

14-0846

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CASE NO. 14-AA-28
KANAWHA COUNTY CIRCUIT COURT

ARDEN J. CURRY, II,
Petitioner,

v.

Civil Action No. 14-AA-28
Judge Tod J. Kaufman

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Respondent.

FINAL ORDER

Before the Court is the Petitioner's *Petition for Appeal* filed on April 4, 2014, alleging that the West Virginia Consolidated Public Retirement Board (hereinafter "Board") erred in its decision of March 5, 2014 denying his request to participate in the Public Employees Retirement System ("PERS").

STANDARD OF REVIEW

West Virginia Code § 6C-2-5(b) provides the grounds upon which a decision by the Board may be reviewed for error by a Circuit Court. Specifically, West Virginia Code § 6C-2-5(b) provides that:

A party may appeal the decision of the administrative law judge on the grounds that the decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the administrative law judge's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court shall “review the entire record that was before the administrative law judge.” See West Virginia Code § 6C-2-5(c).

A circuit court must show deference to the Board’s findings of fact. *See* Syl. pt. 2, *Maikotter v. University of West Virginia Bd. of Trustees/West Virginia University*, 206 W.Va. 691,692, 527 S.E.2d 802,803 (1999) (emphasis added). *See also* *Muscatell v. Cline*, 474 S.E.2d 518, 525 (1996).

A final order of an administrative law judge of the West Virginia Public Employees Grievance Board, based upon findings of fact, should not be reversed unless clearly wrong. *See generally*, Syl. Pt. 1, *Randolph County Bd. of Educ. v. Scalia*, 182 W.Va. 289, 387 S.E.2d 524 (1989).¹ With respect to the grievance proceedings below, the Petitioner bore the burden of proof. *See* Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008).

DICUSSION

Under the requisite Standard of Review, the Court adopts all findings of fact of the decision below. Based upon the recent June 11, 2014 ruling issued by the West Virginia Supreme Court of Appeals in *West Virginia Consolidated Public Retirement Board v. Jones*, No. 13-0937, in which the case had a nearly indistinguishable set of facts, and upon the record as a whole, this Court lack discretion to find any other way but what the West Virginia Supreme Court of Appeals has ruled. Thus, finds that Plaintiff does not qualify for participation in PERS.

The Petitioner in the present case, as was the Petitioner in *Jones*, was on-call twenty-four hours a day, seven days per week, maintained a separate law practice, dedicated approximately 200-300 hours per year (in *Jones* Petitioner estimated only 200 hours), and mad timely payments into PERS for a number of

¹ *See also* Syl. Pt. 1, *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 465 S.E.2d 399 (1995); Syl. Pt. 1, *Bolyard v. Kanawha County Board of Education*, 194 W.Va. 134, 459 S.E.2d 411 (1995).

years before being notified by the Board that they intended to refund those contributions due to his ineligibility to participate in PERS because he was not a full-time employee as defined by statute.

In reversing the Circuit Court decision, the Supreme Court in *Jones* held that employer's error cannot "modify or amend the statutory requirements for PERS eligibility." *West Virginia Consolidated Public Retirement Board v. Jones*, No. 13-0937, 11. As in the present case, Petitioner Jones cites *Hudkins v. State of West Virginia Consolidated Public Retirement Board*, 220 W.Va. 275, 647 S.E.2d 711 (2007) regarding misrepresentations by employers concerning PERS eligibility, however the ruling in *Jones* states that the "ruling in *Hudkins* is limited to instances where the Retirement Board itself makes a false representation regarding a public employee's eligibility to receive retirement benefits." *Hudkins*, at 11. Furthermore, they held that it is "neither legally sound nor prudent to expand [the] holding in *Hudkins* to apply to circumstances regarding a public employer's false representation to an employee that he or she is eligible to participate in PERS.

Petitioner asserts that the Board's May 2005 amendment to its regulation defining full-time employment cannot be used to deprive him of his constitutionally-protected pension. In taking this position, Petitioner assumes that he had the right to participate in PERS until 2005, when the legislative rule was amended from the "and/or" requirement to the "and" requirement. Regardless of this ambiguous language, the statute has always required full-time employment for participation in PERS and that W. Va. Code § 5-10-17(d) grants the Board the authority to decide membership issues.

If the rule language of "and/or" would be construed to mean "or," as Petitioner asserts in the previously addressed position, it would still be in direct conflict with the statutory requirements. As "an administrative agency cannot modify, abridge or otherwise change statutory provisions under which it acquires authority unless the statute expressly grants that power" and "while agencies may not go too far

afield of the letter of the law even if they perceive they are furthering the spirit of the law," the legislative rule cannot be the sole basis for deciding eligibility as it would be in direct conflict with the statutory provisions requiring full-time employment. As to what constitutes full-time employment as that phrase would be ordinarily understood, Petitioner's experience, even in the upper end of his 200-300 hours per year estimate, would put him at only about 14 percent of a normal, full-time forty-hour work week, not full-time as a matter of law.

RULING

After consideration of the record as a whole in light of the recent West Virginia Supreme Court of Appeals ruling, the Court hereby **AFFIRMS** the decision of the Board below. This matter is hereby **DISMISSED** and **STRICKEN** from the docket of the Circuit Court.

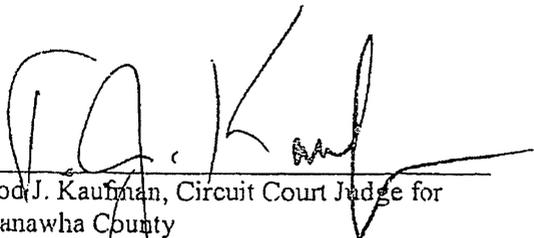
The Circuit Clerk shall send certified copies of this Final Order to all counsel of record:

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Enter this Order the 30 day of July, 2014.



Todd J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, GATHYS GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 31
DAY OF July 2014
Gathys Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA