IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Docket No. 15-0281

CYNTHIA RINGEL-WILLIAMS,
Petitioner Below, Petitioner

v.

(Kanawha County Circuit Court)
(Civil Action No. 11-AA-28)

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,
Respondent Below, Respondent

Respondent's, West Virginia Consolidated Public Retirement Board's, Brief in Opposition to Petition for Appeal

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I. STATEMENT OF CASE

This is an appeal by Petitioner, Cynthia Ringel-Williams, an employee of the Raleigh County Board of Education, of a decision by the West Virginia Consolidated Public Retirement Board (hereinafter referred to as the "Board") denying her request for service credit in the Teachers Retirement System (hereinafter referred to as TRS) for the years in which she worked three days per week. On January 21, 2011, the Board issued its *Final Order* denying this specific request, but granting Petitioner's other requests to acquire service credit in the Teachers Defined Contribution Plan and to subsequently transfer said credit and assets to the Teachers Retirement System. (A.R. Vol. II, 8). The Board's *Final Order* adopted the recommendations of Hearing Officer Jack W. DeBolt dated January 3, 2011. (A.R. Vol. II, 1-7). On February 27, 2015, the honorable Carrie Webster, Circuit Judge, entered an Order *Affirming* the Board's *Final Order*. (A.R. Vol. II, 9-20). Ms. Ringel-Williams, by counsel, filed this appeal to this honorable Court.

Beginning in 1987, Petitioner was employed by the Raleigh County Board of Education as a physical therapist. She worked three days per week. From January 1987 - June 1992, Petitioner was incorrectly enrolled in the Teachers Retirement System (TRS), a defined benefit plan. In 1992, she chose to switch plans and enrolled in the Teachers Defined Contribution Plan (TDC). She further elected to "freeze" her TRS service credit. In 1999, she transferred all of her TRS service credit into TDC, effective January 2000.

Then, in June 2008 after the passage of new legislation (effective July 1, 2008), she elected to transfer all of her retirement service credit from TDC (the defined contribution plan) back into TRS (the defined benefit plan). During this process, Respondent Board's staff audited her account and determined that she was statutorily ineligible to participate in either retirement system because she only worked three days per week.

Respondent Board's staff had no knowledge that Petitioner had only been working three days per week until 2008 when the audit was performed. (A.R. Vol. I, 29). Although Petitioner's employer reported that she was full time but worked less than 200 days, this was not unusual in that many eligible employees work five days per week but only for a partial year and would have been reported in a similar manner by their employer.

Petitioner requested an administrative appeal of Respondent Board's staff's decision that she was ineligible to participate in either retirement plan. On January 3, 2011, the Respondent Board's Hearing Officer issued an *Amended Recommended Decision* which recommended that her request should be granted in part and denied in part. (A.R. Vol. II, 1-7) The Hearing Officer concluded that TRS statutorily required twenty employment days per month for eligibility, but that TDC did not. Thus, contrary to Respondent Board's staff's decision, he concluded that Petitioner was statutorily eligible to participate in TDC from July 1, 1992 through July 1, 2008; however, she was statutorily ineligible to participate in TRS while working three days per week. (A.R. Vol. II, 6).

Counsel for Petitioner incorrectly asserts that the Respondent Board has denied Petitioner's election to transfer her TDC service credit into and to participate in TRS.[1] Since the time of this initial appeal, there have been many changes. Respondent Board's staff initially determined, based upon their historic practice, policy and interpretation of statutes, that Petitioner was ineligible to participate in either plan, TDC or TRS. (A.R. Vol. I, 12). Pursuant to the Hearing Officer's

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[1] See *Appellant's Brief*, p. 6, opposing counsel incorrectly states that "she is apparently unable to participate in the TRS because her change to full time status was after the transfer deadline." However, the Board did honor her requested transfer from TDC to TRS and she is currently participating in TRS as reflected by her current retirement statement which is attached to this brief as Exhibit A.

Amended Recommended Decision and the Board's *Final Order*, Petitioner was given service credit for the time she participated in TDC, and once she began working five days per week, Respondent Board honored her 2008 election to transfer her service credit from TDC into TRS. Petitioner has been an active participating member of TRS since fiscal year 2010-11 with approximately 13 years of service credit.[2]

Therefore, the only service credit now at issue concerns her employment during the periods of January 1987 - June 1992 and July 2008 - August 2010. During theses periods, she only worked three days per week. Also, it is undisputed that the years at issue have never been credited and do not qualify as full years, but rather as approximately .3 to .6 years of service credit depending on the number of days she worked. Thus, the total service credit now in dispute is approximately 4.879 years. Also, Petitioner is now a member of TRS, a defined benefit plan and her preferred plan.

A breakdown of her service credit is as follows:

!987 - 1992 - erroneously enrolled in TRS due to working 3 days per week
1987 - erroneously enrolled in TRS - .367
1988 - erroneously enrolled in TRS - .594
1989 - erroneously enrolled n TRS - .667
1990 - erroneously enrolled in TRS - .667
1991 - erroneously enrolled in TRS - .583
1992 - erroneously enrolled in TRS - .667

1987-1992 - Total: 3.545 years of service credit (disputed)

1993 - July 1, 2008 correctly enrolled in TDC - 9.015 years
She received approximately .6 years of service credit for each of theses years which is not disputed by either party.

July 1, 2008 - election to transfer from TDC - TRS - 9.015 years of service credit (not disputed)

1993 - 2008 - Total: 9.015 years of service credit (not disputed)

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[2]See attached Exhibit A, Petitioner's current retirement statement.

2008 - 2010 - Post transfer from TDC to TRS but ineligible for TRS due to 3 day work week
2008 - 2009 - .667
2009 - 2010 - .667

Total: 1.334 years of service credit (disputed)

2011 - present - enrolled in TRS - working 5 days per week
2011 - TRS - 1.0 years of service credit
2012 - TRS - 1.0 years of service credit
2013 - TRS - 1.0 years of service credit
2014 - TRS - 1.0 years of service credit

Total: 4 years service credit (not disputed)

TOTAL SERVICE CREDIT:

Current Plan - TRS - (not disputed/Petitioner's desired plan)
Total: 13.015 years of service credit (not disputed)
Total: 4.879 years of service credit (disputed) [1987-1992 & 2008-20110 - 3 day work week]

II. SUMMARY OF ARGUMENT

Until 2011, Petitioner was not eligible to participate in TRS based upon the clear and unambiguous language of W. Va. Code §18-7A-3 which defines "employment term" as "employment for at least ten months, a month being defined as twenty employment days." *W.Va. Code §18-7A-3(11).* During the period of time at issue, Petitioner only worked three (3) days per week, approximately twelve days per month.

However, Petitioner was eligible to participate in TDC from July 1, 1992 through July 1, 2008 because, unlike TRS, the eligibility statute for TDC defines "regularly employed for full-time service" as "employment in a regular position or job throughout the employment term regardless of the number of hours worked or the method of pay". *West Virginia Code §18-7B-2 (16).* On July 1, 2008, she elected to transfer from TDC to TRS; however, she did not become eligible for

participation in TRS until she began working five days per week. She is currently an active contributing member of TRS with approximately 13 years of service credit.[3]

Opposing counsel incorrectly asserts that Respondent Board denied her election to transfer to TRS. Therefore, the retirement estimates he refers to regarding TRS and TDC are no longer relevant. She is a member of TRS and will presumably one day retire from that defined benefit plan.

Additionally, the common law doctrines of equitable estoppel and detrimental reliance are inapplicable to the facts of this case. With respect to detrimental reliance, there must first be a statutory right to a benefit which is taken away after the member has detrimentally relied upon such statutory right. *Booth v. Sims, 193 W.Va. 323, 456 S.E.2d 167 (1994).* This Court in *Summers* ruled that "*Booth* concerned substantive amendments to existing provisions governing the state troopers' pension system.... In other words promises of future benefits were actually altered. In contrast, in the instant case the Teachers' Retirement System pension plan never contained [such] a provision. Thus, unlike in *Booth*, the Teachers' Retirement System had not made a promise on which the teachers relied. Therefore, the detrimental reliance principle set forth in *Booth* is not applicable to the present facts." *Summers v. WV Consolidated Public Retirement Board, 618 S.E.2d 408,413 (2005)* (*Court quoting the Hearing Examiner).* In this case, Petitioner did not have a statutory right to participate in TRS while she was working three days per week.

With respect to the doctrine of equitable estoppel, this honorable Court in *West Virginia Consolidated Public Retirement Board v. Jones,* 233 W.Va. 681, 760 S.E.2d 495 (2014) recently issued an opinion in a case involving the same issue and a similar statute involving the Public Employees Retirement System (PERS).

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[3]See attached Exhibit A, Petitioner's, current retirement statement.

In *Reversing and Remanding* the Circuit Court's Order, the Supreme Court held that the Respondent Board was not estopped from denying Petitioner's participation in PERS due to his employer's misrepresentations regarding his eligibility, and further that an employer's error cannot "modify or amend the statutory requirements for PERS eligibility." (A.R. 359). With respect to the *Hudkins* decision relied upon by opposing counsel in his brief, the Court stated "this Court's 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." "**We deem it neither legally sound nor prudent to expand our holding in *Hudkins* to apply in circumstances regarding a public employer's false representation to an employee that he or she is eligible to participate in PERS**." *Id. at 505.*

Strikingly similar to the *Jones* case, in this case it was Petitioner's employer who made the misrepresentation regarding her statutory eligibility for participation in TRS to both Petitioner and the Board. Additionally, the Board was not aware of the misrepresentation until an audit of Petitioner's account was performed, and the Board has always interpreted the eligibility statutes for participation in the Teachers Retirement System (TRS) as requiring employment for two hundred days, ten months per year, with twenty days per month.

Therefore, the statute, West Virginia Code §18-7A-3(11), unequivocally requires a five day work week for eligibility to participate in TRS. Detrimental reliance is not relevant to the facts of this case because neither the Board or Legislature has altered or taken away any of Petitioner's rights. Additionally, the doctrine of equitable estoppel is inapplicable because it was her employer who made the misrepresentation regarding her eligibility rather than the Board. Wherefore, the Respondent Board respectfully requests that this honorable Court affirm the lower Court's Order.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If the Court determines that oral argument is necessary, then this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

IV. STANDARD OF REVIEW

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo;* findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996).*

The West Virginia Administrative Procedures Act governs the review of contested administrative decisions and issues by a court and specifically provides that:

> (g) The Court may affirm the ...decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the...decision of the agency if the substantial rights of the petitioner...have been prejudiced because the administrative...decisions are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> West Virginia Code §29A-5-4.

In the absence of an error of law, factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or "arbitrary and capricious." See, e.g. *Healy v. West Virginia Bd. of Medicine*, 506 S.E. 2d 89, 92 (W.Va. 1998).

Under the arbitrary and capricious standard, a circuit court which is reviewing the factual findings of an administrative agency must "not substitute its judgment for that of the hearing examiner." *Woo v. Putnam County Board of Education*, 504 S.E. 2d 644, 646 (W.Va. 1998).

Legal issues, such as statutory and regulatory interpretation, are legal matters which are subject to *de novo* review. Id.

As to judicial review of an administrative agency's interpretations of these statutes must be given substantial deference. *Sniffen*, citing *WV Department of Health v. Blankenship*, 189 W. Va. 342, 431 S. E. 2d 681 (1993); *WV Non-Intoxicating Beer Commr' v. A&H Tavern*, 181 W.Va. 364, 382 S. E. 2d 558 (1989); *Dillon v. Board of Educ.*, 171 W.Va. 631, 301 S. E. 2d 588 (1983); *Smith v. State Workmen's Comp. Comm'r.*, 159 W.Va. 108, 219 S. E. 2d 361 (1975).

This Court may not confer retirement benefits for employment where the legislature has not so authorized. See *Cain v. PERS*, 197 W.Va. 514, 476 S.E.2d 185 (1996). The rule of statutory construction to liberally construe a remedial statute to the benefit of the beneficiaries of the statute does not operate to confer a benefit where none is intended. *Id.*

V. ARGUMENT

Respondent Board responds to the assignments of error as follows:

A. Until 2009, Petitioner was not eligible to participate in TRS based upon the clear and unambiguous language of W. Va. Code §18-7A-3; however, she was eligible to participate in TDC from July 1, 1992 - July 1, 2008, and to subsequently transfer to TRS.

West Virginia Code §18-7A-3 governs the eligibility for participation in the Teachers Retirement System (TRS) and defines the relevant terms to this issue as follows:

(18) "Nonteaching member" means any person, except a teacher member, who is **regularly employed for full-time service** by: (A) Any county board of education; (B) the State Board of Education; (C) the Higher Education Policy Commission; (D) the West Virginia Council for Community and Technical College Education; or (E) a governing board, as defined in section two, article one, chapter eighteen-b of this code: *Provided,* That any person whose employment with the Higher Education Policy Commission, the West Virginia Council for Community and Technical College Education or a governing board commences on or after July 1, 1991, is not considered a nonteaching member.

(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.

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

These definitions have been in effect and unamended since 1986, the same year Petitioner began her employment. The statute is clear and unambiguous. The Hearing Officer concluded as follows:

> "Reading these three definitions together, the language of § 18-7A-3 becomes clear, unambiguous and not subject to interpretation. This language has endured to date. One must have, as a minimum, what is commonly referred to as a 200-day contract. The Applicant did not. It is concluded that Applicant's three-day-per-week job failed to meet the definitions and that she was ineligible to participate in TRS from the inception of her regular employment in January, 1987, to July 1, 1992, when she began participation in TDC, as well as the period from July 1, 2008 through October, 2009, when she had ostensibly become a member of TRS through the merger process from TDC." (A.R. Vol. II, 4).[4]

Opposing counsel's brief argues various rules of statutory construction; however, if the

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The Hearing Officer, based upon Petitioner's testimony, found that she "ostensibly became a member of TRS" in October, 2009; however, her employer's verification of service indicates that she began working five days per week in August, 2010 at which time she became eligible for TRS service credit. *See attached Exhibit B, Employer Verification.*

statute is plain and unambiguous, then there is nothing to construct. When deciding a case of statutory interpretation, the Court first examines the language employed by the Legislature. "We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't, 195 W.Va.* at 587, 466 S.E.2d at 438. Thus, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). Accord Syl. pt. 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997) ("'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. Pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951)."). See also Sizemore v. State Farm Gen. Ins. Co., 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) ("'A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.'" (quoting Hereford v. Meek, 132 W.Va. 373, 386, 52 S.E.2d 740, 747 (1949))).

This TRS statute, W.Va. Code §18-7A-3(11), clearly requires an individual to work twenty (20) days per month. The Legislature could have chosen an hour-based criterion but it did not. Even though others may work five days per week but less hours than Petitioner and be eligible to participate, it still does not change the clear mandates of the statute. Additionally, Deputy Director, Terasa Miller, testified that it had always been the Board's staff's interpretation "that you had to work two hundred days, ten months a year, with twenty days per month to participate in both systems." (A.R. Vol. I, 12).

However, the Hearing Officer and Board found that TDC and TRS are two separate and distinct retirement plans with different statutory eligibility requirements. TRS is administered pursuant to W.Va. Code §18-7A- *et al,* and TDC is administered pursuant to W.Va. Code §18-7B- *et al.*

Eligibility to participate in TDC is governed by W. Va. Code §18-7B-2(11)(K) which defines "member" or "employee" as "any person who is regularly employed for full-time service by any county board of education or the State Board of Education..". West Virginia Code §18-7B-2 (16) defines "regularly employed for full-time service" as "employment in a regular position or job throughout the employment term regardless of the number of hours worked or the method of pay;".

Unlike TRS which requires ten months/twenty employment days for eligibility, TDC does not define "employment term". Therefore, the Petitioner was statutorily eligible to participate in TDC for the years in which she was a member of TDC from July 1, 1992 - July 1, 2008. Additionally, opposing counsel is incorrect when he asserts that the Board has in some manner voided Petitioner's 2008 election to transfer her assets from TDC to TRS. As reflected in the attached Exhibit A, Petitioner's retirement statement, the Petitioner is currently an actively contributing member of TRS and has been since she became employed on a five day per week basis.

As a member of TRS, as opposed to TDC, Petitioner's retirement, when she becomes eligible, will be a calculation based upon her final average salary times her years of service times two percent. *W.Va. Code §18-7A-26.* Whereas, a TDC retirement is speculative because it is based upon the earnings made from the investment of contributions. Therefore, the estimated retirement annuity amounts referred to in opposing counsel's brief for the two plans are not only inaccurate, but also no longer relevant now that Petitioner will be retiring from her desired defined benefit plan (TRS)

rather than the defined contribution plan (TDC).[5]

Furthermore, the *Andre* case cited by opposing counsel in his brief, is a Circuit Court opinion regarding a legal malpractice case and carries no precedential weight. The Respondent Board was not a party in that case and was not afforded the opportunity to present its position.

B. Respondent Board is not bound on the basis of estoppel for the misrepresentations made by Petitioner's employer.

The common law doctrines of equitable estoppel and detrimental reliance are inapplicable to the facts of this case. It is important to note that of the 4.879 years of service credit in dispute, 3.545 of those years occurred during the years of 1987-1992. The Respondent Board did not exist until 1991. *W.Va. Code § 5-10D-1 (statutorily authorized in 1990).* The remaining service credit of 1.334 years in dispute occurred during the years of 2008-2010. Deputy Director, Terasa Miller, testified that "back in 2008, during the audit, is the first time that our staff was aware that she was only working a hundred and twenty days per year." (A.R. Vol. I, 29). Additionally, former Executive Director of Respondent Board notified Petitioner in October of 2009 that the auditors had found that her "employer had incorrectly enrolled" her in the retirement system and further that her employer had "regularly certified her as a full time employee and that is also not correct according to the audit." (A.R. Vol. I, 130).

The record reflects that it was Petitioner's employer who erroneously enrolled Petitioner in TRS and incorrectly certified to the Respondent Board that she was a full time employee when she was only working three days per week. Petitioner did not receive any incorrect information from the

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[5]See Appellant's brief p. 7.

Respondent Board, and it has always been the Board's staff's interpretation "that you had to work two hundred days, ten months a year, with twenty days per month to participate in both systems." (A.R. Vol. I, 12 *quoting Deputy Director Terasa Miller*).

There are approximately 36,000 active members of TRS and approximately 32,000 retired members of TRS. It is not possible for approximately a dozen employees to analyze 68,000 accounts in addition to their other responsibilities. Respondent Board must rely upon the information sent by employers regarding eligibility. Although Petitioner's employer reported that she was full time but worked less than 200 days, this would not have been a red flag to the Board because it is not unusual in that many eligible employees work five days per week but only for a partial year and would have been reported in a similar manner by their employer.

The facts of this case closely resemble the facts in a case recently decided by this honorable Court. In *W.V. Consol. Pub. Ret. Bd v. Jones (2014),* this Court ruled that the Respondent Board was not estopped from denying Petitioner's participation in PERS due to his employer's misrepresentations regarding his eligibility.[6]

In *Jones*, the employer sought the services of what they deemed to be a "full time" attorney eligible for participation in PERS. In November of 2010, after Mr. Jones and his employer had made timely payments into PERS for almost nine years and he had presumably vested, Respondent Board notified him that they intended to refund those contributions because he was ineligible to participate in PERS because he was not a full time employee as required and defined by statute. The Circuit Court held that the Respondent Board was equitably estopped from denying Mr. Jones'

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[6] *West Virginia Consolidated Public Retirement Board v. Jones,* 233 W.Va. 681, 760 S.E.2d 495 (2014).

participation in PERS due to his reliance on his employer's misrepresentation regarding his eligibility.

In *Reversing* the Circuit Court, the Supreme Court held that an employer's error cannot "modify or amend the statutory requirements for PERS eligibility." *Id. at p.506.* With respect to the *Hudkins* decision relied upon by opposing counsel in his brief, the Court stated "this Court's 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." "**We deem it neither legally sound nor prudent to expand our holding in *Hudkins* to apply in circumstances regarding a public employer's false representation to an employee that he or she is eligible to participate in PERS**." *Id. at p.506.*

In *Hudkins,* it was the Retirement Board who not only gave Ms. Hudkins the incorrect information, but had also reversed its own practice and position with respect to granting retirement credit for unused leave. Ms. Hudkins relied upon the Board's misrepresentation in deciding to retire, and she was already in retirement status when the Board reversed its own practice and position.

In this case, despite opposing counsel's assertions in his brief, the record reflects that Petitioner and her employer never contacted the Board for guidance as to her eligibility to participate in TRS. Unlike the Board's actions in *Hudkins,* the Board in this case did not make any misrepresentations to Petitioner, and the Board has never taken the position or had the practice of permitting individuals who work less than five days per week to participate in TRS. (A.R. Vol. I, p. 12 & 29).

Additionally, the first element of estoppel is that there be a misrepresentation of fact. The

misrepresentation made by Petitioner's employer regarding her statutory eligibility to participate in TRS is a misrepresentation of law rather than fact. The doctrine of equitable estoppel is not applicable to misrepresentations of law. *WV Consol. Pub. Ret. Bd. v. Carter, Trembush*, 633 S.E.2d 521, 531.

Furthermore, equitable estoppel has consistently been limited in its applicability to state entities. See, e.g., *Bradley v. Williams*, 465 S.E.2d 180 (W. Va 1995); *McFillian v. Berkeley County Planning Commission*, 438 S.E.2d 801 (W. Va. 1993); *Samsell v. State Line Development Co.*, 174 S.E.2d 318 (W. Va. 1970); *Cawley v. Board of Trustees of Firemen's Pension Fund of Beckley*, 76 S.E.2d 683 (W. Va. 1953). West Virginia's Supreme Court of Appeals recognized that "an estoppel may **not** be invoked against a government unit when functioning in its governmental capacity." *Samsell*, 174 S.E.2d at 325. Moreover, the Court held, "all persons must take note of the legal limitations upon [state officers'] power and authority," and that "this Court has stated many times that the state and its political subdivisions are not bound, on the basis of estoppel, by the *ultra vires* or legally authorized acts of its officers in the performance of government functions." *Id.* at 325, 326.

In *Samsell*, the Court recognized that equitable estoppel may, in very limited circumstances, be applied to the state "when acting in a proprietary capacity, as distinguished from a governmental capacity." *Id.* at 326. Assuming without deciding that the state officers in question in that case were acting in a proprietary rather than governmental capacity, the Court concluded that equitable estoppel could **not** be properly applied under the facts of that case. In this case, the Board is clearly acting in a governmental capacity, so estoppel cannot be applied.

In *McFillian*, the Supreme Court again noted the distinction which must be made when a

government entity is acting in a government rather than proprietary capacity. *McFillian*, 438 S.E.2d at 808. When acting in a governmental capacity, a state entity "is **not** subject to the law of equitable estoppel." *Id.* (Emphasis supplied). The Court noted that a governmental entity acts in a governmental capacity when "the act performed is for the common benefit of the public" rather than for the special benefit or profit of the entity. *Id.*

Here, it is clear that the Board has, in its capacity as administrator of the various state retirement systems, acted in a governmental rather than proprietary capacity. The Board and its members have the "highest fiduciary duty to maintain the terms of the [..TRS] trust, as spelled out in the statute." State ex rel. Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988). As a federally qualified pension plan, it is incumbent upon the Board, as part of its fiduciary duty, to ensure that the plan is administered according to its terms, for the exclusive benefit of all plan participants and beneficiaries, in order to protect and preserve the plan's qualified tax status. See IRC 401(a); W. Va. Code §5-10-3a. Such a duty encompasses the duty to maintain the integrity and credibility of the plan. Consequently, and under the prevailing law of this state, the doctrine of equitable estoppel cannot properly be applied here.

This Court has also recognized that the Board has the authority to correct mistakes **only** when the individual had a **statutory right** to the relief requested. *Flanigan v. West Virginia Public Employees' Retirement System*, 342 S.E.2d 414.

Flanigan *is distinguished from this case because* Flanigan *had a statutory right to the relief* he requested, but because of his employer's mistake he was deprived of this right. The Court in *Flanigan*, citing §5-10-44 of the West Virginia Code, found that Respondent was required to provide

Petitioner with retroactive enrollment in order to correct the mistake that had been made. *Id.* at 420.

In a similar manner, counsel for petitioner also inaccurately cites *Booth v. Sims* for the proposition that Petitioner has a constitutionally protected property and contractual right to the remedy she seeks by virtue of having detrimentally relied upon the action and/or inactions of her employer and Respondent Board. *Booth v. Sims*, 456 S.E.2d 167 (W.Va. 1994)

In analyzing a detrimental reliance argument, the Court in *Summers v. WV Consolidated Public Retirement Board* affirmed Respondent Board's Hearing Officer's interpretation of *Booth* and held as follows:

> "Booth principally stands for the proposition that government cannot take away contractual promise of pension benefits after an employee has relied thereon to his detriment, such detrimental reliance being presumed after ten years of service..... That which is lacking in the present circumstance, at least, is the contractual promise as enunciated by the statutes and Legislative rules... There just has never been such a promise upon which these applicants could have relied. (*Court quoting the Hearing Examiner).*
>
> *Booth* concerned substantive amendments to existing provisions governing the state troopers' pension system.... In other words promises of future benefits were actually altered. In contrast, in the instant case the Teachers' Retirement System pension plan never contained [such] a provision. Thus, unlike in *Booth*, the Teachers' Retirement System had not made a promise on which the teachers relied. Therefore, the detrimental reliance principle set forth in *Booth* is not applicable to the present facts." *Summers v. WV Consolidated Public Retirement Board*, 618 S.E.2d 408, 413 (2005).

Booth cannot rationally be expanded to include conferring constitutionally protected property rights where none statutorily existed. The issue in *Booth* was whether the legislature could amend an active employee's pension plan without unconstitutionally impairing the obligations of contract. *Id.* at 177. The Court's analysis centered on the concept that when a legislature creates a pension system and an employee for a number of years relies upon that "promise" of deferred payment, a

contract is formed and the employee acquires a constitutionally protected property interest.

In this case, the legislature never promised the Petitioner anything. To the contrary, the statute unequivocally states "at least ten months, a month being defined as twenty employment days". *W. Va. §18-7A-3(11).* The statute in essence becomes the contract between the state and the potential employee.

Petitioner in this case does not have a statutory right to her request. Respondent Board cannot give Petitioner a statutory right that does not exist, and Petitioner cannot detrimentally rely upon a right that never existed.

Therefore, the doctrine of detrimental reliance is not relevant to the facts of this case because neither the Board or Legislature has altered or taken away any of Petitioner's rights. Additionally, the doctrine of equitable estoppel is inapplicable because it was her employer who made the misrepresentation regarding her eligibility rather than the Board, and the misrepresentation was one of law rather than fact.

C. Any action contrary to statute violates Respondent Board's fiduciary duty to the fund and its members.

Pursuant to West Virginia Code §5-10D-1(g), the West Virginia Consolidated Public Retirement Board is a trustee for all public retirement plans. As such, it occupies a fiduciary position with respect to the members of all retirement systems and the funds it is charged with administering.

As fiduciaries of the plans it administers and as required by federal plan qualification requirements, the Board must apply the terms of the plans for the exclusive benefit of all participants and beneficiaries according to plan terms. Permitting the Petitioner to participate in a retirement plan in which she is not statutorily eligible to participate in is contrary to the explicit mandate of the

statute and violates the Board's fiduciary duty to all participants in the retirement plan.

The underlying issue in this case is whether a state agency, West Virginia Consolidated Public Retirement Board, has the authority or discretion to act contrary to the directives of a clear and unambiguous statute.

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." *McDaniel v. WV Division of Labor,* Syllabus Point 4, 214 W.Va. 719; 519 S.E.2d 277 (2003).

Additionally, the Court will not confer retirement benefits for employment where the legislature has not so authorized. *Cain v. PERS,* 197 W.Va. 514, 476 S.E.2d 185 (1996). The rule of statutory construction to liberally construe a remedial statute to the benefit of the beneficiaries of the statute does not operate to confer a benefit where none is intended. *Id.* at fn 9.

The Respondent Board, as an administrative agency, must faithfully carry out the mandates of the statute with respect to the retirement plans it is charged with administering. The Board is without any power to supplant its views of fairness and equity in place of the will and intent of the Legislature. *Appalachian Regional Healthcare, Inc. v. WV Human Rights Commission*, 180 W.Va. 303, 376 S.E.2d 317 (1988) (an administrative agency's power is solely a creature of statute and thus it must arrive any authority claimed from legislative enactment. It has no common law power but only that power conferred by law, expressly or by implication); *State Human Rights Commission v. Pauley*, 158 W.Va. 459, 212 S.E.2d 77 (1975) (an administrative agency can exert only such powers

as those granted by the legislature and if it exceeds its statutory power its actions may be nullified by a court); 2 Am.Jur. 2d *Administrative Law* §77 (an agency cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power).

In this case, the statute is clear and unambiguous. By having worked only three days per week until 2011, Petitioner cannot meet the TRS eligibility definitions contained within West Virginia Code §18-7A-3.

To permit employers to bind the state and Respondent Board with *ulra vires* promises regarding pension benefits would have catastrophic implications for public pensions and be contrary to statute and long standing common law. TRS has tens of thousands of active and retired members who are all governed by the same statutory provisions for the protection of the fund. Employers do not have the authority to bestow something that is contrary to those legislative mandates.

Wherefore, the Board does have a fiduciary duty to the members of the plans it administers; however, the Board does not have a fiduciary duty to nonmembers. A person who does not meet the statutory eligibility requirements for participation in the plan is not a member of the plan. Permitting participation that is contrary to the explicit mandate of a statute would be a violation of the Board's fiduciary duty to the plan and its members. Additionally, the cases relied upon by opposing counsel to support his breach of fiduciary duty claim are all out of state cases involving private corporations governed by ERISA which are inapplicable to governmental plans and this case.

VI. CONCLUSION

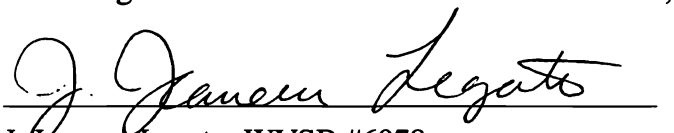
Opposing counsel's brief implies that the Board has taken 23 years of service credit away

from Petitioner. This is not accurate. There are 4.879 years of service credit at issue in this case. Also, the Petitioner was able to transfer her assets from TDC into TRS, and is currently an actively participating member of that plan.

The statute, West Virginia Code §18-7A-3(11), unequivocally requires a five day work week for eligibility to participate in TRS. The common law doctrines of detrimental reliance and equitable estoppel are inapplicable to the facts of this case. The doctrine of detrimental reliance is inapplicable because neither the Board or Legislature has altered or taken away any of Petitioner's rights. The doctrine of equitable estoppel is inapplicable because it was her employer who made the misrepresentation regarding her eligibility rather than the Board, and the misrepresentation was one of law rather than fact. Additionally, the Board has a fiduciary duty to faithfully carry out the mandates of the statute with respect to the retirement plans it is charged with administering, and as a fiduciary lacks the authority to act contrary to those mandates.

Wherefore, Respondent Board prays that this honorable Court will affirm the Circuit Court's *Final Order.*

RESPECTFULLY SUBMITTED,
West Virginia Consolidated Pubic Retirement Board,

By Counsel : 

J. Jeaneen Legato, WVSB #6978
West Virginia Consolidated Public Retirement Board
4101 MacCorkle Ave. S.E.
Charleston, West Virginia 25304
Phone (304) 957-3522 Facsimile (304) 558-6337
Cell (304) 549-8488
Email: Jeaneen.J.Legato@wv.gov

Exhibit A

REPORT DATE: 07/28/2015

CONSOLIDATED PUBLIC RETIREMENT BOARD
4101 MACCORKLE AVENUE S E
CHARLESTON WV 25304
(304) 558-3570
1-800-654-4406

FROM: VICTORIA SUTTON

WV TEACHERS' RETIREMENT SYSTEM

* * * S T A T E M E N T * * *

CONTRIBUTIONS & INTEREST

PRESENT EMPLOYER: RALEIGH CO.

RINGEL WILLIAMS CINDY M STATUS: A BIRTH DATE:

FISCAL YEAR	EMPLOYER	CONTRIBUTION TYPE	CONTRIBUTIONS TAXABLE	CONTRIBUTIONS NON-TAXABLE	INTEREST	SERVICE	FISCAL SALARY
2010	0041	RD-25% TDC SERVICE ROLLOVER	11,589.16		463.57	2.254	
2011	0041	TC-TAXABLE CONTRIBUTION	3,444.80		619.90	1.000	57,412.00
2012	0041	TC-TAXABLE CONTRIBUTION	3,602.20		788.79	1.000	60,038.00
2013	0041	TC-TAXABLE CONTRIBUTION	3,598.26		964.27	1.000	59,970.24
2014	0041	TC-TAXABLE CONTRIBUTION	3,680.06		1,150.04	1.000	61,334.57
2015		IC-INTEREST COMPUTED			1,196.04		
		TRS TRANSACTION TOTALS:	25,914.48	.00	5,182.61	6.254	

TDC EMPLOYEE CONTRIBUTIONS TRANSFERRED IN 2008: 46,078.68 75% TDC SERVICE: 6.761

ACCOUNT SUB-TOTALS: 71,993.16 .00 5,182.61

TOTAL ACCOUNT BALANCE AS OF 6/30/2015 77,175.77 TOTAL SERVICE 13.015

If you believe any of the information reported on this statement to be inaccurate, please return a copy with changes noted. Be certain to include your address and a daytime phone number that we may contact you. For additional information or questions you may also want to visit our website at: www.wvretirement.com

* * * ALL INFORMATION SUBJECT TO AUDIT * * *

SSN: Name: CINDY RINGEL WILLIAMS Participant Web Site

General Info. | Transaction History | Transaction History | Fees | Loan Info. | **Vesting Info.** | Acct. Balance | Bene

Period Begin Date	Period End Date	YTD Credited Hours	YTD Credited Hours Excluded	Service Years	Effective Date	Process Date	Total Comp.	Plan Comp.	Section 125 Contributions
07/01/2008	06/30/2009		N						
07/01/2007	06/30/2008	120.00	N	0.600					
07/01/2006	06/30/2007	120.00	N	0.600	06/30/2007	09/10/2007	32,494.80		
07/01/2005	06/30/2006	120.00	N	0.600	06/30/2006	09/20/2006			
07/01/2004	06/30/2005	120.00	N	0.600	06/30/2005	09/21/2005			
07/01/2003	06/30/2004	120.00	N	0.600	06/30/2004	10/12/2004			
07/01/2002	06/30/2003	120.00	N	4.140	06/30/2003	09/27/2004			
07/01/2001	06/30/2002	120.00	N	0.600	06/30/2002	09/25/2004			
07/01/2000	06/30/2001	120.00	N	0.600	06/30/2001	09/25/2004			
07/01/1999	06/30/2000	119.00	N	0.595	06/30/2000	09/25/2004			
07/01/1998	06/30/1999	120.00	N	0.600	06/30/1999	09/25/2004			
07/01/1997	06/30/1998	119.00	N	0.595	06/30/1998	09/25/2004			
07/01/1996	06/30/1997	120.00	N	0.600	06/30/1997	09/25/2004			
07/01/1995	06/30/1996	119.00	N	0.595	06/30/1996	09/25/2004			
07/01/1994	06/30/1995	6.00	N	0.030	06/30/1995	09/25/2004			
07/01/1993	06/30/1994	120.00	N	0.600	06/30/1994	09/25/2004			
07/01/1992	06/30/1993	120.00	N	0.600	06/30/1993	09/25/2004			
07/01/1991	06/30/1992	0.00	N	0.000	06/30/1992	09/25/2004			

1987-92
3.545 DB Svc
.600 TDC Svc

Total Service Years = ~~11.955~~ 11.960 Computation Period: Plan year

Total verified Svc through 6/30/07

Change Current Period Vesting

KLH
6/17/08

Total service = 11.960
+ 2008 service = .6
- 1987-1992 = -3.545

Total Service = 9.015

* * * P R O F I L E * * *

REPORT DATE 01/27/00

CONTRIBUTIONS & INTEREST
THROUGH LAST ANNUAL REPORT

TERMINATION DATE: 07/01/1992
THRU JUNE 30 OF FISCAL

PRESENT EMPLOYER: RALEIGH CO.

MEMBERSHIP-DATE: 11/01/1984

RINGEL-WILLIAMS CYNTHIA M STATUS: F IMPORTANT NOTE: BIRTH DATE:

FISCAL YEAR	EMPLOYER	CONTRIBUTION TYPE	CONTRIBUTIONS TAXABLE	CONTRIBUTIONS NON-TAXABLE	INTEREST	SERVICE	FISCAL SALARY
1987	0041	AA-STANDARD CONTRIBUTION	825.00		24.75	.367	13,750.00
1988	0041	AA-STANDARD CONTRIBUTION	1,345.25		65.85	.594	22,420.48
1989	0041	AA-STANDARD CONTRIBUTION	1,500.00		112.83	.667	25,000.00
1990	0041	AA-STANDARD CONTRIBUTION	1,555.78		162.88	.667	25,929.40
1991	0041	AA-STANDARD CONTRIBUTION	1,375.50		209.04	.583	22,925.00
1992	0041	AA-STANDARD CONTRIBUTION	1,608.00		263.55	.667	26,800.00
1993		AZ-INTEREST COMPUTED			271.45		
1994		AZ-INTEREST COMPUTED			279.60		
1995		AZ-INTEREST COMPUTED			287.98		
1996		AZ-INTEREST COMPUTED			296.62		
1997		AZ-INTEREST COMPUTED			305.52		
		SUB-TOTALS	8,209.53	.00	2,280.07	3.545	

U N V E R I F I E D REFUNDABLE BALANCE 10,489.60 TOTAL SERVICE 3.545

AFFADAVIT OF RECORDS CUSTODIAN CERTIFYING RECORDS

STATE OF WEST VIRGINIA)
)
COUNTY OF KANAWHA)

Victoria Sutton having first been duly sworn according to law, makes oath upon her personal knowledge as follows:

1. I, Victoria Sutton, am the duly authorized custodian of the records for West Virginia Consolidated Public Retirement Board, and in such capacity, I have authority to certify the attached records.

2. The attached records are true copies of original records maintained by West Virginia Consolidated Public Retirement Board regarding the account of Cynthia Ringel-Williams.

3. The attached records were kept in the course of the regularly conducted business activity of West Virginia Consolidated Public Retirement Board and were prepared as a regular practice and custom of this agency.

4. The attached records were prepared by the personnel of West Virginia Consolidated Public Retirement Board in the ordinary course of business at or near the time of the act, condition, diagnosis or event reported thereon, and by a person or persons with knowledge of and a business duty to record or transmit those matters.

AND FURTHER AFFIANT SAITH NOT.

Victoria Sutton

AFFIANT

Victoria Sutton, Manager
Teachers Retirement System
WV Consolidated Public Retirement Board
(304) 558-3570 ext. 52428

Sworn and subscribed to before me

This 3RD day of AUGUST, 2015.

Dan Morris

Dan Morris, Notary Public

My commission expires: 10-26-16

OFFICIAL SEAL - NOTARY PUBLIC
STATE OF WEST VIRGINIA
Dan Morris
WV Consolidated Public Retirement Board
4101 MacCorkle Avenue, SE
Charleston, WV 25304
My Commission Expires October 26, 2016

Exhibit B

State of West Virginia
Consolidated Public Retirement Board
4101 MacCorkle Avenue SE, Charleston, West Virginia 25304-1636
Telephone: (304) 558-3570 or (800) 654-4406 Fax: (304) 558-1394
CPRB@wvretirement.com **www.wvretirement.com**

TEACHERS DEFINED BENEFIT SYSTEM
VERIFICATION OF MEMBERS EXPERIENCE

Please complete this form in its entirety. This information will be used to make a determination regarding the account of the member below:

Name: ____ Cindy M Ringel Williams ____ DOH 01-05-87

SSN: ____

Payroll Loc: ____ Raleigh 41

Fiscal Year	Position	Status of Employment	Contract Months	Days Worked	Total Earnings	Retirement Deducted
Example: 1978-79	*Teacher*	*Full-time*	*10*	*165*	*21,236.45*	*1,274.19*
2008-09	Physical Therapist	60% Contract	10	120	34117.20	2047.00
2009-10	Physical Therapist	60% Contract	10	120	34297.20	2057.80

I do solemnly swear that the above information is a true copy of the contributory records of the above named individual for the years listed with this employer.

By: Sandy Moye (Signature of Payroll Administrator) Date: 7-28-15

Title: Acct. Pay. Supervisor

Telephone Number and Extension: 304 256 4500 ext 3313

S:/forms/Form H

AFFADAVIT OF RECORDS CUSTODIAN CERTIFYING RECORDS

STATE OF WEST VIRGINIA)
)
COUNTY OF KANAWHA)

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AND FURTHER AFFIANT SAITH NOT.

Victoria L. Sutton

AFFIANT

Victoria Sutton, Manager
Teachers Retirement System
WV Consolidated Public Retirement Board
(304) 558-3570 ext. 52428

Sworn and subscribed to before me

This 3RD day of AUGUST, 2015.

Dan Morris

Dan Morris, Notary Public

My commission expires: 10-26-16

OFFICIAL SEAL - NOTARY PUBLIC
STATE OF WEST VIRGINIA
Dan Morris
WV Consolidated Public Retirement Board
4101 MacCorkle Avenue, SE
Charleston, WV 25304
My Commission Expires October 26, 2016

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0281

CYNTHIA RINGEL-WILLIAMS,
Petitioner Below, Petitioner

v.

(Kanawha County Circuit Court)
(Civil Action No. 11-AA-28)

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,
Respondent Below, Respondent

CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, counsel to the West Virginia Consolidated Public Retirement Board, do hereby certify that *Respondent's, West Virginia Consolidated Public Retirement Board's, Brief in Opposition to Petition for Appeal*, filed herein on this 3rd day of August 2015, was forwarded to counsel for Petitioner by U.S. Mail with proper postage affixed on the same day of said filing, and further certify that same was mailed to the following address:

Andrew J. Katz, Esq.
The Katz Working Families' Law Firm
The Security Bldg, Suite 1106
100 Capitol Street
Charleston, WV 25301

Respectfully Submitted,
WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD

BY: J. Jeaneen Legato

J. Jeaneen Legato, Esq. (WV Bar #6978)
Counsel to the Board
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