

REDACTED DECISION – DK# 15-319 RPD-M

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
ISSUED ON MARCH 15, 2022**

FINAL DECISION

This matter¹ is one of approximately forty (40) cases that were held in abeyance pending the United States Supreme Court’s decision in Dawson v. Steager, 139 S.Ct. 698, 203 L.Ed 2d 29 (2019). In the Dawson case, the Petitioner, a retired U.S. Marshal, sought the reducing modification contained in West Virginia Code Section 11-21-12(c)(6).² The Supreme Court ruled that Subdivision (6) violates the intergovernmental tax immunity doctrine, as codified in Section 111 of Title 4 of the United States Code. In plain English, the Court ruled that West Virginia discriminates against retired federal law enforcement officers when it gives certain retired West Virginia law enforcement officers a tax break on their retirement income, but denies that same tax break to retired federal law enforcement officers.

In this case, the Tax Commissioner agreed to be bound by the Dawson decision. During an evidentiary hearing, held in this matter on December 16, 2020, Mr. X (hereinafter “the Petitioner”) testified that he is a retired federal law enforcement officer similarly situated to retired Marshal Dawson. Specifically, he testified that from February of 2005 through June of 2012, he was a Customs and Border Protection Officer, employed by the U.S. Customs and Border Protection

¹ This matter was styled incorrectly upon receipt. The Petitioners are John and Jane X, a married couple.

² (c) *Modifications reducing federal adjusted gross income.* -- There shall be subtracted from federal adjusted gross income to the extent included therein:

(6) Retirement income received in the form of pensions and annuities after December 31, 1979, under any West Virginia Police, West Virginia Firemen’s Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System, including any survivorship annuities derived from any of these programs, to the extent includable in gross income for federal income tax purposes; W. Va. Code Ann. § 11-21-12 (West).

Agency. During this employment he carried a badge and a weapon and was authorized to conduct arrests. Moreover, he receives a federal retirement pension based upon this employment.

As stated above, this case is one of approximately forty (40) similar cases heard by this Tribunal regarding the applicability of West Virginia Code Section 11-21-12(c)(6) to federal retirees' pensions. Once the U.S. Supreme Court issued its decision in the Dawson case, almost all of those 40 cases were resolved without the need for a hearing. However, this case is different, because before he was a border patrol agent, Mr. X was a New York City Police Officer, and he receives a disability pension from New York as well. Mr. X makes two arguments regarding his pension from his time as a New York City Police Officer. First, he argues that his pension is a disability pension, and as such it is not taxable income, and that he has never paid income tax on it. Next, they argue that the downward modification contained in West Virginia Code Section 11-21-12(c)(6) should also be applied to this New York pension.³

The West Virginia Office of Tax Appeals is unable to grant the relief requested regarding the Petitioner's New York pension, for a variety of reasons. First, the Petitioners were informed that they carried the initial burden, and as such they would have to prove that the Tax Commissioner has made some error of law regarding his contention that this disability pension is income subject to West Virginia personal income tax. To that end, the Petitioners were encouraged to elicit testimony, perhaps through the use of an expert witness, such as an accountant, that this pension is not income under West Virginia's tax laws. At hearing, the Petitioners offered no evidence regarding the taxability of this New York pension.

The Petitioners next argue that in similar fashion to retired U.S. Marshal Dawson, they are being treated unfairly by the Tax Commissioner's unwillingness to grant them the downward

³ As will be discussed below, the Petitioners would be entitled to the downward modification regarding the Petitioner's federal pension, but we are unable to grant that relief either.

modification other retired West Virginia law enforcement officers receive. Here we must reiterate that the Petitioners are making this argument regarding Mr. X's New York disability pension, not his federal pension. We should note that because the downward modification contained in West Virginia Code Section 11-21-12(c)(6) involves retirement income received by certain retired West Virginia law enforcement officers, **and not** disability pensions, the Petitioners are really arguing apples to oranges. Nonetheless, we address their argument below.

While it does not happen every day, this Tribunal is regularly confronted with Petitioners complaining that the Tax Commissioner has treated them "unfairly." Most times when such Petitioners are *pro se* we translate these complaints into what they truly are, claims of unconstitutionality based upon an equal protection violation. In fact, at the same time as retired Marshal Dawson's case was making its way through this Tribunal, so were numerous cases involving retired West Virginia law enforcement officers and retired law enforcement from other states. The one thing they had in common was the fact that by its plain and unambiguous language, the downward modification in Section 11-21-12(c)(6) was not available to them. They all complained that this was unfair, and this Tribunal ruled against them all, and we do so in similar fashion here.

It is well settled that, as part of the executive branch, neither the Tax Commissioner nor this Tribunal can declare a statute unconstitutional. Actually, two concepts are well settled. The first is the separation of powers doctrine. In West Virginia, as in many states, it is more than a doctrine and is actually an article of our State Constitution.

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature

W. Va. Const. art. V, § 1. The West Virginia Supreme Court of Appeals has elaborated on this constitutional provision on many occasions, including mere weeks prior to the issuance of this

decision. “The separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts.” State ex rel. Workman v. Carmichael, 819 S.E.2d 251, 261 (W. Va. 2018).

Next, we must ask, is declaring a statute unconstitutional a purely judicial act? The short answer is yes, and virtually every state court in the nation has, at some time in the past, clearly and cogently stated as such. *See e.g.* Gordon v. State by & through Capitol Bldg. Rehab., 2018 WY 32, 413 P.3d 1093 (Wyo. 2018) (Declaring the validity of statutes in relation to the constitution is a power vested in the courts); Gannon v. State, 305 Kan. 850, 390 P.3d 461 (2017) (the judiciary has the sole authority to determine whether an act of the legislature conforms to their supreme will, *i.e.*, is constitutional); Gen. Engines Co. v. Dir., Div. of Taxation, 23 N.J. Tax 515 (2007) (Division of Taxation, as an administrative agency, has neither the responsibility, the authority, nor the jurisdiction to declare statutes unconstitutional).

The West Virginia Supreme Court of Appeals has never answered the precise question before us, namely can an executive branch agency declare a statute unconstitutional. What the Court has said is that the mere fact that an executive branch agency performs quasi-judicial functions does not make it a court, and that it is the duty of the courts to declare statutes unconstitutional. *See e.g.* State ex rel. State Bldg. Comm’n v. Bailey, 151 W. Va. 79, 150 S.E.2d 449 (1966) (it is the duty of a court to declare a statute invalid if its unconstitutionality is clear); Rice v. Underwood, 205 W. Va. 274, 517 S.E.2d 751 (1998) (the deciding of contested cases by a board or regulatory body is a recognized administrative function and does not transform the administrative agency into a court). We do not think the fact that the Bailey Court failed to say that it is “solely” the duty of a court to declare a statute unconstitutional is determinative. This Tribunal is quite certain that the concept is as equally well settled in West Virginia as elsewhere.

As a result, the Petitioners' contention that it is "unfair" that they do not receive the same downward income modification as certain other retired West Virginia law enforcement officers, is an issue that neither the Tax Commissioner nor this Tribunal can pass judgment on.

Finally, this matter began with an assessment, issued against the Petitioners on August 20, 2015, in the amount of \$_____. This assessment was for tax years 2012 and 2014.⁴ At hearing, neither party could offer a definitive number as to which portion of this assessment involved Mr. X's federal pension and which part involved his city pension. As such, this matter was remanded back to the Tax Commissioner for recalculation.⁵

Upon remand, the Tax Commissioner asked the Petitioners for information regarding Mr. X's N.Y. pension, however, he refused to provide it. It was his contention that the Tax Commissioner should already have all of the couple's tax filing information. Counsel for the Tax Commissioner indicated that they did not have the information for tax years 2012 and 2014. The Petitioners also refused to provide any current documentation regarding the N.Y. pension.⁶ The Petitioners were advised that failure to cooperate would necessitate this Tribunal's ruling against them entirely, and the Petitioners indicated that they understood. While this Tribunal is loath to deny the Petitioners the adjustment they are entitled to as a result of the U.S. Supreme Court decision, it has become fairly clear what has transpired. During the evidentiary hearing in this matter, Mr. X inadvertently brought up his N.Y. city disability pension, not remembering that he had not divulged it to the West Virginia Tax Department. When the matter was remanded back to the parties for recalculation, this Tribunal was unaware of this fact, and thought that recalculation was necessary to have an accurate picture of

⁴ At hearing, the parties discussed tax year 2013, however the file in this matter reveals that the Tax Commissioner never issued an assessment (or a refund denial) against the Petitioners for tax year 2013. As such, this Tribunal has no jurisdiction over any tax years except 2012 and 2014.

⁵ At hearing, counsel for the Respondent agreed to waive the \$_____ in penalties/additions contained in the assessment.

⁶ The Petitioners are no longer residents of West Virginia, and have not filed tax returns here in approximately four or five years.

the Petitioners' tax situation. Although we cannot be certain, it appears that the August 2015 assessment only involves Mr. X's federal pension. Therefore, if Mr. X had not brought up his New York City disability pension, this Tribunal could have just vacated that assessment and that would have been the end of the matter. Unfortunately, we cannot un-ring the bell Mr. X has rung, and we are unwilling to issue a decision that does not accurately reflect the Petitioners' entire West Virginia tax situation.

Based upon the foregoing, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the August 20, 2015 assessment issued against the Petitioners, in the amount of \$_____ is hereby **MODIFIED**, to reflect the Tax Commissioner's willingness to waive the penalties/additions. As such, it now reflects tax due in the amount of \$_____ and interest in the amount of \$_____, for a total of \$_____. However, pursuant to West Virginia Code § 11-10-17(a), interest continues to accrue on these unpaid taxes until fully paid.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

Date Entered