

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

Senate Bill 649

FISCAL
NOTE

By Senators Hunt and Chapman

[Introduced February 5, 2024; referred
to the Committee on the Judiciary; and then to the
Committee on Finance]

1 A BILL to amend and reenact §5-10-48 of the Code of West Virginia, 1931, as amended; and to
 2 amend and reenact §51-9-10 of said code, all relating to clarifying per diem compensation
 3 and reimbursable expenses for senior intermediate court judges and senior family court
 4 judges recalled into service.

Be it enacted by the Legislature of West Virginia:

**CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE
 GOVERNOR, SECRETARY OF STATE AND ATTORNEY GENERAL;
 BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES,
 COMMISSIONS, OFFICES, PROGRAMS, ETC.**

ARTICLE 10. WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT ACT.

§5-10-48. Reemployment after retirement; options for holder of elected public office.

1 (a) The Legislature finds that a compelling state interest exists in maintaining an actuarially
 2 sound retirement system and that this interest necessitates that certain limitations be placed upon
 3 an individual’s ability to retire from the system and to then later return to state employment as an
 4 employee with a participating public employer while contemporaneously drawing an annuity from
 5 the system. The Legislature hereby further finds and declares that the interests of the public are
 6 served when persons having retired from public employment are permitted, within certain
 7 limitations, to render post-retirement employment in positions of public service, either in elected or
 8 appointed capacities. The Legislature further finds and declares that it has the need for qualified
 9 employees and that in many cases an employee of the Legislature will retire and be available to
 10 return to work for the Legislature as a per diem employee. The Legislature further finds and
 11 declares that in many instances these employees have particularly valuable expertise which the
 12 Legislature cannot find elsewhere. The Legislature further finds and declares that reemploying
 13 these persons on a limited per diem basis after they have retired is not only in the best interests of

14 this state but has no adverse effect whatsoever upon the actuarial soundness of this particular
15 retirement system.

16 (b) For the purposes of this section: (1) "Regularly employed on a full-time basis" means
17 employment of an individual by a participating public employer, in a position other than as an
18 elected or appointed public official, which normally requires 12 months per year service and at
19 least 1,040 hours of service per year in that position; (2) "temporary full-time employment" or
20 "temporary part-time employment" means employment of an individual on a temporary or
21 provisional basis by a participating public employer, other than as an elected or appointed public
22 official, in a position which does not otherwise render the individual as regularly employed; (3)
23 "former employee of the Legislature" means any person who has retired from employment with the
24 Legislature and who has at least 10 years' contributing service with the Legislature; and (4)
25 "reemployed by the Legislature" means a former employee of the Legislature who has been
26 reemployed on a per diem basis not to exceed 175 days per calendar year.

27 (c) If a retirant becomes regularly employed on a full-time basis by a participating public
28 employer, payment of his or her annuity shall be suspended during the period of his or her
29 reemployment and he or she shall become a contributing member to the retirement system. If his
30 or her reemployment is for a period of one year or longer, his or her annuity shall be recalculated
31 and he or she shall be granted an increased annuity due to the additional employment, the annuity
32 to be computed according to §5-10-22 of this code. If his or her reemployment is for a period less
33 than one year, he or she may request in writing that the employee and employer retirement
34 contributions submitted during reemployment be credited to the participating public employer
35 pursuant to §5-10-44 of this code, and his or her previous annuity shall be reinstated effective the
36 first day of the month following termination of reemployment and the board's receipt of written
37 notice thereof. A retirant may accept legislative per diem, temporary full-time, or temporary part-
38 time employment from a participating employer without suspending his or her retirement annuity
39 so long as he or she does not receive annual compensation in excess of \$25,000.

40 (d) Senior judges, justices, and magistrates. –

41 (1) Notwithstanding the provisions of subsection (c) of this section, a retired ~~judge or justice~~
42 intermediate court judge, circuit court judge, or family court judge or justice who is recalled and
43 assigned to temporary service as a senior judge or justice by the West Virginia Supreme Court of
44 Appeals may receive per diem compensation pursuant to the requirements of §51-9-10 of this
45 code while continuing to receive his or her annuity.

46 (2) Notwithstanding the provisions of subsection (c) of this section, a retired magistrate
47 who is recalled and assigned to temporary service as a senior magistrate by the West Virginia
48 Supreme Court of Appeals may receive per diem compensation pursuant to the requirements of
49 §50-1-6a of this code while continuing to receive his or her annuity.

50 (e) If a member retires and is then subsequently elected to a public office or is
51 subsequently appointed to hold an elected public office, or is a former employee of the Legislature
52 who has been reemployed by the Legislature, he or she has the option, notwithstanding
53 subsection (c) of this section, to either:

54 (1) Continue to receive payment of his or her annuity while holding public office or during
55 any reemployment of a former employee of the Legislature on a per diem basis, in addition to the
56 salary he or she may be entitled to as an office holder or as a per diem reemployed former
57 employee of the Legislature; or

58 (2) Suspend the payment of his or her annuity and become a contributing member of the
59 retirement system as provided in subsection (c) of this section. Notwithstanding the provisions of
60 this subsection, a member who is participating in the system as an elected public official may not
61 retire from his or her elected position and commence to receive an annuity from the system and
62 then be elected or reappointed to the same position unless and until a continuous 12-month period
63 has passed since his or her retirement from the position: *Provided*, That a former employee of the
64 Legislature may not be reemployed by the Legislature on a per diem basis until at least 60 days
65 after the employee has retired: *Provided, however*, That the limitation on compensation provided

66 by subsection (c) of this section does not apply to the reemployed former employee: *Provided*
67 *further*, That in no event may reemployment by the Legislature of a per diem employee exceed
68 175 days per calendar year.

69 (f) A member who is participating in the system simultaneously as both a regular, full-time
70 employee of a participating public employer and as an elected or appointed member of the
71 legislative body of the state or any political subdivision may, upon meeting the age and service
72 requirements of this article, elect to retire from his or her regular full-time state employment and
73 may commence to receive an annuity from the system without terminating his or her position as a
74 member of the legislative body of the state or political subdivision: *Provided*, That the retired
75 member shall not, during the term of his or her retirement and continued service as a member of
76 the legislative body of a political subdivision, be eligible to continue his or her participation as a
77 contributing member of the system and shall not continue to accrue any additional service credit or
78 benefits in the system related to the continued service.

79 (g) Notwithstanding the provisions of §5-10-27b of this code, any publicly elected member
80 of the legislative body of any political subdivision or of the State Legislature, the Clerk of the House
81 of Delegates, and the Clerk of the Senate may elect to commence receiving in-service retirement
82 distributions from this system upon attaining the age of 70 and one-half years: *Provided*, That the
83 member is eligible to retire under the provisions of §5-10-20 or §5-10-21 of this code: *Provided*,
84 *however*, That the member elects to stop actively contributing to the system while receiving the in-
85 service distributions.

86 (h) The provisions of §5-10-22h of this code are not applicable to the amendments made to
87 this section during the 2006 regular session.

88 (i) The Legislature hereby finds and declares that a severe shortage of child protective
89 services workers and adult protective services workers exists throughout the state and therefore a
90 compelling state interest exists in expanding the use of retired employees to serve this critical
91 need. Notwithstanding any provision of subsection (c) of this section to the contrary, a person

92 receiving retirement benefits or eligible to receive retirement benefits pursuant to the provisions of
93 this chapter may accept employment as a child protective services worker or an adult protective
94 services worker on a full-time or part-time basis without having payment of his or her retirement
95 annuity suspended and without reentering the retirement system as a contributing member. This
96 subsection is only applicable if the retired employee meets the minimum qualifications of the
97 position, has been retired for at least 60 days, and is hired to fill an existing child protective
98 services or adult protective services vacancy. The retired employee may continue to work under
99 this subsection only as long as that position remains vacant. The vacant position shall be posted
100 until it is filled by a regularly employed person meeting the minimum qualifications to serve as a
101 child protective service worker or an adult protective service worker. The provisions of this
102 subsection shall expire July 1, 2025.

CHAPTER 51. COURTS AND THEIR OFFICERS.

§51-9-10. Services of senior judges and justices.

1 (a) The Legislature finds that:

2 (1) Section seven, article VIII of the Constitution of West Virginia expressly requires the
3 Legislature to fix judicial salaries by statute, providing that: "[j]ustices, judges and magistrates
4 shall receive the salaries fixed by law".

5 (2) When originally enacted in 1949, this section of the code required any retired judge
6 receiving retirement benefits to serve as a special judge, when assigned to temporary service,
7 "without charge or compensation, per diem or otherwise to him".

8 (3) In 1974, the Judicial Reorganization Amendment to the Constitution of West Virginia
9 was ratified. Among other matters, in section eight, article VIII, the amendment addressed the
10 ongoing practice of recalling retired judicial officers to service by empowering the Chief Justice of
11 the Supreme Court of Appeals to recall a retired judge or justice to service, "with his permission
12 and with the approval of the supreme court of appeals", for temporary assignment.

13 (4) Absent from the Judicial Reorganization Amendment and article VIII of the Constitution
14 of West Virginia is any provision authorizing the Supreme Court of Appeals to fix compensation for
15 recalled judges or justices. Indeed, the Judicial Reorganization Amendment added language to
16 section seven, article VIII of the Constitution of West Virginia, unequivocally stating that "[j]ustices,
17 judges and magistrates shall receive the salaries fixed by law".

18 (5) In 1975, the Legislature amended and reenacted this section of the code, which still
19 then required any retired judge receiving retirement benefits to serve as a special judge, when
20 assigned to temporary service "without charge or compensation, per diem or otherwise to him".

21 (6) In 1991, the Legislature amended and reenacted this section of the code again,
22 authorizing and empowering the Supreme Court of Appeals to create a panel of senior judges and
23 justices "to be assigned duties as needed and as feasible toward the objective of reducing
24 caseloads and providing speedier trials to litigants throughout the State".

25 (7) The 1991 reenactment of this section of the code statutorily authorized, for the first
26 time, "reasonable payment" to senior judges and justices "on a per diem basis", and provided that
27 "the per diem and retirement compensation of a senior judge shall not exceed the salary of a sitting
28 judge".

29 (8) In 2018, the West Virginia House of Delegates adopted and communicated Articles of
30 Impeachment to the West Virginia Senate, naming justices of the Supreme Court of Appeals
31 serving at that time as respondents. Several of the articles alleged that certain justices, each while
32 serving as Chief Justice of the Supreme Court of Appeals, had intentionally signed contracts
33 agreeing to pay retired judges recalled to service above the compensation limitations of this
34 section of the code.

35 (9) In a petition to the Supreme Court of Appeals, styled *State ex. rel. Workman v.*
36 *Carmichael*, one justice named as respondent in the 2018 impeachment proceedings challenged
37 the constitutionality of the Articles of Impeachment in which she was named, including the articles
38 alleging payment of senior judges above the limitations of this section of the code.

39 (10) In ruling on the petition in State ex. rel. Workman v. Carmichael, the Supreme Court of
40 Appeals, at that time composed of five circuit judges temporarily assigned to sit as justices for that
41 case, issued a writ of prohibition staying impeachment proceedings.

42 (11) In direct contradiction of section seven, article VIII of the Constitution of West Virginia,
43 the decision in State ex. rel. Workman v. Carmichael held, in part, that this section of the code,
44 providing for and limiting the compensation of senior judges, is "unconstitutional and
45 unenforceable".

46 (12) The majority opinion in State ex. rel. Workman v. Carmichael ignored the plain
47 language of section seven, article VIII of the Constitution of West Virginia, which explicitly provides
48 that "[j]ustices, judges and magistrates shall receive the salaries fixed by law".

49 (13) Syllabus point four of the majority opinion in State ex. rel. Workman v. Carmichael
50 mischaracterizes what the Legislature had done in enacting this section of the code, by providing
51 that: "West Virginia Code §51-9-10 (1991) violates the Separation of Powers Clause of Article V, §
52 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment
53 matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the West
54 Virginia Constitution. Consequently, W.Va. Code §51-9-10, in its entirety, is unconstitutional and
55 unenforceable".

56 (14) Occasionally, circumstances may require the extended assignment of senior judges
57 and justices, necessitating the Legislature to prescribe such circumstances when the limitations
58 on compensation of senior judges and justices receiving retirement benefits may be exceeded.

59 (b) The Legislature recognizes and acknowledges the authority of the West Virginia
60 Supreme Court of Appeals to recall retired judges and justices for temporary assignment and to
61 create a panel of senior judges and justices to utilize the talent and experience of former ~~circuit~~
62 ~~court~~ intermediate court, circuit court, and family court judges and supreme court justices of this
63 state: *Provided*, That extended assignment of retired judges and justices must not be utilized in
64 such a way as to threaten the qualified status of the Judges' Retirement System under applicable

65 provisions of the Internal Revenue Code, including Treasury Regulation section 1.401(a)-1(b)(1)
66 requiring that a qualified plan must be established primarily to provide payment of definitely
67 determinable benefits to its employees after retirement or attainment of normal retirement age.

68 (c) Senior intermediate court and circuit court judges and justices recalled and assigned to
69 service shall receive per diem compensation set by the Supreme Court of Appeals, but not to
70 exceed \$430 for each day actually served: *Provided*, That the combined total of per diem
71 compensation and retirement benefits paid to a senior judge or justice during a single calendar
72 year may not exceed the annual salary of a sitting circuit judge, except as set forth in subsection
73 (d) of this section.

74 (d) Notwithstanding subsection (c) of this section, for purposes of maintaining judicial
75 efficacy and continuity in judicial decision making, a senior judge or justice may continue to receive
76 per diem compensation after the combined total of per diem compensation and retirement benefits
77 paid to the senior judge or justice during that calendar year exceeds the annual salary of a sitting
78 circuit judge if the Chief Justice of the Supreme Court of Appeals enters an administrative order
79 certifying there are certain extraordinary circumstances involving the necessary absence of a
80 sitting judicial officer because of a protracted, but temporary, illness or medical condition or a
81 lengthy suspension which necessitate the extended assignment of the senior judge or justice.
82 Immediately upon entering such an order, the Chief Justice shall submit copies of the order to the
83 State Auditor and the State Treasurer.

84 (e) In addition to the per diem compensation authorized by this section, senior judges and
85 justices recalled to service may be reimbursed for their actual and necessary expenses incurred in
86 the performance of their duties.

87 (f) Within 90 days after the effective date of this section, the Treasurer, as the chief
88 custodian of public funds, shall petition the West Virginia Supreme Court of Appeals for a writ of
89 prohibition pursuant to the court's original jurisdiction, naming as respondent the State Auditor and
90 petitioning the court to prohibit the State Auditor from issuing any warrant for the payment of per

91 diem compensation to senior judges and justices in excess of the limitation on the daily rate of per
92 diem compensation in subsection (c) of this section.

93 (g) Senior family court judges recalled and assigned to service shall receive per diem
94 compensation set by the Supreme Court of Appeals, but not to exceed \$325 for each day actually
95 served: *Provided*, That the combined total per diem compensation and retirement benefits paid to
96 a senior family court judge during a single calendar year may not exceed the annual salary of a
97 sitting family court judge, except as set forth in subsection (d) of this section. In addition to the per
98 diem compensation authorized by this section, senior family court judges recalled to service may
99 be reimbursed for their actual and necessary expenses incurred in the performance of their duties.

NOTE: The purpose of this bill is to clarify that senior status intermediate court judges and family judges are subject to the same per diem compensation limits as senior circuit court judges. This addresses a possible gap in code created after the creation of intermediate court of appeals and the inclusion of the family court judges in the judicial retirement system.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.