:

> If an individual transfers from a non-contributory system to a contributory system, *on retirement* the individual's retirement allowance shall be reduced by the actuarial equivalent of the accumulated contributions that would have been deducted if the individual had earned the transferred service credit under the new system, including interest on those contributions.

(Emphasis added.)

valuation rate for any member who retired after July 1, 2007. The court's decision benefitted the members of Subclasses 2 and 3, as every one of them retired on or after July 1, 2007.

On the other hand, the court rejected the contention that BCERS was required to use the regular rate for the members of Subclass 1, who retired before July 1, 2007. In support of its conclusion, the court asserted that until July 1, 2007, "the statute was bereft of any indication of the rate to be used." The court discounted the use of the regular rate by the State retirement systems, writing that this practice was "not binding" on the County.

The court took note of the Attorney General's 2006 opinion. The court, however, seemed to use the opinion to support the conclusion that BCERS was entitled to use the valuation rate for persons who retired before July 1, 2007: it quoted the Attorney General's statement that "'the County Attorney's advice has been relied on by Baltimore County in support of the use of the valuation rate of interest on investments to calculate the interest on contributions.'" The court did not quote the Attorney General's conclusion, which was that, even before the 2007 amendments, the term "interest" in SPP § 37-203(f)(2) meant "regular interest."

The court did not expressly discuss the import of § 5-1-220.1 of the Baltimore County Code, which purported to authorize BCERS to use the valuation rate in calculating the contribution deficiency for periods of service before July 1, 2007, regardless of when the member retired. Nonetheless, the clear import of the court's

decision is that § 5-1-220.1 is invalid insofar as it authorizes the use of the valuation rate for anyone who retired on or after July 1, 2007.

The court turned to the class members' constitutional claims. It reasoned that the members of Subclasses 2 and 3 had been deprived of nothing, because they would get the benefit of the regular rate. Similarly, it reasoned that the members of Subclass 1 had been deprived of nothing because BCERS would be required to calculate their contribution deficiencies in accordance with what the court had determined the law to be. The court rejected the class members' substantive due process claims on the ground that the County "had a reasonable basis to use the valuation rate when it did."

In an accompanying order, the court granted the County's motion for summary judgment on the State and federal constitutional claims in the second amended complaint. The court declared that the County was permitted to use the valuation rate in computing the contribution deficiency for members who had transferred from a noncontributory system and retired before July 1, 2007. By contrast, the court declared that the County was required to use the regular rate in computing the contribution deficiency for members who had transferred from a noncontributory system and retired on or after July 1, 2007. To the extent that § 5-1-220.1 mandates the use of the valuation rate in determining the contribution deficiency for members who transferred from a noncontributory system and retired on or after July 1, 2007, the court declared that § 5-1-220.1 conflicted with SPP § 37-203(f)(2) and enjoined the County from enforcing it. The court granted the County's motion for summary judgment as to the claims of the members of Subclass 1, who retired

before July 1, 2007. As to the class members who retired on or after July 1, 2007, however, the court ordered the County to recalculate the contribution deficiency, using the regular rate, and to "adjust such members' retirement accordingly including any additional amounts owed."[9]

The court did not address whether the County should compound the interest on a monthly basis (as BCERS had previously done for members of Subclass 1, such as Mr. Rowe) or an annual basis (as the Board of Appeals had ordered BCERS to do in the administrative proceeding brought by Mr. Rowe). Nor did the court address the class members' claim to prejudgment interest on the sums that the County wrongfully withheld from their periodic retirement payments.

The class members noted a timely appeal. The County did not note a cross-appeal.

QUESTIONS PRESENTED

The class members pose eight questions, which we have distilled to six, rephrased, and reorganized:

1. Did the circuit court err in its interpretation of SPP § 37-203(f)(2) and in concluding that the members of Subclass 1 were not entitled to additional benefits?

[9] In its brief, the County asserts that it has used the regular rate to calculate the contribution deficiency for members who retired after July 1, 2007. In support of its assertion, the County cites a page of the circuit court's opinion, which does not say what the County says. If the circuit court thought that the County had correctly calculated the contribution deficiency for members who retired after July 1, 2007, it is unclear why the court ordered the County to recalculate the deficiency and to "adjust such members' retirement accordingly."

2. Did the circuit court err in failing to address whether interest should be compounded on an annual basis, as opposed to a monthly basis, when calculating a contribution deficiency under SPP § 37-203(f)(2)?

3. Did the circuit court err in not expressly declaring that County Bill 30-10 (now § 5-1-220.1 of the Baltimore County Code) is unconstitutional?

4. Did the circuit court err in failing to quantify the benefits owed to the retired members of the class in an enforceable judgment and in not allowing discovery to undertake the calculation thereof?

5. Did the circuit court err in failing to award prejudgment interest to the class?

6. Did the circuit court err in finding no deprivation of the class members' property rights and substantive due process rights?[10]

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[10] The class members phrased their questions as follows:

1. Did the Circuit Court err in denying relief and in not awarding underpaid retirement benefits to the retirees in Subclass 1?

2. Did the Circuit Court erroneously interpret the pre-7/1/2007 version of SPP §37-203(f) contrary to the defined terms therein and its interpretation by the State Retirement Agency and County's Board of Appeals?

3. Did the Circuit Court err in upholding the "Transfer Policy" of BCERS which was contrary to State law and not properly adopted?

4. Did the Circuit Court err in failing to address the manner in which interest should be compounded when calculating a contribution deficiency under SPP §37-203(f)?

5. Did the Circuit Court err in failing to declare all portions of County Bill 30-10 (now §5-1-220.1 of the Baltimore County Code) involving non-contributory service unlawful and unconstitutional?

6. Did the Circuit Court err in failing to quantify back pay owed to the retired members of the Class in an enforceable judgment and in not allowing discovery necessary to undertake the calculation thereof?

For the reasons explained below, we shall affirm the judgment in part, reverse the judgment in part, and remand the case for further proceedings consistent with this opinion.

STANDARD OF REVIEW

Maryland Rule 2-501(f) permits a court to grant a motion for summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." The issue of whether a trial court properly granted summary judgment is a question of law. *Butler v. S & S P'ship*, 435 Md. 635, 665 (2013) (citing *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012)). This Court conducts a *de novo* review to determine whether the circuit court's conclusions were legally correct. *D'Aoust v. Diamond*, 424 Md. at 574.

DISCUSSION

I. The Regular Rate or the Valuation Rate?

The central issue in this case is the correct interpretation of SPP § 37-203(f)(2) before the 2007 amendments – specifically, the correct interpretation of the phrase "interest on those [accumulated] contributions." In this statute, did the word "interest,"

7. Did the Circuit Court err in finding no deprivation of Class Members' vested property and substantive due process rights?

8. Did the Circuit Court err in failing to award prejudgment interest, costs, and fees to the Class.

unmodified by any adjective, mean that a retirement system had the discretion to select the interest rate to apply when calculating a contribution deficiency? Or did the structure, legislative history, and administrative practice under the statute demonstrate that the word "interest" meant "regular interest," as the Attorney General opined in 2006? And did the 2007 amendments change the law, or did they merely clarify what the law had always been?

To answer these questions, we turn to the Attorney General's 2006 opinion, which is a masterpiece of statutory interpretation.[11]

As previously stated, the Attorney General issued the opinion in response to an inquiry from the Chairman of the Baltimore County Council about the precise issue in this very case: was BCERS entitled to use the valuation rate in calculating the contribution deficiency or was it required to use the regular rate? The Attorney General responded that BCERS was required to use the regular rate. Although we are not bound by the Attorney General's opinion (*see, e.g.*, *Grant v. County Council of Prince George's County*, 465 Md. 496, 531 (2019)), we can conceive of no reasonable basis on which to disagree with its compelling analysis.

The analytical section of the opinion begins with the language of SPP § 37-203(f)(2) as it read before the 2007 amendments:

> If an individual transfers from a non-contributory system to a contributory system, on retirement the individual's retirement allowance shall be reduced by the actuarial equivalent of the accumulated

[11] The opinion was co-authored by Robert N. McDonald, who later became an associate judge on the Court of Appeals of Maryland.

> contributions that would have been deducted if the individual had earned the transferred service credit under the new system, including interest on those contributions.

91 Md. Op. Att'y Gen. 219, 222 (2006), 2006 WL 5939692, at *2.

The Attorney General looked first to the meaning of "accumulated contributions," a key term in determining the amount by which a member's "retirement allowance" must be reduced. "'[W]hen used in relation to a local retirement or pension system,'" the Attorney General observed, the term "accumulated contributions" had "'the meaning most closely analogous to the meaning stated in [SPP § 20-101] within the context of the local retirement or pension system.'" 91 Md. Op. Att'y Gen. at 223, 2006 WL 5939692, at *3 (quoting SPP § 37-101(b)).

In 2006, SPP § 20-101(b), "the main definition section of Division II of the [SPP]," defined "accumulated contributions" as follows:

> (1) "Accumulated contributions" means the amounts credited to a member's individual account in the annuity savings fund of the appropriate State system.
>
> (2) "Accumulated contributions" includes:
>
> (i) member contributions;
>
> (ii) additional contributions; and
>
> (iii) *regular interest*.

91 Md. Op. Att'y Gen. at 223-24, 2006 WL 5939692, at *3 (quoting SPP § 20-101(b)) (emphasis added by the Attorney General).[12]

In other words, in and before 2006, the key statutory term "accumulated contributions" was defined to include "regular interest." *Id.* at 225, 2006 WL 5939692, at *4.

"Thus," the Attorney General wrote, "'accumulated contributions' is the cumulative amount of both the required and voluntary contributions made by the member into [the member's] individual account in the annuity savings fund, as well as the 'regular interest' credited by a retirement system to the member's account with respect to those contributions." *Id.* at 224, 2006 WL 5939692, at *3. "It is a balance that increases periodically as a result of additional contributions deducted from the member's salary or paid by the member, and the periodic crediting of 'regular interest' to that balance." *Id.* Under SPP § 20-101(ii) "'regular interest,'" in turn, meant "*interest at the rate payable on accumulated contributions* as provided under this Division II for each State system." *Id.* (emphasis added by the Attorney General).

In view of the statutory definitions of "accumulated contributions" and "regular interest," the Attorney General concluded that "a transferee system is not free to use any interest rate it wishes . . . in imputing a contribution deficiency in the individual's annuity

[12] The current version of SPP § 20-101(b) is identical to the version that was in effect in 2006. In addition, the current version of SPP § 20-101(b) adds a definition of "member contributions," the term that replaced "accumulated contributions" in the 2006 amendments to SPP § 37-203(f)(2). *See supra* n.4.

account." *Id.* Instead, the Attorney General opined that "a State transferee system must apply the regular rate of interest – the rate that is used to compute the interest that is credited to the member's annuity savings fund account." *Id.* at 224-25, 2006 WL 5939692, at *3. "[I]n accordance with SPP § 37-101(b)(2)," a local system, like BCERS, was required to "use the rate 'most closely analogous' to the rate used in the State system," which is the rate that the local system "pays on its member contributions." *Id.* at 225, 2006 WL 5939692, at *3 (quoting SPP § 37-101(b)(2)). In Baltimore County that rate was five percent per annum. *See id.*

The Attorney General recognized that "the process described in SPP § 37-203(f)(2)" was "apparently redundant." *Id.* at 225, 2006 WL 5939692, at *4. "At first glance," the Attorney General wrote, it might appear "superfluous for the statute to specify that 'interest on those contributions' must be included, when the phrase 'accumulated contributions' is defined to include regular interest." *Id.* "The reason for this apparent duplication," the Attorney General explained, is that "the statute directs a reduction of the 'accumulated contributions that *would have been deducted*.'" *Id.* (quoting former SPP § 37-203(f)(2)) (emphasis added by the Attorney General). But "[a]lthough member contributions are *deducted from* a member's salary, regular interest is *credited to* the member's account." *Id.* (emphasis in original). "Thus," the Attorney General concluded, "the drafters of this provision apparently believed it necessary to further specify that the reduction in benefits should take into account 'interest on those contributions.'" *Id.* (quoting former SPP § 37-203(f)(2)).

In summary, viewing the language of former SPP § 37-203(f)(2) "in light of the statutory scheme," the Attorney General opined that the phrase "interest on those contributions" was "essentially a reiteration of the idea that 'accumulated contributions' includes a member's cumulative payroll contributions, plus regular interest credited to the member on those contributions." *Id.*

The Attorney General went on to explain that "[t]he legislative history of the statute confirms this construction of the statutory language." *Id.* The statutory scheme derives from a 1981 enactment, which was designed "to permit transfers, without loss of pension benefits, between noncontributory and contributory retirement systems, thereby increasing portability." *Id.* at 226, 2006 WL 5939692, at *4. The legislation addressed what would occur (1) if an employee moved from a contributory system to another contributory system, (2) if an employee moved from a contributory system to a non-contributory system, or (3) if an employee moved from a noncontributory system to a contributory system.

In the first instance (contributory to contributory), the accumulated contributions, with regular interest, would be credited to the transferee system. In the second (contributory to noncontributory), the employee would receive a refund of the accumulated contributions, with regular interest. In the third (noncontributory to contributory), the employee's benefits would be "'*reduced by the actuarial equivalent of the accumulated contributions with interest* that ha[d] not been deducted'" while the employee was a member of a noncontributory system. *Id.* at 227, 2006 WL 5939692, at

*5 (quoting Md. Code (1957, 1978 Repl. Vol., 1981 Supp.), Art. 73B, § 32(a)(1)) (emphasis added by the Attorney General).

"The premise of the 1981 law," the Attorney General wrote, "appears to be that some parity could be achieved in the use of the concept of 'accumulated contributions.'" *Id.* at 228, 2006 WL 5939692, at *5.

> In each instance where a transfer involved a contributory system on the "sending" or "receiving" end of the transaction, the formula takes into account the accumulated contributions – *i.e.*, contributions plus interest – attributable to the period of the transferred service credit. That sum is either transferred to the new system, refunded to the member, or used to calculate a reduction in benefits in the new system. A member receives the benefit of prior contributions in the new system, receives a refund if the new system does not involve contributions, or is docked the amount of benefits associated with the missed contributions if the member made none in the original system.

Id.

In view of the structure of this statute, the Attorney General saw that "[t]here would be little parity – and much confusion – if a system could choose one interest rate for certain types of transfers – *e.g.*, a low rate when refunding contributions – and another for other purposes – *e.g.*, a high rate to compute the missed contributions of a transferee, thereby lowering the transferee's benefits." *Id.* "Such a conclusion," the Attorney General opined, "appears antithetical to the evident purpose of the 1981 law to facilitate pension portability." *Id.*

The Attorney General observed that, in recodifying the State Pensions and Personnel Article in 1994, the General Assembly made what the revisor's note describes as a "clarifying amendment" to SPP § 37-203(f)(2). *Id.* at 228-29, 2006 WL 5939692, at

*5-6. In the previous version of the statute, the retirement allowance was to be reduced by "'the actuarial equivalent of the accumulated contributions with interest that have not been deducted.'" *Id.* at *5-6. In the amended version, by contrast, the retirement allowance was to be reduced by "the actuarial equivalent of the accumulated contributions that would have been deducted if the individual had earned the transferred service credit under the new system, including interest on those contributions." *Id.* at 229, 2006 WL 5939692, at *6. The Attorney General explained that, "[b]y moving the phrase 'interest on those contributions' to the end of the sentence, the revisors presumably sought to clarify that the interest in question was not an amount that 'would have been deducted,' but rather the interest that would have accumulated in the member's hypothetical annuity account with respect to the hypothetical contributions." *Id.* "[T]hat interest rate," the Attorney General asserted, "has always been what is now referred to as the 'regular' rate of interest." *Id.*

In addition, the Attorney General found significance in a 2000 amendment concerning transfers to and from the State Employees System and the Teachers Pension System. The amendment was necessary because those systems began as noncontributory systems, but became contributory systems in 1998. *Id.* Instead of amending § 37-203 to deal with transfers to and from those systems now that they had become contributory, the General Assembly drafted a new statute, SPP § 37-203.1, "to mirror the various transfer rules and indicate any differences." *Id.* In addressing transfers from a noncontributory system to a contributory system, § 37-203.1(b)(3) stated:

> On retirement . . . the individual's retirement allowance shall be reduced by the actuarial equivalent of the accumulated contributions that would have been deducted during the period after June 30, 1998, when the individual was a member of the noncontributory system, if the individual had earned the transferred service credit under the State Contributory Employees' Pension System or the State Contributory Teachers' Pension System, *including regular interest at the rate of 5% per year compounded annually*.

Id. at 230, 2006 WL 5939692, at *6 (emphasis added by Attorney General).[13]

According to the fiscal note that accompanied the 2000 legislation, the new law had "no impact" on the State Retirement and Pension System, "because there [was] no change to current law." *Id.* "Thus," the Attorney General concluded, "the drafters of the 2000 legislation understood that the phrase 'interest on contributions' in SPP § 37-203(f)(2) referred to the regular interest rate payable on member contributions." *Id.*

Finally, the Attorney General noted that, since the enactment of SPP § 37-203(f)(2)'s predecessor statute in 1981, the State Retirement Agency has used the regular rate to compute "the mandated reduction in benefits" for transferees from a noncontributory plan to a contributory plan. *Id.* at 230, 2006 WL 5939692, at *7. In other words, "the agency charged with administering most of the retirement plans governed by the statute" had adopted a "longstanding administrative construction" under which the term "interest" in SPP § 37-203(f)(2) meant "regular interest" or "interest at the regular rate." *Id.* "That construction," the Attorney General asserted, "is entitled to

[13] The same substantive provision is currently codified at SPP § 37-203.1(b)(3)(i)(2). Like the version of SPP § 37-203(f)(2) that took effect as a result of the 2007 amendments, SPP § 37-203.1 now uses the phrase "member contributions" instead of "accumulated contributions." *See supra* n.4.

deference, and legislative acquiescence in that interpretation 'gives rise to a strong presumption that the interpretation is correct.'" *Id*. (quoting *Morris v. Prince George's County*, 319 Md. 597, 613 (1990)).

We are persuaded by the Attorney General's impeccable analysis that, even before the 2007 amendments, SPP § 37-203(f)(2) required BCERS to use the regular rate in computing the contribution deficiency of a member who transferred from a noncontributory system. Before the 2007 amendments, a central factor in the computation was the amount of the member's hypothetical "accumulated contributions," which was already defined, by statute, to include interest at the "regular rate." It would thwart the main purpose of the statute – facilitating the portability of public pensions – if a system could pick and choose which rate to use depending on where its financial interests lay – i.e., if the system could use the regular rate when it had to refund a member's contributions with interest, but could use a higher rate when it computed the amount by which it would reduce benefits of a member who had transferred from a noncontributory system. The 2000 legislation, concerning the State Employees System and the Teachers Pension System, is almost conclusive proof that "interest" always meant "regular interest," because the legislation was said to make no change to the current law even as it specified the use of "regular" interest. If any further proof were needed, it lies in the consistent administrative practice of the principal agency charged with administering the system, as well as the General Assembly's decades-long acquiescence in that practice.

Accordingly, we hold that the circuit court erred in concluding that BCERS was entitled to use the valuation rate in computing the contribution deficiency of members who transferred from a noncontributory system and retired before July 1, 2007. SPP § 37-203(f)(2) has always required BCERS to use the regular rate in computing the contribution deficiency of all members who transferred from a noncontributory system, regardless of when they retired.

In reaching a contrary conclusion, the circuit court seems to have decided that the 2007 amendments changed the law by "conform[ing]" the statute to the Attorney General's opinion. It did not. The title of the 2007 legislation specifically stated that it was a "[c]larification" of the existing law. Moreover, the 2013 report to the Joint Committee on Pensions confirmed that the changes were intended as clarifying and "were in direct response" to the drafting problems identified in the Attorney General's opinion. To reiterate, both before and after the 2007 amendments, SPP § 37-203(f)(2) required the use of "regular interest" in the calculation of a contribution deficiency.

The circuit court may have been motivated by the County's reliance on the unsettled state of the law before the Attorney General's 2006 opinion or before the 2007 amendments. On various occasions, the court stated, incorrectly, that the County had no prior guidance and that the statute was "silent" and "bereft" of any indication of the rate to be used. In fact, the County had received the opinion of the State Retirement Agency in 2003, and the Attorney General's analysis relied largely on the text, history, and purposes of a statute that had been in effect since 1981. Nonetheless, the court appears to

have been moved by the County's reliance on the County Attorney's contrary advice. Although we recognize that the managers of a pension system must make difficult decisions based on their evaluation of the law, including unsettled questions of law, no one has a vested right in an incorrect interpretation of a statute.

On remand, the circuit court should issue a revised declaratory judgment that conforms with the conclusions in this opinion.[14]

II. Annual Compounding or Monthly Compounding?

In calculating a contribution deficiency, does the retirement system compound the interest on the contributions on an annual basis or a monthly basis? The class members complain that the circuit court did not specify which compounding method BCERS must use.

We agree that the court could have articulated its views more clearly, especially because the County has previously asserted the right to compound the interest on a monthly basis, to the detriment of its retirees. We also agree that in calculating a contribution deficiency under SPP § 37-203(f)(2), whether before or after the 2007 amendments, the transferee system must compound regular interest on an annual basis. *See* 91 Md. Op. Att'y Gen. at 224, 2006 WL 5939692, at *3. Consequently, on remand,

[14] In view of the resolution of this issue, we need not decide whether the circuit court erred or abused its discretion (*see Garrity v. Maryland St. Bd. of Plumbing*, 447 Md. 359, 371 (2016)) in declining to employ the doctrine of offensive, non-mutual collateral estoppel to permit the class members, other than Mr. Rowe, to use the 2008 opinion of the Board of Appeals to preclude the County from arguing that it was entitled to use the valuation rate in computing the contribution deficiency for any of the class members.

the circuit court should revise its declaratory judgment to state that the County must compound regular interest on an annual basis when calculating a contribution deficiency under SPP § 37-203(f)(2).

III. The Invalidity of § 5-1-220.1 of the Baltimore County Code

The class members complain that the circuit court did not expressly declare that Bill 30-10 (§ 5-1-220.1 of the Baltimore County Code) is invalid insofar as it conflicts with SPP § 37-203(f)(2) by purporting to authorize the use of the valuation rate in calculating the contribution deficiency for service credit earned in a noncontributory system before July 1, 2007. Although the invalidity of the County Code provision is evident (in various ways) both from the circuit court's decision, the circuit's court order, and our opinion, we agree that it is in the best interest of all, including the citizens of Baltimore County, for the circuit court to declare the parties' rights on this issue, as the class members requested. Consequently, we direct the circuit court, on remand, to issue a revised declaration that states expressly that § 5-1-220.1 is invalid insofar as it conflicts with SPP § 37-203(f)(2).

IV. Damages

The class members complain that the circuit court failed to enter an enforceable judgment for back pay in favor of any of the class members, even those who retired after July 1, 2007, and (according to the court) had had their contribution deficiencies incorrectly calculated. Instead, for members who retired on or after that date, the court

ordered the County "to recalculate the deficiency using the regular rate of interest and adjust such members' retirement accordingly including any additional amounts owed."

From our remote appellate perspective, it is not entirely clear why the court ordered the County to do the recalculation and what the court ordered the County to do. The parties' briefs shed no light on the court's reasoning. In fact, the County's brief does not even address the class members' contention that the circuit court erred in failing to enter a money judgment in favor of the class members.

Nonetheless, because the court rejected the State and federal constitutional claims that were alleged in Counts III through VIII of the second amended complaint, we surmise that the court must have ordered the County to recalculate the contribution deficiencies under the only counts on which it agreed (in part) with the class members – Counts I and II. Those counts requested a writ of mandamus and an injunction requiring the County to employ the regular rate of interest in calculating the contribution deficiency for the class representatives (Count I) and for the class members (Count II). Because the court concluded that the County had miscalculated the contribution deficiencies for the members of Subclasses 2 and 3 (i.e., those who transferred from a noncontributory system and retired on or after July 1, 2007), we interpret the court's order as a writ of mandamus, a permanent injunction, or both, requiring the County to recalculate the contribution deficiencies for those class members, using the regular rate. The court did not err in granting relief in the form that the class members requested.

The court did err, however, in confining that relief to the members of Subclasses 2 and 3 – i.e., to the members who retired on or after July 1, 2007. Because SPP § 37-203(f)(2) required the County to use the regular rate, compounded annually, in calculating the contribution deficiency for all class members regardless of when they retired, the court should have ordered the County to recalculate the contribution deficiency for every class member, including those who retired before July 1, 2007. On remand, the court should revise its order to impose that requirement.

Beyond requiring the County to recalculate the contribution deficiency using the regular rate, it is unclear what the court intended when it ordered the County to "adjust" the members' "retirement accordingly including any additional amounts owed." Presumably, the court meant that the County must upwardly "adjust" the class members' future payments because of the use of the regular rate in calculating their contribution deficiencies. But what about the "additional amounts" that the class members should have received in every periodic payment since they retired? The order is opaque as to how the County is to "adjust" that component of their retirement benefits. Does the order envision a lump-sum payment to each class member or some other form of payment? And when can the class members finally expect to receive reimbursement?

On remand, the court should clarify its order to address these questions, as well any other reasonable questions concerning when and how the County must reimburse the class members for the portion of the periodic payments that the County erroneously

withheld because it employed the valuation rate, compounded on a monthly basis, and not the regular rate, compounded annually, in calculating their contribution deficiencies.

V. Prejudgment Interest

In addition to complaining that the circuit court failed to quantify their damages, the class members complain that the court failed to award them prejudgment interest on their damages. The County's brief does not respond to the contentions concerning prejudgment interest.[15]

Prejudgment interest compensates judgment creditors for their inability to use the funds that should have been in their hands at some earlier time. *See*, *e.g.*, *Nationwide Prop. & Cas. Ins. Co. v. Selective Way Ins. Co.*, 473 Md. 178, 189 (2021). In general, a party's entitlement to prejudgment interest is an issue for the finder of fact. *Id.* at 189-90. In some circumstances, however, a court must award prejudgment interest as a matter of right. *See id*. at 190.

"Pre-judgment interest is allowable as a matter of right when 'the obligation to pay and the amount due had become certain, definite, and liquidated by a specific date prior to judgment so that the effect of the debtor's withholding payment was to deprive the creditor of the use of a fixed amount as of a known date.'" *Buxton v. Buxton*, 363 Md. 634, 656 (2001) (quoting *First Virginia Bank v. Settles*, 322 Md. 555, 564 (1991));

[15] In their list of questions presented, the class members also complain that the court did not award them the costs of the action. In their brief, however, the class members include no argument on that subject. Hence, we decline to consider it. *HNS Dev., LLC v. People's Counsel*, 425 Md. 436, 458-60 (2012).

accord Nationwide Prop. & Cas. Ins. Co. v. Selective Way Ins. Co., 473 Md. at 190. "[T]he right to pre-judgment interest as of course arises under written contracts to pay money on a day certain, such as bills of exchange or promissory notes, in actions on bonds or under contracts providing for the payment of interest, in cases where the money claimed has actually been used by the other party, and in sums payable under leases as rent." *Buxton v. Buxton*, 363 Md. at 656; *accord Nationwide Prop. & Cas. Ins. Co. v. Selective Way Ins. Co.*, 473 Md. at 190.

"[P]ublic pension rights are contractual in nature and are not mere gratuities." *Priester v. Board of Appeals of Baltimore County*, 233 Md. App. 514, 547 n.19 (2017). "Under Maryland law, pension plans create contractual duties toward persons with vested rights under the plans." *Board of Trs. of Emps.' Ret. Sys. v. Mayor & City Council of Baltimore*, 317 Md. 72, 100 (1989); *accord Cherry v. Mayor & City Council of Baltimore*, 475 Md. 565, 610-11 (2021). Thus, the class members have a contractual right to have their contribution deficiencies correctly computed in accordance with the law. Moreover, the class members have (and have had) a contractual right to receive the difference between what their periodic pension payments would have been had the contribution deficiency been correctly computed and the lesser amounts that they have received to date.

On remand, the court should consider whether the County's "'obligation to pay and the amount due had become certain, definite, and liquidated by a specific date prior to judgment so that the effect of the debtor's withholding payment was to deprive the

creditor of the use of a fixed amount as of a known date.'" *Buxton v. Buxton*, 363 Md. at 656 (quoting *First Virginia Bank v. Settles*, 322 Md. at 564). If the court answers that question in the affirmative, it must direct the County to include prejudgment interest in reimbursing the class members for the portion of the periodic payments that the County erroneously withheld because it employed the valuation rate and not the regular rate in calculating their contribution deficiencies. If the court does not answer that question in the affirmative, it may, but need not, direct the County to include prejudgment interest in reimbursing the class members.

VI. Mandamus and Injunctive Relief

The circuit court concluded that the County had miscalculated the contribution deficiency only for the class members who retired on or after July 1, 2007. The court ordered the County to recalculate the contribution deficiencies for those members, using the regular rate, and to adjust their retirement benefits accordingly.

The court apparently thought that it was unnecessary to order any further injunctive relief or to order any relief by way of mandamus. The class members complain the circuit court tacitly denied their request for a writ of mandamus and an injunction to require the appropriate County officials to comply with their statutory obligation to employ the regular rate of interest in computing the contribution deficiencies.

We review the circuit court's decision "to grant or deny a request for injunctive relief under an 'abuse of discretion' standard." *100 Harborview Drive Condo. Council of*

Unit Owners v. Clark, 224 Md. App. 13, 63 (2015). Similarly, we will not disturb the dismissal of a petition for a writ of mandamus "unless there has been a clear abuse of discretion on the part of the trial court." *See Goodwich v. Nolan*, 102 Md. App. 499, 506-07 (1994).

We have interpreted the court's order as a writ of mandamus, a permanent injunction, or both, requiring the County to recalculate the contribution deficiencies for the members of Subclasses 2 and 3, using the regular rate. We have required the court, on remand, to revise its order to require the County to recalculate the contribution deficiencies for all class members, using the regular rate, compounded annually. We have also required the court to revise its order to specify when and how the County must reimburse the class members for the portion of the periodic payments that the County erroneously withheld because it miscalculated their contribution deficiencies by using the valuation rate, compounded monthly. Finally, we have required the court to decide whether the class members should or must receive prejudgment interest on the amounts that the County erroneously withheld. Once the court complies with these directives on remand, the court need not exercise its discretion to order further relief by way of injunction or mandamus.

VII. The Constitutional Claims and the Claim for Attorneys' Fees

The class members argue that the court erred in rejecting their State and federal claims alleging a taking and the deprivation of property without due process, as well as their related claim for damages under 42 U.S.C. § 1983.[16] We see no error.

The County proceeded under a colorable, if mistaken, interpretation of its statutory obligations. As a consequence of its error, the County breached its pension contract and violated its statutory obligations. But a government does not take property or deprive a person of property without due process merely because it withholds payment (or, in this case, partial payment) on the basis of a plausible but erroneous understanding of its statutory or contractual obligations. *See, e.g.*, *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U.S. 462, 471 (1911) (holding that "[t]he breach of a contract is neither a confiscation of property nor a taking of property without due process of law[]"); *Piszel v.*

[16] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States, 833 F.3d 1366, 1376 (Fed. Cir. 2016) (stating that, "when the government itself breaches a contract, a party must seek compensation from the government in contract rather than under a takings claim"); *Massó-Torrellas v. Municipality of Toa Alta*, 845 F.3d 461, 467 (1st Cir. 2017) (stating that "'a simple breach of contract does not amount to an unconstitutional deprivation of property[]'") (quoting *Redondo-Borges v. U.S. Dept. of Hous. & Urban Dev.*, 421 F.3d 1, 10 (2005)); *Velez-Rivera v. Agosto-Alicea*, 437 F.3d 145, 155 (1st Cir. 2006) (stating that "'[a] mere breach of a contractual right is not a deprivation of property without constitutional due process of law[]'") (quoting *Jiménez v. Almodóvar*, 650 F.2d 363, 370 (1st Cir. 1981). To hold otherwise would be to make a constitutional violation out of every breach of contract by a state or local government. *Massó-Torrellas v. Municipality of Toa Alta*, 845 F.3d at 467; *Velez-Rivera v. Agosto-Alicea*, 437 F.3d at 155.[17]

This litigation affords the class members all of the process that they are due. They have established that the County must use the regular rate of interest, compounded annually, in calculating the contribution deficiency for any member of BCERS who transferred service credit from a noncontributory State or local pension system, regardless of when the member retired. In accordance with the relief requested in their second amended complaint, the circuit court, on remand, will issue a writ of mandamus, a permanent injunction, or both, requiring the County to correctly recalculate their

[17] For additional authority on this issue, see *Massó-Torrellas v. Municipality of Toa Alta*, 845 F.3d at 467 & n.5.

contribution deficiencies in accordance with SPP § 37-203(f)(2), to adjust the periodic payments that they will receive in the future so as to reflect the amounts that they should receive under SPP § 37-203(f)(2), and to reimburse them for the amounts that the County has wrongfully withheld from the periodic payments that they have received in the past, with prejudgment interest if it is required or appropriate.

In short, the circuit court did not err in rejecting the constitutional claims or the § 1983 claim. And as the class members have no viable claim under 42 U.S.C. § 1983, they have no right to their attorneys' fees under 42 U.S.C. § 1988. *See Maryland Bd. of Physicians v. Geier*, 241 Md. App. 429, 486 (2019) (citing *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)).

We express no opinion as to whether an award of attorneys' fees might ultimately be appropriate under another theory.

VIII. Failure to Exhaust Administrative Remedies

On the final two pages of its 29-page brief, the County briefly argues that all of the class members except for Mr. Rowe have failed to exhaust their administrative remedies. For that reason, the County concludes that their claims are "barred."

The County raises the issue of exhaustion without having filed a cross-appeal. Although we normally consider the issue of failure to exhaust administrative remedies on our motion even if the issue is not raised or properly preserved, we are disinclined to do so in the circumstances of this case, where the County consented to the adjudication of all issues on a class-wide basis and moved (with considerable success) for the entry of

summary judgment in its favor. And even if we were to address the issue of exhaustion we would reject it, because the class members were not required to exhaust administrative remedies before pursuing their federal constitutional claims and their facial challenge to the validity of a County Code provision that conflicts with a State statute.

The County raised the issue of exhaustion below in its motion for summary judgment. The circuit court, however, rejected the County's contention when it reached the merits, concluded that the County was required to use the regular rate of interest to calculate the contribution deficiency for the members of Subclasses 2 and 3 (who retired on or after July 1, 2007), and ordered the County to recalculate the deficiency for those members and to adjust their retirement benefits accordingly. Apparently content that the court did not require the use of the regular rate for all class members, including the members of Subclass 1, who retired before July 1, 2007, the County did not note a cross-appeal.

In general, when a party is satisfied with the judgment on appeal, the party may still challenge the trial court's adverse ruling on a discrete issue if the challenge will present the appellate court with an alternative ground to affirm the judgment on the merits. *See Offutt v. Montgomery Cnty. Bd. of Educ.*, 285 Md. 557, 564 n.4 (1979). In those circumstances, the party need not note a cross-appeal in order to bring the adverse ruling before the appellate court. *See id.* On the other hand, if the party wishes to raise an appellate issue that would not serve as an alternate ground for affirming the trial

court's decision on the merits, the party must note a cross-appeal in order to bring that issue before the appellate court.

For example, in *Joseph H. Munson Co. v. Secretary of State*, 294 Md. 160, 166 (1982), the Secretary of State contended that the trial court should dismiss the action against him on the ground that his adversary, Munson, lacked standing. The trial court rejected the standing argument, reached the merits of the case, and issued a declaratory judgment in the Secretary's favor. *Id.* Munson appealed; the Secretary did not. *Id.* at 166-67.

On appeal, the Secretary reiterated the argument that Munson lacked standing. The Court of Appeals held that he could not do so, because he had not noted a cross-appeal:

> [I]n the case at bar, if the trial court had dismissed the action on some ground other than lack of standing, the Secretary as appellee would be entitled to argue Munson's alleged lack of standing as an alternate basis for affirmance. However, the trial court did not dismiss the action. Instead, it rendered a declaratory judgment on the merits. Munson's alleged lack of standing would not furnish an alternate ground for affirming the declaratory judgment. On the contrary, the Secretary's argument amounts to an attack upon the judgment. If the issue is properly before us, and if we agreed that Munson had no standing, we would be obliged to order that the trial court's judgment be reversed and that the case be remanded with directions to dismiss the action.

Id. at 168.

"Consequently," the Court reasoned, "the Secretary [was] attempting to challenge the trial court's judgment in [that] case without having taken an appeal." *Id*. He was not permitted to do so.

As in *Munson*, the County is attempting to challenge the judgment without having taken an appeal. If the class members had no right to proceed in the circuit court because they failed to exhaust their administrative remedies, then the circuit court would have erred in reaching the merits, in deciding that the County had miscalculated the benefits of some of the class members, and in ordering the County to recalculate their benefits. Thus, if we agreed that the class members (other than Mr. Rowe) have failed to exhaust their administrative remedies, we would be obligated to reverse the judgment below (not to affirm it, as the County requests in its brief) and to order that the action be dismissed as to every class member other than Mr. Rowe.

In these circumstances, the County's exhaustion argument, like the Secretary's standing argument in *Munson*, "amounts to an attack on the judgment." *Id.* If the County wished to wage that attack, it was required to note a cross-appeal. It did not.

Still, the County argues, correctly, that an appellate court may raise the issue of exhaustion on its own motion. *See, e.g.*, *Renaissance Centro Columbia, LLC v. Broida*, 421 Md. 474, 487 (2011) (stating that "'issues of primary jurisdiction and exhaustion of administrative remedies will be addressed by this Court sua sponte even though not raised by any party'") (quoting *Board of Education for Dorchester County v. Hubbard*, 305 Md. 774, 787 (1986)); *Brown v. Fire & Police Empls.' Ret. Sys.*, 375 Md. 661, 670 (2003) (stating that "an appellate court *ordinarily* will notice the issue of exhaustion of statutory remedies on its own initiative even though the issue was not

raised by the parties") (emphasis added). Nonetheless, in the circumstances of this case, which are far from ordinary, we are disinclined to notice the unpreserved issue.

The first administrative "agency" that might have decided the substantive issues in this case appears to be the Board of Trustees of BCERS (*see* Balt. Cnty. Code § 5-1-220.2), which is a defendant and an appellee. Furthermore, Baltimore County, whose Office of Administrative Hearings and Board of Appeals would hear any appeal from the Board of Trustees' decision (*see id.*), is also a defendant and an appellee. Yet the County and the trustees agreed that the circuit court could decide the merits of this case when they consented to class certification. Moreover, the County and the trustees affirmatively requested that the court decide the merits of the case when they moved for summary judgment in their favor. Thus, were we to consider the unpreserved exhaustion argument at this late juncture, we would enable the County to deploy a kind of doomsday device to destroy the product of 12 years of litigation because the decision on the merits, which the County itself had asked the court to make, was not going in the County's favor.

Not only has this case been in litigation for more than a decade, but further proceedings must occur on remand before the class members will be properly compensated for the County's violation of their statutory and contractual rights. Some of the class members, such as the members of Subclass 1, have already been waiting for as long as 15 years to have their benefits correctly calculated and paid. Most significantly, when the County agreed to class certification, it led the class members to believe that it was unnecessary for them to exhaust their administrative remedies. If we considered the

unpreserved exhaustion argument in these circumstances, we would frustrate rather than further the goal of judicial economy, which the principle of exhaustion is designed to serve. *See, e.g., Priester v. Baltimore County*, 232 Md. App. 178, 200 (2017). Consequently, we decline to consider the County's argument that the class members, other than Mr. Rowe, have failed to exhaust their administrative remedies.

Finally, even if we were to consider the unpreserved issue of exhaustion, we would reject the proposition that the doctrine of administrative exhaustion bars the class members' claims. It is beyond dispute that the class members had no obligation to exhaust administrative remedies before they pursued their federal constitutional claims. *Felder v. Casey*, 487 U.S. 131, 147 (1988); *Md. Reclamation Assocs., Inc. v. Harford Cnty*., 342 Md. 476, 492 (1996). Moreover, the remaining claims, properly understood, amount to a facial challenge to § 5-1-220.1 of the Baltimore County Code: the class members argue that § 5-1-220.1 conflicts with SPP § 37-203(f)(2) (both before and after July 1, 2007) and thus that the State statute impliedly preempts the County Code provision. *See, e.g., Board of Cnty. Comm'rs of Washington Cnty. v. Perennial Solar LLC*, 464 Md. 610, 619 (2019); *Talbot County v. Skipper*, 329 Md. 481, 487-88 (1993); *East Star, LLC v. Cnty. Comm'rs of Queen Anne's Cnty.*, 203 Md. App. 477, 484-86 (2012). Hence, those remaining claims would appear to fall within the narrow constitutional exception to the requirement of exhaustion. *See, e.g., Ehrlich v. Perez*, 394 Md. 691, 700 n.6 (2006) (stating that the constitutional exception "permits an aggrieved litigant to proceed immediately to court to seek a declaratory judgment or equitable

remedy, regardless of the existence of an available administrative appeal, where the sole contention raised in the court action is based on a facial attack on the constitutionality of the governmental action").

CONCLUSION

We hold that SPP § 37-203(f)(2) required BCERS to employ the regular rate both before and after the clarifying amendments that took effect on July 1, 2007. Consequently, we reverse the circuit court's conclusion that SPP § 37-203(f)(2) required a retirement system to employ the regular rate only for members who retired on or after July 1, 2007. We also hold, however, that the circuit court did not err in disposing of the class members' State and federal constitutional claims on summary judgment.

We remand the case to the circuit court for further proceedings consistent with this opinion. Those proceedings shall include the issuance of a writ of mandamus, a permanent injunction, or both, requiring the County to correctly recalculate the class members' contribution deficiencies in accordance with SPP § 37-203(f)(2), to adjust the periodic payments that the class members will receive in the future so as to reflect the amounts that they should receive under SPP § 37-203(f)(2), and to reimburse the class members for the amounts that the County has wrongfully withheld from the periodic payments that they have received in the past, with prejudgment interest if it is required or appropriate; and a declaration that § 5-1-220.1 of the Baltimore County Code is invalid because it conflicts with SPP § 37-203(f)(2).

ORDER OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. THREE-FOURTHS OF THE COSTS ARE TO BE PAID BY BALTIMORE COUNTY; ONE-FOURTH OF THE COSTS ARE TO BE PAID BY APPELLANTS.