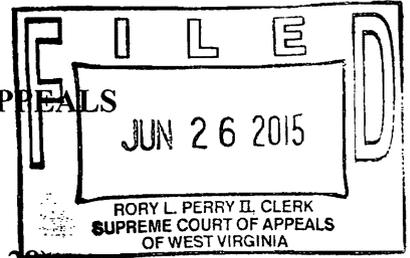


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NUMBER 15-0281

(Kanawha County Circuit Court, Docket Number 11-AA-28)



**CYNTHIA RINGEL-WILLIAMS,**

**Petitioner**

**vs.**

**STATE OF WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD**

**Respondent**

**APPELLANT'S BRIEF**

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### **III. ASSIGNMENT OF ERROR**

1. The CPRB's interpretation of the W. Va. Code § 18-7A-3 is erroneous, is inconsistent with other related statutes, and is contrary to the rules of statutory interpretation.

2. The CPRB is barred by the doctrine of equitable estoppel from forfeiting Petitioner's pension benefits and terminating her participation under the TRS.

3. The CPRB breached its fiduciary duty to identify and notify the Petitioner and others similarly situated of the CPRB's interpretation of West Virginia Code § 18-7a-3, that teachers in the TRS were ineligible to participate in those plans unless the employee worked 200 days in each school term.

### **IV. STATEMENT OF THE CASE**

Petitioner, Cynthia Ringel-Williams has been an employee of the Raleigh County Board of Education since December 16, 1986, when she signed a teacher's probationary contract to work for the Board as a physical therapist to work with handicapped students in the school system, effective January 5, 1987. Jt. App.V1, Ex. 27. The contract contemplated that she would work three days a week, 120 days in all, for the full ten months of the school term. That arrangement suited both parties, allowing the board to obtain necessary professional services at a lower cost, while Ms. Ringel-Williams was able to supplement her income with other work. The contract does not designate which particular days she would work, and the Raleigh school board had the right to direct the days she was to work.

At the time of her employment on December 12, 1986, she filled out a "Membership

Enrollment” form to sign up for the TRS. The form stated that “all persons employed as ‘teachers’ (as defined the retirement act) since July 1941, are members of the retirement system as a condition of their employment.” Jt. App. V1, Ex. 3. The promise of a pension and health care as part of her compensation was a substantial factor in her decision to go to work for the Raleigh County school system. Jt. App. V1, pp.106-107.

On September 26, 1989, Ms. Ringel-Williams and the Raleigh County Board entered into a teacher’s continuing contract of employment, effective August 28, 1989, the first day of the 1989-90 school year. That contract was under the same terms as the probationary contract of 1986. Jt. App. V1, Ex. 28. Under both the probationary contract of 1986 and the continuing contract of 1993, pursuant to W. Va. Code §18-7A-14, 6% of her gross salary was remitted to the TRS on a monthly basis, and the Raleigh County Board of Education contributed an equal amount.

On an annual basis, pursuant to § 18-7A-14(b), those contributions were credited to Ms. Ringel-Williams’ account. Each year from 1987 to 2009, the Raleigh County Board submitted a printout to the TRS (or TDC). Jt. App.V1, Ex. 2. The format used in the printout submitted to the TRS included a column for “paid days” and a column for “contract months.” Each year, except the partial year of 1986-87, those columns listed for Ms. Ringel-Williams that she was employed for 10 months and that she worked 120 days or some similar number. Both of those statements were completely true, and that information was provided to the TRS or TDC annually for 23 years and was included in the databases of the TRS and/or TDC.

From 1987 to 2009, the TRS had possession of all of the information needed to determine whether or not Ms. Ringell-Williams or others similarly situated were working less than 200 days a year with a simple computer query. When the TRS finally noticed that Ms. Ringel-

Williams might not be working 200 days a year some, they requested verification from the records from Raleigh County. Jt. App. V1, Ex. 4. The information they received was the same information Raleigh County had been providing annually for the past 23 years. Those records clearly indicated that she was on a 10 month contract, was considered by the Raleigh County board to be “full time” but worked approximately 120 days, or three days a week, the same information provided by the annual reports received by the TRS and TDC.

From 1987 to 2009, Ms. Ringel-Williams received statements from the TRS or TDC regarding her pension contributions and credit. Statements from the TRS from 1987 to 1991 indicated her contributions and service credited toward the TRS, and clearly indicated that she was receiving less than a full year of service credit, another indication to the TRS that she was working less than 200 days. Jt. App. V1, Ex. 5, 6, 7. She received pension credit based upon her earnings and the employer match, just like any other employee. She worked three days a week and received pension credit of 60% of that of a 200-day employee.

In 1991, Ms. Ringel-Williams elected to enter the Teacher’s Defined Contribution Retirement System (TDC), although her service credit earned from 1987 to 1990 remained in the TRS. Jt. App. V1, Ex. 10. From 1992 to 2008, she received statements from the TDC at least quarterly, either directly from TDC or its third party administrator. Jt. App. V1, Ex. 11-18, 21, 24. Those statements included contributions made to her account, including both her contributions and the contributions of her employer. They also tracked her vested status in the plan.

In 1999, Ms. Ringel-Williams accepted an offer from the TRS and TDC to transfer her 1987-1992 contributions and service credit from the TRS to the TDC. Jt. App. V1, Ex. 19, 20. The CPRB transferred \$10,489.69 and 3.545 years of service to the TDC. That process required

ta detailed look at her previous service under the TRS and a printout of that credit. Jt. App. V1, Ex. 19, p. 5. The service column of the printout clearly shows that her annual credited service was approximately 60% to 66% of a full year's credit. The records on their face indicated that Ms. Ringel-Williams was working something less than 200 days. Jt. App. V1, Ex. 20, pp. 1, 5.

In 2002, the TDC apparently sent to all participants a "participant data" form, advising them of the status of their participation in the TDC. Jt. App. V1, Ex. 22. The information on the form addressed to Ms. Ringel-Williams clearly indicates her date of participation as January 1, 1987, and that her days paid from 1991-92 through 2001-02 was 119 or 120 days each year except 1994-95 when she was off on leave most of the year. Including the transferred service credit from the TRS shift, she was listed with 8.97 years of service, which is 60% of the 15 years she had been employed. The instructions on the form describe how to make corrections, but states that "If no corrections are needed: Do not complete this form."

The letter accompanying the form, dated November 15, 2002, states: "Please take a moment to review the report to make sure that the information we currently have on file is correct. **Keep in mind that to receive one full year of service credit in the TDC System you must work and be paid for at least 200 days, anything less credits you with a fractional part of the year.**" (example, 192 / 200 = .96). Jt. App. V1, Ex. 22 at p. 3. (emphasis added).

Nothing in that letter indicated that a participant must work 200 days per year or she is not eligible to participate at all in the TDC. To the contrary, it indicates that working less than 200 days simply results in a pro-rated portion of a year's service. Ms. Ringel-Williams understood that she did not earn a full year's service credit, but earned a fractional part of a full year. The information provided by the form was both correct and consistent with her understanding of her pension benefit. She therefore followed the instructions and did not return

the form. She was never told or received any information from the CPRB that she was ineligible for either plan because she worked three days per week, or that there was a distinction between the TRS and the TCD.

The data presented on the “participant data” sheet demonstrates that the TDC had in its database the information that Ms. Ringel-Williams was work 120 days a year and was receiving roughly 60% of a full year of service credit.

In 2003, the TDC switched to a different third party administrator, Great West, which used a new format for the quarterly statements. App. Ex. 5. They continued to state the balance of Ms. Ringel-Williams account, the distribution of the investments, her rate of return, payroll contributions by both employee and employer, and dividends on the investments. The January-March, 2004 indicated that the balance of her account was \$60,849.75. Jt. App. V1, Ex. 25, p. 3. The Great West statement for the period ending 9/30/04 and 12/31/04 indicated that she had 10.155 years of service, and also breaks out the days worked from 1991-2003, plus the service credit from the TRS, again demonstrating that the CPRB had access to the data which clearly shows that Ms. Ringel-Williams was working less than 200 day. Great West statements continued to include that information in subsequent years.

The TDC, the defined contribution plan created in 1991 never achieved the promised financial returns. As a result, the Legislature sought to merge the TDC into the TRS, the defined contribution plan, and enacted West Virginia Code § 18-7C. That legislation was challenged by participants wanting to stay in the TDC, and the Legislature subsequently enacted §18-7D, which offered members an election to transfer their pension accruals from the TDC to the TRS, as long as 65% of participants elected to transfer. The deadline for making that election was May 12, 2008.

In 2008, the legislature permitted members of the TDC to vote on whether they wished to transfer their TDC credit from the TDC to the TRS. A majority of participants voted in favor of the transfer, and Ms. Ringel-Williams accepted the offer and timely submitted forms to have her pension credit transferred to the TRS. She also elected to purchase the additional service credit which was also authorized by the legislation. Jt. App. V1, Ex. 26.

On October 7, 2009, after 23 years of employment, and more than a year after she elected to transfer to the TRS, the CPRB sent a letter to Ms. Ringel-Williams, advising her that she was ineligible to participate in either the TRS or TDC, and that the money contributed by both her and her employer would be returned to the Raleigh County Board of Education, and that she would not receive any pension from the TRS or TDC. The CPRB after the hearing modified its position and held that the Petitioner was eligible to participate in the TDC but was not eligible to participate in the TRS, and her retirement benefits under the TRS were forfeited.

The failure of the CPRB to take any measures to identify and notify Ms. Ringel-Williams and others in similar situations of the CPRB's interpretation of the statutes has caused her to lose a substantial amount of her retirement income. If she had been notified that her 3-day per week work schedule disqualified her from participation in either of the pension plans, she could have resolved the problem by changing her work schedule or by going to a 200 day contract, which was exactly what she did after she received the CPRB's letter of October 7, 2009. As a result, she is apparently unable to participate in the TRS because her change to full time status was after the transfer deadline.

In the course of the transfer to the TRS in 2008, Ms. Ringel Williams was provided with a document labeled "Choose - Revised Statement as of April 25, 2008, and on the second page,

titled “How the Retirement Benefit Plans Compare” which stated her service and an estimate of benefits under both the TDC and the TRS.

The CPRB estimated her benefit taken as a straight life annuity under the TDC plan as a monthly benefit of \$1260 at age 60 and \$2121 at age 65. A similar annuity under the TRS plan, with the additional purchased credit which Ms. Ringel-Williams purchased, would yield a monthly annuity of \$2363 at age 60 and \$3384 at 65, assuming low inflation. Ms. Ringel-Williams accountant has calculated the difference in participation in the TRS and the TDC under the CPRB’s projections in the “Choose” document as between \$199,586 and \$122,453, depending on her retirement date and inflation. By any measure, the failure of the CPRB to notify her that she was not eligible to participate in the TRS based upon its interpretation of statute, her retirement has been severely affected.

## **V. SUMMARY OF ARGUMENT**

This is an appeal by Cynthia Ringel-Williams from a final decision of the Consolidated Public Retirement Board (“CPRB”), as administrator of the Teacher’s Retirement System (“TRS”). That decision held retroactively that the Petitioner was ineligible to participate in the TRS, although she had been enrolled in the TRS when she was first employed by the Raleigh County Board of Education in 1986. She had been a participant in the TRS for several years, subsequently enrolled in the Teacher’s Defined Contribution plan (“TDC”) in 1991. In 2008, the legislature permitted members of the TDC to vote on whether they wished to transfer their TDC credit from the TDC to the TRS. A majority of participants voted in favor of the transfer, and Ms. Ringel-Williams accepted the offer and transferred her pension credit transferred to the TRS.

The CPRB initially took the position that Ms. Ringel-Williams was not eligible to participate in either the TRS or the TDC, forfeiting her entire accrued retirement service credit from 1987 to 2009 and terminating her status as a member of the TRS. App. Ex. 1.1 This action was apparently based upon the CPRB's interpretation that she was never eligible to participate because she worked three days a week during that period, although her contract was a 10-month contract and she worked regularly during the entire 10 month school term. Following the hearing, the CPRB accepted the recommendation of the hearing officer and decided that the Petitioner was ineligible to participate in the TRS, but would be permitted to participate in the in the TDC. The CPRB's action effectively denied her a pension from the TRS after nearly 23 years of contributions and participation in the TRS and the Teacher's Defined Contribution plan ("TDC").

Even with the modified decision of the Board, the Ms. Ringel-Williams will lose a substantial feature of her TRS credit and the loss of the opportunity to participate in the TRS in the future.

The Petitioner contends that (1) the CPRB's interpretation of the definitions in W. Va. Code §18-7A-3 is erroneous, (2) that even if the CPRB's interpretation of the statute is correct, the CPRB should be estopped from eliminating her prior service credit because she detrimentally relied upon the CPRB's representations for 23 years that she was accruing pension benefits, and (3) that the CPRB breached its fiduciary duty to identify and notify Ms. Ringel-Williams and others similarly situated that its interpretation of the statute was that she was not eligible to participate in the TRS.

## **VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Of course, this Honorable Court best knows if oral argument will assist clarifying any points raised by the parties. Appellant believes that it will. Thus, Appellant requests a Rule 19 argument.

## **VII. DISCUSSION AND POINTS AND AUTHORITIES**

### **A. THE CPRB'S INTERPRETATION OF THE STATUTE IS INCONSISTENT WITH OTHER STATUTES OF SIMILAR PURPOSE, AND IS CONTRARY TO THE RULES OF STATUTORY INTERPRETATION.**

Notwithstanding the egregious circumstances of this case, the CPRB continues to apply its interpretation that W. Va. Code § 18-7A-3, requires that a school employee work 20 days per month in order to participate in the Teachers' Retirement System ("TRS"). Ms. Ringel-Williams' has had a substantial portion of her retirement savings retroactively destroyed by the application of the Board's interpretation. The CPRB's witness Ms. Miller testified that approximately 100 other participants have also had their reasonable expectations disrupted by the application of this policy. Tr. 14-15. The CPRB's failure to proactively identify and notify participants makes it all the more important to determine whether an interpretation which has done such damage is in fact a reasonable reading of the statute. As discussed below, the Board's interpretation of the statute is contrary to the rules of statutory interpretation, inconsistent with other provision of school law, and has been rejected by at least one circuit court.

The language in question is three provisions of the definitions of several terms in West Virginia Code § 18-7A-3:

(11) “Employment term” means employment for at least ten months, a month being defined as twenty employment days.

(27) “Regularly employed for full-time service” means employment in a regular position or job throughout the employment term regardless of the number of hours worked or the method of pay.

(30) “Teacher member” means the following persons, if regularly employed for full time service: (A) Any person employed for instructional service in the public schools of West Virginia

Ms. Ringel-Williams was employed as a physical therapist by the Raleigh County Board of Education who worked with handicapped children. She signed a teacher’s contract of employment, and was apparently considered a “teacher member” pursuant to subsection (30).<sup>31</sup> By the terms of subsection (30), she is eligible to participate in the TRS if she is employed for “full time service,” which is a defined term described in subsection (27).

Ms. Ringel-Williams had a regular continuing contract that provides that she is employed for the entire 10-month employment term. Her contract does not specify her work schedule, but indicates that she works 120 days a term. She normally worked three days a week, but was on call to come out at other times for meetings with other school personnel, wheelchair deliveries, and other occasions. V1, pp. 101-102.

The CPRB’s position is apparently based upon subsection (11), specifically the second phrase which defines a month as “twenty employment days.” However the language nowhere says that a teacher or other professional must actually work 20 days each month for 10 months. It

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<sup>31</sup>If she is not considered a teacher, she is eligible to participate in the TRS as a “nonteaching member,” pursuant to W.Va. Code §18-7A-3 (18).

is simply defining the duration of the “employment term” as ten months of 20-day months. In other words, it is describing the “employment term” as the 10 months composed of 20 days of the school calendar, not the standard calendar months. If the legislature intended to require that only employees who worked for 200 days were eligible to participate in the TRS, it could have said so in plain language, without the necessity to tie together the definitions of “term of employment” and “regularly employed for full time service” in order to impose such a requirement by implication.

The actual language employed by the legislature indicates otherwise. The two clauses (11) and (27) are independent and clear on their face. Subsection (11) defines the “employment term” and subsection (27) defines “regularly employed for full time service” as “employment in a regular position or job throughout the employment term.” Ms. Ringel-Williams clearly meets that definition.

Since she was hired she has had a contract with the board of education under which she is at the service of the board for the full 10-month period of the school term, just as any teacher with a regular contract. She has a regular position and specific job that lasts for the entire employment term. She is nothing like a substitute teacher, or a temporary employee of any kind. Her services are specific and necessary to the school system, and she renders them throughout the 200-day regular school term. Nothing in subsection (27) indicates that working 200 days is a necessary component of the term “regularly employed for full time serve.” In fact, the language of the statute unambiguously says quite the opposite: “regardless of the number of hours worked or the method of pay.” What determines eligibility for participation in the TRS is whether you are employed in a regular position for the during the entire period of 10 months, period. The number of hours worked do not matter.

The CPRB's interpretation cannot account for the clear statement that the number of hours worked are irrelevant to whether or not an employee is eligible for participation in the TRS. That language clearly assumes that persons described in subsection (27) may work less than 200 full days, and provides that such individuals may still participate in the TRS. If everyone must work 200 days, the phrase "regardless of the number of hours worked" has no meaning. The legislature clearly did not intend to fit the employment needs of the county boards into a straight-jacket of 200 days, but contemplated more flexible arrangements.

Terasa Miller, the CPRB's Deputy Director and Chief Operating Officer of the Board, who testified at the hearing, conceded that under the Board's interpretation, Ms. Ringel-Williams was ineligible for participation because she normally worked normally three days a week, while a similarly situated employee who works half days five days a week would be eligible. Tr. 12-13. In that situation, an employee who worked three days a week performed more service than one who worked five half-days, but is ineligible to participate, while the employee rendering lesser service is eligible. Is there a rational explanation as to why the Legislature would intentionally make such a distinction? The above hypothetical is the least egregious situation under the Board's interpretation of the statute.

Effect must be given to the clear intent of subsection (27), that the number of hours worked does not matter. A teacher who teaches a single 50-minute class five days a week and then goes home each day at 9:00 a.m., or any employee who reports in and does some task for some period of time five days a week, would be eligible for participation under the Board's but an employee who works four full days is not. The Board's interpretation requires ignoring the phrase "regardless of the number of hours worked or the method of pay," or assuming that the legislature deliberately intended to create arbitrary and irrational distinctions between similarly situated

employees. The Board's interpretation essentially assumes that the legislature intended that days worked matter, while it expressly provided that hours worked do not matter. However, hours worked are components of days worked. There is no reason to assume that the Legislature intended to create such arbitrary distinctions between employees providing similar services.

Indeed, the legislature's policy has been to ensure that similarly situated employees are treated equally. Sections 18A-4-5a and 18-4-5b, for teachers and service personnel, provide as follows in pertinent part.:

§18A-4-5a.

. . . Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county.

§18A-4-5b

. . . Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county.

The Supreme Court has recognized the legislative mandate that employees who are similarly situated should be treated equally on matters of pay and benefits, and has in numerous cases upheld the legislature's directives that there should be uniformity among similar situated employees of the education system See Weimer-Godwin v. Board of Educ. of Upshur County, 179 W.Va. 423, 369 S.E.2d 726 (1988), Board of Educ. of The County of Tyler v. White, 216 W.Va. 242, 605 S.E.2d 814 (2004),

It is difficult to believe that the legislature conferred a right to uniform treatment of similarly situated school employees in matters of pay and compensation, but then created an arbitrary policy which grants pension eligibility to some and denies it to others doing the same

job and the same amount (or more) work. Participation in the pension plan is certainly a substantial portion of an employee's compensation. In the face of the uniformity statutes, the Board's interpretation presumes that the legislature intended, while stating that eligibility was "regardless of the number of hours worked," to allow participation by some employees, while denying it to others who provided the same (or more) services based upon how many days they set foot in the building, regardless of how long they stay. To arrive at that conclusion violates the rules of statutory construction.

The Supreme Court explained the rule against statutory absurdity in Charter Communications v. Community Antenna Service, 211 W.Va. 71, 561 S.E.2d 793<sup>2</sup> (2002):

A well established canon of statutory construction counsels against such an irrational result.

It is the 'duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.' We have also explained that this rule may apply even where the statutory language is plain. Although courts should not ordinarily stray beyond the plain language of unambiguous statutes, we recognize the need to depart from the statutory language in exceptional circumstances. Courts, therefore, may venture beyond the plain meaning of a statute in the rare instances in which there is a clearly expressed legislative intent to the contrary, in which a literal application would defeat or thwart the statutory purpose 980-81 (1982); or in which a literal application of the statute would produce an absurd or unconstitutional result, Where warranted a departure must be limited to what is necessary to advance the statutory purpose or to avoid an absurd or unconstitutional result.

[citations omitted].

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<sup>2</sup> It is well established that a court should avoid a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results, even. State v. Kerns 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990), Expedited Transportation Sys. v. Vieweg, 207 W.Va. 90, 90, 529 S.E.2d 110, 118 (2000), Mullen v. Division of Motor Vehicles, 216 W.Va. 731, 734, 613 S.E.2d 98, 101(2002), Dunlap v. Friedman's Inc., 213 W.Va. 394, 401, 582 S.E.2d 841, 484 (2003) .

In the Charter case, there were conflicting statements in the statutes regarding cable services in apartment buildings, where some provisions expressed the intent to afford residents the right to access of to cable service of their choice, but also contained a provision clearly permitting landlords and cable operators to enter into mutual agreements regarding cable services in apartment buildings“without having to comply with the provisions of this article.” The Court found the provisions conflicting, and construed the language in favor of the rights of the tenants based upon the statements of intent, holding that to do otherwise would lead to an irrational and absurd result. In the present case, the legislature has spoken clearly regarding the policy of uniformity of wages and other compensation for similarly situated school employees, but the Board’s interpretation of the eligibility requirements contradicts the legislature’s policy of uniform treatment by making an arbitrary distinction between certain employees based upon whether their work is spread over three days or five, even if they provide equal or greater services.

It should be noted that the language the Board relies on is much less clear than the language in the Charter case, and is at best ambiguous. As noted above, the language does not say that employees must work 200 days, but only describes the term of employment period as ten 20-day months.

The Board’s interpretation of the statutory definitions also has a problem with other black letter rules of rule of statutory interpretation: the axioms that legislature is presumed to intend that every word or phrase in the statute has a specific purpose and meaning, and that the statute should be construed to give effect to all its provisions. Meadows v. Wal-Mart Stores, 530 S.E.2d 676 (W.Va. 1999). L. H. Jones Equipment Co. v. Swenson Spreader, LLC, 687 S.E.2d 353 (W.Va. 2009).

What purpose does the phrase “regardless of the hours worked or the method pay” have under the Board’s interpretation of the statute? If all employees are required to work 200 days in order to participate in the TRS, why did the legislature provide that the number of hours worked doesn’t matter with respect to pension eligibility but the number of days in which some work is presumably performed is critical. What rationale purpose is served by making such a distinction? With all due respect, the Board’s interpretation is simply wrong. There is a much simpler and rational interpretation. The Legislature was not interested in counting the number of hours worked or the number of days in which their work was performed, but was applying a simple test for pension eligibility: whether the employee is employed under a contract for the 10 months period of the school year or not. The language refers only to the period of the employee’s employment, distinguishing persons who are employed the full 10 months of the school calendar from substitutes or short-term employment.

The Circuit Court of Tucker County rejected the CPRB’s interpretation under essentially identical facts Andre v. Crandall, Pyles, Haviland & Turner et al., Civil Action 02-C-26 (July 12, 2004). Ms. Andre was a teacher at the Davis Center, who worked three days per week, 12 months per year, but was notified in 1990 that she was not eligible to participate and her contributions were refunded. The circuit court held that: “A review of all the circumstances of this particular case shows that Mrs. Andre was regularly employed for full time service, that she performed a valuable service, that she relied upon the assurances of the state to her detriment before the state unfairly pulled the rug out from under her. If this matter would have come to this Court as an appeal under the Administrative Procedures Act, this Court would have reversed the decision and found that Mrs. Andre was entitled to retirement benefits.” Order at 7. The CPRB interpretation of the statute is clearly erroneous.

**B. EQUITABLE ESTOPPEL BARS THE CPRB FROM FORFEITING  
MS. RINGELWILLIAM'S PENSION BENEFITS.**

Ms. Ringel-Williams and the Raleigh County Board of Education entered into a contract of employment on December 16, 1986, for her to provide physical therapy services to handicapped children in the school system. That agreement provided that she would work a normal schedule of three days a week. That schedule was mutually beneficial, in that it permitted the Board to acquire necessary services at a lesser cost while Ms. Ringel-Williams was able to do some outside practice and receive benefits, including the deferred benefits of participation in the TRS and health benefit plans. The pension benefit was a major factor in her decision to work for the Board of Education, and she reasonably expected that she would have the security and deferred compensation of the TRS. V1, pp.106-107.

This arrangement was a contract to which Ms. Ringel-Williams, the Raleigh County Board of Education, and the TRS and the TDC were parties. Raleigh County received the services of Ms. Ringel-Williams, she received a salary and a promise of deferred pension benefits, and the TRS and TDC received contributions from both Ms. Ringel-Williams and the Raleigh County board, and the ability to invest those funds for its purposes. The Petitioner performed her part of the bargain for 23 years. The CPRB's action upsets her reasonable expectations.

For the last 23 years, she has performed her part of the bargain by providing the services she agreed to provide. For those 23 years, she made contributions to the TRS or TDC, and her employer did the same. The TRS or the TDC had the use of those funds for those 23 years. When she enrolled in the TRS and signed her probationary contract, the enrollment form indicated that she was (and was required to be) a member of the TRS. The CPRB, as administrator of the TRS, now contends that she was never eligible for participation in the TRS and will never receive the

promised pension from that plan. While the CPRB's modification of its initial action has alleviated some of the damage, Ms. Ringel-Williams will still lose a significant part of her retirement income.

Although Appellant opted to return to the TRS in 2008 when the legislature permitted members of the TDC to transfer to the TRS, she will be denied the benefits of that choice. The legislature offered that option precisely because the TDC fell well short the promised returns. The Petitioner has now been denied that option and is left with a diminished retirement income. The statement in the CPRB's letter notifying her of this action, that "this will come as a horrible surprise," barely begins to describe it.

The basis of the CPRB's action is its interpretation of the statutory definitions in West Virginia Code § 18-7A-3. As discussed above, we contend that the CPRB's interpretation of the statutory language is mistaken and should be rejected. Assuming for the purpose of argument that the CPRB's interpretation is correct, Ms. Ringel-Williams' right to participate in the TRS pension cannot simply be vacated for several other reasons. The Supreme Court in, Booth v. Sims, 193 W.Va. 323, 327, 456 S.E.2d 167, 181 (1994), that: "a pension participant has a property right in a reasonable expectation of receiving a pension where she has detrimentally relied upon the apparent promise of a pension."

Ms. Ringel-Williams became a member of the TRS in January 1987, just six months after the effect date of the legislative changes which the CPRB now contends precludes Ms. Ringel-Williams from participating in the TRS. The question, however, is when the TRS first applied its current interpretation and what it did it do to notify boards of education and the members of the TRS, particularly for those potentially affected, of that interpretation.

At the time Ms. Ringel-Williams was hired, it was clearly her understanding, and that of the Raleigh County Board of Education, that her three day per week schedule did not pose any problems with her enrollment in the TRS. Terasa Miller did not know when the CPRB first adopted that interpretation of the 1986 amendments. (Tr. 12). The meaning of the statutory language is not self evident. It does not preclude part time employment (in the popular sense), and states that pension status is regardless of the hours worked. The Board's interpretation does not preclude participation in the TRS for part-time employees, but permits some and denies others based upon how the part time work is arranged (i.e, partial days vs. days per week). (Tr. 12-13). Under the circumstances, Ms. Ringel-Williams had no idea that she would be considered ineligible to participate in the TRS, and she relied upon the information she received from the Raleigh County Board and the TRS. She had no reason to believe otherwise until she received the CPRB's letter 23 years.

Equitable estoppel has previously been applied by the West Virginia Supreme Court in similar (and much less egregious) cases. In Board of Trustees of the Police Officers Pension and Relief Fund of the City of Wheeling v. Carenbauer, 567 S.E.2d 612, 211 W.Va. 602 (2002), the Court held on the basis of reliance/equitable estoppel, that pension rights of public pension plan members, who had substantially relied to their detriment upon their entitlement to those rights, cannot be detrimentally altered to any extent, and any alterations to keep the trust fund solvent must be directed to the infusion of additional money.<sup>3</sup>

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<sup>3</sup> In the context of this case, the Court defined "detrimentally alter" to mean the legislature cannot reduce existing benefits (including such things as medical coverage) of the pension plan or raise the contribution level without giving employees sufficient money to pay higher contributions

Although the West Virginia Supreme Court has limited the application of equitable estoppel to state government, the court has applied equitable estoppel to situations where the governmental actors are in particular positions of trust. For example, in Flanigan v. WVPERS, 176 W.Va. 330, 342 S.E.2d 414 (1986), a magistrate received inaccurate information from an authorized agent of PERS which caused him to be erroneously excluded from participation in PERS. The Supreme Court corrected the error relying upon the rule of construction found in West Virginia Code § 5-10-3a and the Byrne decision of the Nevada Supreme Court. Quoting Byrne, this court stressed that a “governmental body, charged with as important a function as the administration of a public employees retirement system, bears a most stringent duty to abstain from giving inaccurate or misleading advice.” Nevada Public Employees Retirement Board v. Byrne, 96 Nev. 276, 280, 607 P.2d 1351, 51353 (1980).

This Court recently held in Hudkins v. State Consolidated Retirement Board, 220 W.Va. 275, 647 S.E.2d 711 (2007), that “the general rule that equitable estoppel does not apply against a governmental agency is not without exceptions.” The Court held that an estoppel may be raised against the government only when the normal requirements for estoppel are met and additional factors are present, including: (1) the injury to the public interest if the government is estopped is out weighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped; (2) raising the estoppel prevents manifest or grave injustice; (3) raising the estoppel will not defeat a strong public interest or the operation of public policy; (4) the exercise of government functions is not impaired or interfered with; (5) circumstances make it highly inequitable or oppressive not to estop the government; and (6) the government's conduct works a serious injury and the public's interest will not be harmed by the

imposition of estoppel. Nevada Public Employees Retirement Board v. Byrne, 96 Nev. 276, 280, 607 P.2d 1351,1353 (1980) (emphasis added).

The Court found those elements present in Hudkins, where the plaintiff was told by a CPRB employee that she was eligible to claim service credit for her unused sick leave, and she relied on that advice in resigning her employment, only to be told when she retired two years later that the information she was provided was wrong. Every element favoring estoppel in Hudkins is present here, in much more egregious circumstances.

**1. The CPRB and Her Employer Represented That Ms. Ringel-Williams Eligible to Participate in the TRS and TDC.**

Ms. Ringel-Williams was told by the Raleigh County Board of Education that she would be participating in the TRS, she signed the enrollment forms and she was duly enrolled as a member of the retirement system. The Raleigh County Board deducted contributions from her pay and forwarded them to the TRS, and later the TDC. The TRS was not misinformed by anyone regarding her employment status. The Raleigh County Board reported every year for 23 years that she was working 120 days a year, and also reported that her contract was for 10 months. Jt. App. V1, Ex. 2, Tr. 23-28. The TRS had that information in its database from the beginning of her employment until now, and occasionally reported that information back to Ms. Ringel-Williams on statements and verification forms. Jt. App. V1, Ex. 22, 25.

For 23 years, the TRS and later the TDC sent her, at least quarterly, statements advising her of the status of her pension benefits, describing her service credit, the status of her investment funds in the TDC, after she switched to the TDC in 1991, the status of her vesting rights with respect to the employer's contributions, and other information. Each such statement was a representation to Ms. Ringel-Williams that she was a participating member in the pensions plans

(both the TRS and TDC), that her contributions had been made and acknowledged, that she was accumulating service credit toward her pension and vesting, that her retirement account and investments were growing, and that her retirement benefits were secure.

## **2. The CPRB Had Knowledge of the Facts, But Failed to Notify Ms. Ringel-Williams of Her Alleged Ineligibility**

It is clear from the facts of the Andre case, discussed in Section A of the Argument, that the TRS was applying the interpretation at issue here as early as 1990. Andre Order at 4, paragraph 5, copy attached to this brief.

In the ensuing 19 years before the letter to Ms. Ringel-Williams, there is no evidence that the TRS did anything proactive to provide notice to members of the TRS who might be in jeopardy of losing their pensions simply because their work schedule did not meet the TRS' standards. There is no evidence that any notice of the potential problem was published and circulated to the members of the TRS. There is no evidence that the TRS attempted to identify members who might be affected by the Board's interpretation of the statute, and notify them of the TRS' interpretation<sup>4</sup>.

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<sup>4</sup> Ms. Miller testified that brochures were sent out with annual statements, but was unable to state whether those brochures addressed this issue. The standard TRS brochure on the CPRB web site does not mention this issue. Ms. Ringel-Williams kept virtually everything she received from the TRS or TDC. The only statement arguably relevant is the November 14, 2002 letter distributing the "Participant Data" forms reflecting their credits, which says that a member must be paid for at least 200 days to receive a full year of service credit, but indicates that anything else results in a fractional part of the year's credit. Nowhere does it say that if you work fewer than 200 days you are not eligible to be a member at all. Jt. App. V1, Ex. 22.

The TRS had all the information it required to identify members who might be affected. In Ms. Ringel-Williams' case, the Raleigh County Board of Education sent a statement to the TRS of the service credit of its employees annually. Each year for 23 years those statements plainly stated that Ms. Ringel-Williams was working 120 days per year, on a ten month contract. The data in those . These statements went into the TRS database. The pension statements sent back to Ms. Ringel-Williams clearly stated on their face that she was not working 200 days per year. Tr. 37, 39. The same information went to the TDC's third party administrator. Statements were generated and sent to members which contained the same information regarding days worked that was contained in the TRS and TDC databases.

After a few instances, the CPRB certainly knew or should have known that there were members in the system's who pensions were in jeopardy based upon CPRB's interpretation of the statute. A simple database query for members working less than 200 days would have retrieved Ms. Ringel-Williams' record, and likely the majority of others similarly situated. V1, pp. 25-29. That was never done. V1, p. 29. Apparently the CPRB's method of dealing with the problem was to wait until someone in the CPRB accidentally stumbles over a potential suspect in the course of some other process, often at the point or retirement, and then kick them out of the system. Given the severe consequences to the members, that procedure fails to meet the CPRB's responsibility to its members. Ms. Miller's testimony that there have been perhaps 100 people in the same situation as Ms. Ringel-Williams indicates that many others have been caught in the same trap. In addition to information in the CPRB database or those of its third party administrators, on at least three separate occasions, Ms. Ringel-Williams' pension information was pulled and reviewed for the purpose of transferring pension credits from one system to another. She was originally enrolled in the TRS in 1987, when she first went to work for the Raleigh County board.

In 1991, she transferred to the defined contribution plan (TDC) established at that time. Jt. App. V1, Ex. 9. In 1999, she transferred her credit earned between 1987 and 1991 from the TRS into the TDC. Jt. App. V1, Ex. 19, 20. In 2008, she transferred her pension service credit back to the TRS. Jt. App. V1, Ex. 26. On each of those transfers, it was necessary for someone to review her service credit in order to process those transactions.

It should have been obvious from the documents and printouts that Ms. Ringel-Williamson was working less than 200 days per year, and if there had been any effort to identify persons who might be subject to the CPRB's interpretation, Ms. Ringel-Williams could have resolved the problem by going to work for 200 days or changing her work schedule to provide for half days or some similar arrangement.

Given the severe consequences to the members affected by the CPRB's interpretation, waiting to discover them at or close to retirement fails to meet the CPRB's fiduciary responsibility to its members. The fact that the problem could be easily corrected by rearranging the member's work schedule makes it even more egregious for the CPRB to wait until retirement before identifying them. The employees affected by the CPRB's interpretation could have been identified long ago Tr. 68-69. They should have been identified and given notice of the problem. A simple computer query for all participants working less than 200 days could have identified Mr. Ringel-Williams and many others. A simple warning in a newsletter could have put participants in similar situations on notice to adjust their job arrangements. There is no evidence that the CPRB did anything to warn persons who might be affected by the Board's interpretation.

**3. Ms. Ringel-Williams Relied upon the Statements of the TRS and TDC That She Was a Member and Participant in the Pension Plans.**

Ms. Ringel-Williams clearly relied on those representations. She would not have taken the job had she been ineligible to participate in the pension plan. Tr. 106-107. If she had been given the information that the CPRB interpreted the statute to require work for 200 days for participation in the plan, she would have made different arrangements with the Raleigh County board, by working full-time or half time five days a week. Tr. The problem could have been fixed years ago had she been told by the CPRB that it considered her ineligible while working three days a week. She did nothing wrong to cause this situation, as the CPRB acknowledges. (Tr. 60).

**4. The Injury to Ms. Ringel-Williams and the Injustice That Would Arise if the CPRB Is Not Estopped Far Outweighs Any Harm to the CPRB.**

The injury to Ms. Ringel-Williams and her family are devastating, and clearly outweighs any harm to the CPRB or the TRS. She and her husband are approaching retirement age. If her pension rights are simply erased after 23 years of participation, their living standard and their ability to help their children will be significantly altered. She does not have another 23 years of work-life to rebuild another retirement fund, and she cannot replace the retirement income lost. They may not be able to retire for years after they normally would have retired. V1, pp. 107-108, 120-124.

On the other hand, there is no significant harm to the TRS. Ms. Ringel-Williams paid her contributions for 23 years and the TRS and TDC received the benefit of those funds, as well as the employer's contributions. She received no unfair advantage with respect to her benefits by virtue of working only three days a week, since her pension credit and retirement benefit would always be proportionate to her actual work.

**5. Raising the Estoppel Would Prevent Manifest or Grave Injustice, and Will Not Defeat a Strong Public Interest or the Operations of Public Policy.**

The element of unfairness to Ms. Ringel-Williams is clearly present. The loss of a significant portion of her retirement income under these circumstances is grossly unfair. While she loses her TRS pension, the TRS receives a windfall because it has had the use of her contributions for investment for a number of years, and she receives nothing but a return of her original contributions, without interest. The TRS gets what is effectively an interest-free loan from Ms. Ringel-Williams for the past 23 years. Ringel-Williams has done nothing wrong in this situation. Tr. 60. Such a windfall to the TRS at the expense of Ms. Ringel-Williams pension do not fall in the category of a public interest, and what has occurred here cannot be considered “the operations of public policy.” The public has no interest in a policy that permits this situation to occur.

**6. The Exercise of Government Functions Will Not Be Impaired or Interfered With.**

An estoppel in this instances will not impair or interfere with the TRS or CPRB. All that is required is leave Ms. Ringel-Williams in the TRS, continue to honor her pension credit, provide her with her pension upon retirement, and keep the contributions of both Ms. Ringel-Williams and her employer.

**7. The Circumstances Make It Highly Inequitable Not to Estop the TRS.**

For the reasons set forth in Sections 1-5, the circumstances make it highly inequitable to invoke such a drastic result on Ms. Ringel-Williams, where she was not at fault and had no knowledge of the problem, and the TRS had the information and failed to notify members who were affected in a timely manner.

**C. THE CPRB BREACHED ITS FIDUCIARY DUTY TO IDENTIFY AND NOTIFY MS. RINGEL-WILLIAMS OF THE CPRB'S INTERPRETATION OF WEST VIRGINIA CODE § 18-7A-3 THAT TEACHERS IN THE TRS WERE INELIGIBLE TO PARTICIPATE IN THOSE PLANS UNLESS THE EMPLOYEE WORKED 200 DAYS IN EACH SCHOOL TERM.**

Ms. Ringel-Williams was clearly both a contributor and a member of the TRS. The statute defines those terms as follows: (7) "Contributor" means a member of the retirement system who has an account in the teachers accumulation fund. (14) "Member" means any person who has accumulated contributions standing to his or her credit in the State Teachers Retirement System. A member shall remain a member until the benefits to which he or she is entitled under this article are paid or forfeited, or until cessation of membership pursuant to section thirteen of this article.

For the past 23 years she has had an account with the TRS, the TDC, or both, and has accumulated contributions in the TRS, following her transfer of her TDC account to the TRS in 2008. She also has a vested right to her employer's contributions by virtue of her service. As a contributor and a member, the CPRB and its members and managing staff have a fiduciary relationship with Ms. Ringel-Williams.

That relationship is not the product of the Employee Retirement Income Security Act (ERISA), but derives from the common law of trusts. The relationship of participants and the CPRB as Trustees of the TRS, is regulated by the law of trusts whether or not it is subject to ERISA. Indeed, most of the law developed under ERISA has as its origin in trust law. The CPRB, as trustees of the TRS is without question an institutional type of trustee and both the members of its Board and the higher members of its staff are "fiduciaries" as described in

Dadisman v. Moore, 181 W.Va. 779, 784-5, 384 S.E.2d 816, 821-2 (1988). The West Virginia Supreme Court outlined the scope of the fiduciary duties of the trustee's predecessor, the PERS:

By the very use of the term “Trustee,” as well as by the allocation of responsibilities to them, the Legislature has placed the Respondent Trustees in a fiduciary relationship with the PERS and its participants. The fiduciary responsibility of the CPRB and the TRS is not limited to protecting the solvency of the trust, but extends as well to its dealing with individual participants. This Court stated in Flanigan v. West Virginia Public Employees Retirement System, 176 W.Va. 330, 335, 342 S.E. 2d 414 (1986) that:

... under West Virginia Code § 5-10-3a (1979) Replacement Vol.) we are directed to give substantial weight to the remedial nature of the PERS Act by the legislative ordination to construe its provisions liberally in favor of its intended beneficiaries. We are also guided by the proposition that “a governmental body, charged with as important function as the administration of a public employees retirement system, bears a most stringent duty to abstain from giving inaccurate or misleading advice.” (citing Nevada Pub. Employees Retirement Bd. v. Byrne, 96 Nev. 276, 280, 607 P.2d 1351, 1353 (1980) and Crumpler v. Board of Admin. Employees' Retirement Sys., 32 Cal.App.3d 567, 582, 108 Cal.Rptr. 293, 304 (1973).

The duty of the TRS extends to the failure to disclose information that should be disclosed.

As stated by Justice Cardozo, “A beneficiary, about to plunge into ruinous course of dealing, may be betrayed by silence as well as by the spoken word.” Globe Woolen Company v. Utica Gas & Electric Co., 224 N.Y. 483, 489, 121 N.E.378, 380 (1918). That formulation of fiduciary law has become commonplace trust law.

Globe and its progeny discussed herein support, or are based on,

§173 of the Restatement (Second) of Trusts, Comment (c1)<sup>5</sup> Those principles have been

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<sup>5</sup>Section 173 of the Restatement (Second) of Trusts, under Comment (d) requires trustees to inform their beneficiaries of unknown or unappreciated risks the beneficiaries are undertaking. Under Comment (d), the fiduciary has a “duty to communicate to the beneficiary material matters which threaten the interests of the beneficiary which he knows the beneficiary does not know and

repeatedly applied in the setting of employer-employee benefits, and in particular to the duties of those fiduciaries administering such benefits - specifically to inform beneficiaries of unknown or unappreciated risks they are undertaking or unknown opportunities that may be available.

When Ms. Ringel-Williams was initially employed by the Raleigh County school system, she understood, and had every reason to believe, that she would be a member and contributor to the TRS, and that she would be entitled to a pension upon retirement. She signed an enrollment form, her contributions were deducted from her paycheck, and for the next 23 years she received statements indicating that she was a member and was accumulating retirement income. She had no knowledge of and no way to know that the CPRB had interpreted the TRS once she was enrolled in the TRS. Not until 2009 did the TRS tell her that her work schedule, in their interpretation, made her ineligible for participation in the TRS.

The Andre case indicates that the TRS arrived at its interpretation of the 1986 amendments at least by 1990, which is consistent with Terasa Miller testimony that it was done “many years” ago, “well before I was hired.” She also stated that there had been approximately 100 participants over a period of years who were in the same situation.

Since the CPRB had arrived at that interpretation “many years” ago and at least by 1990, and its managers and staff were aware that a number of such cases had been identified, the CPRB knew or should have known that there were likely other members of the TRS or TDC in the same situation. “duty to communicate to the beneficiary material matters which threaten the interests of the beneficiary which he knows the beneficiary does not know and which the

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which the beneficiary needs to know for his protection in dealing with a third person with respect to his interests.”

beneficiary needs to know for his protection in dealing with a third person with respect to his interests.”

Given that knowledge, the CPRB clearly had a fiduciary duty to notify those individuals who they considered ineligible to participate to put them on notice that unless they worked 200 days a year, their pensions would be forfeited. In view of the severity of the consequences, it was incumbent on the CPRB to take some action to try to identify those members and advise them of the problem. The problem was merely a technical one, which could have been corrected easily had the member in question known about it. It can be presumed with a high degree of probability that if a member knew he or she would forfeit her pension by working three days a week rather than five half days (or five full days), he or she would have changed her work schedule to comply with the Board’s interpretation. That is exactly what Ms. Ringel-Williams did after she received the 2009 letter advising that her pension was gone. She went to the Raleigh County Board of Education and arranged to go full time, five days a week. Unfortunately, she was never told by the TRS that it was a problem until 2009, when the damage was already done.

If the TRS had come to that interpretation of the statute during the six months between the amendment and the date of Ms. Ringel-Williams hiring by the school board, it should have notified at least the county boards of education of that interpretation immediately. That clearly did not happen. The most likely reason is that the TRS did not take that position until several years later, in 1990 or before, after such one or more situations presented themselves. Even so, the TRS had an obligation to notify its members as well as the boards of education of that position. There is no evidence that the CPRB ever sent a notice or other communication to its members, advising them of the Board’s interpretation and that persons working less than 200 days a year are ineligible. Ms. Miller suggests that there might have been something in a brochure, but

no such document has been produced, and the standard brochure on the web page contains no such warning.

The information required to identify those individuals who might be at risk was in the hands of the CPRB. County school systems submit at least annually information on the service credits and contributions of their employees. The number of days worked is a part of that reporting and goes directly into the member database of the CPRB and its third party contractors. A simple computer query for employees in the state working less than 200 days would have immediately identified most if not all of those whose pensions might be at risk. It appears that the CPRB took no proactive measures to identify and warn members who were at risk. Given the serious consequences, the fact that many cases were discovered only when the member was in the process of retiring makes the CPRB's failure to notify such persons unconscionable.

In the instant situation, as in Globe Woolen and Eddy v. Colonial Life Insurance Co., 919 F.2d 447, 450-51 (D.C. Cir. 1990), "this duty to disclose and inform governs the case before us." Since the trustees are both creditors and fiduciaries, they must, unlike a creditor, act with the highest care and consideration of the beneficiaries instead of simply ignoring the debts for as long as 16 years and then demanding unconscionable interest payments.

Section 173 of the Restatement has been applied in numerous employee benefit settings. The failure of an employer to disclose its real plans for the company at the point it is offering some of the employees seemingly attractive severance packages has been held a breach of the duty to inform beneficiaries.<sup>6</sup> Likewise, the failure to fully describe all of the relevant benefits available is a breach of the duty, even though the fiduciary is only asked about one particular

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<sup>6</sup>9Lix v. Edwards, 147 Cal. Rpt. 294, 299-300 (Ct. Appeals 1978); Erion v. Timken Co., 368 N.E.2 312, 313 (Ohio Ct. App., 1976).

benefit. Overly technical or narrow answers which do not respond to the real need of the employee breach the same duty to inform. Eddy, 919 F.2d at 751 (“[T]he same ignorance that precipitates the need for answers often limits the ability to ask precisely the right question.”)

The common law duty to notify beneficiaries of the information they need to make informed decisions was applied to situations where a benefits counselor responded incompletely to questions which were inartful or simply incomplete. The ignorance of the employee regarding the questions to ask heightens the duty of the fiduciary to see that the employees are informed. For example, in Eddy, there was a breach of fiduciary duty by failing to inform the husband-employee that, had he waited an additional seven days to retire, his wife would have been eligible for a survivor death benefit.

Eddy v. Colonial Life Insurance Co., 919 F.2d 447, 450-51 (D.C. Cir.1990), involved a retiring employee, who was suffering from AIDS, being misinformed as to his rights to convert his health insurance. Instead of using the word “continue” when asking the employer's benefit advisor about an extension of his health insurance, the sick employee (who was obviously in need of medical benefits) used the technically incorrect term when he referred to “convert[ing]” his employment-based coverage to an individual policy. Relying on the advice provided by the personnel department that he had no rights to “convert” his insurance policy, when, in fact, he could have continued the policy, the employee resigned without exercising his COBRA conversion right. Resigning without exercising his COBRA rights to purchase health insurance cost the former employee tens of thousands of dollars in medical expenses for care of his AIDS case.

Applying “common-law trust principles” the D.C. Circuit ruled that once the company was aware of the employee's predicament, which occurred in that case when the employee asked

the question about “converting” his benefits, the Company had a fiduciary duty to do more than simply not misinform, it had an affirmative obligation “not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the relationship. For example, a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer - such as the failure of an employer to contribute to an employee benefit fund as required . . . ” 919 F.2d at 751.15 The employer benefit fiduciary has “an affirmative duty to inform - to provide complete and correct material information on [the retiring employees] status and options.” 919 F.2d at 751. The D.C. Circuit refused to hold the employee responsible for failing to ask the precise question because his question had made his predicament clear. “A fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threatened interests relevant to the relationship.”<sup>7</sup>

In *Glaziers Local 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1181

(1996), the Third Circuit explained the breadth of the duty:

We have never held that a request is a condition precedent to such a duty [to inform] regardless of the circumstances known to the fiduciary. Contrary, it is clear that circumstances known to the fiduciary can give rise to this affirmative obligation even absent a request by the beneficiary. “The duty to

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<sup>7</sup> See also *Becker v. Eastman Kodak Company*, 120 F.3d 14 5 (2d Cir. 1997) (in view of ill health of employee who died eighteen months after retiring, the company retirement planner should have advised the decedent as to the possibility of a lump sum retirement instead of limiting discussion to whether to retire or elect long-term disability); *Bixler v. Central Pennsylvania Teamsters Health and Retirement Fund*, 12 F.3d 1296, 1300 (3d Cir. 1993) (trustee and other plan fiduciaries have “not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.”) (emphasis added); *Krohn v. Huron Memorial Hospital*, 173 F.3d 542 (6th Cir.1999), also held that when the employee asked about one type of long-term benefits, the fiduciary representative was under a duty to disclose all material facts regarding his coverage options.

disclose material information is the core of the fiduciary's responsibility.”  
Indeed, absent such information, the beneficiary may have no reason to suspect  
that it should make inquiry into what may appear to be a routine matter.<sup>16</sup>

(emphasis added).<sup>8</sup>

The common thread running through all of the above cases is that in the employee benefits setting, the fiduciaries who run the benefit plan must do more than avoid making misrepresentations and giving an incorrect answer only when asked. In this case, the CPRB was aware of the problem for years and knew the members were losing their pensions based upon the CPRB’s interpretation of the statute, but it never attempted to communicate that position and the potential consequences to members at large, or attempted to identify those at risk individually. Those failures to act to protect the rights of their beneficiaries was a breach of the CPRB’s fiduciary duty, and was directly responsible for the fact that Ms. Ringel-Williams has lost her pension after 23 years of contributions.

The law provides a remedy for such breaches of fiduciary duty. A trustee may be enjoined from committing a breach of trust, and may be compelled to redress such a breach. Such a trustee is chargeable with any loss to the value of the trust result from such a breach. Restatement (2d) of Trusts §§ 199, 205 (1959).

The CPRB must reinstate her pension credit and allow her to participate in the TRS. Ms.

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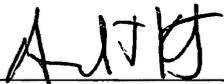
<sup>8</sup>15The following cases, requiring employers to self-report benefit contribution delinquencies directly to their own employees, illustrate the extent of the development of disclosure of the duty to provide employees with the needed facts. Rosen v. Hotel & Restaurant Employees, 637 F.2d 592, 600 (3d Cir.), cert. denied 454 US 898 (1981); McNeese v. Health Plan Marketing, Inc., 647 F.2d.981, 986; Professional Helicopter Pilots Assn v. Denison, 804 F.Supp. 1347, 1452 (M.D. Ala.1992); Dellacava v. Painters Pension Fund, 851 F.2d 22, 27 (2d Cir.1988).

Ringel-Williams should not suffer the forfeiture of her pension because the CPRB failed to act while Ms. Ringel-Williams continued to make contributions for nearly 20 years after the CPRB knew of the problem.

### VIII. CONCLUSION

Appellant's Petition should be granted for the reasons contained herein.

CYNTHIA RINGEL-WILLIAMS  
By Counsel,



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**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**CYNTHIA RINGEL-WILLIAMS,**

**Petitioner-Appellant,**

**vs.**

**Docket No.: 15-0281**

**STATE OF WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD,**

**Respondent-Appellee.**

**CERTIFICATE OF SERVICE**

I, Andrew J. Katz, counsel for Cynthia Ringel-Williams, do hereby certify that I have on the 26<sup>th</sup> day of June, 2015 caused to be served a true copy of an **APPELLANT'S BRIEF** and **JOINT APPENDIX VOLUMES I AND II** via hand delivery to the following individual:

J. Jeaneen Legato, Counsel  
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