

11-0243

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BOARDS OF EDUCATION OF THE COUNTIES OF:

BARBOUR, BERKELEY, BOONE,
BRAXTON, BROOKE, CABELL, CALHOUN, CLAY,
DODDRIDGE, FAYETTE, GILMER, GREENBRIER, HAMPSHIRE,
HANCOCK, HARDY, HARRISON, JACKSON, JEFFERSON,
KANAWHA, LEWIS, LINCOLN, LOGAN, MARION,
MARSHALL, MASON, MCDOWELL, MERCER, MINERAL,
MONONGALIA, MONROE, MORGAN, NICHOLAS,
PENDLETON, PLEASANTS, POCAHONTAS, PUTNAM,
RALEIGH, RANDOLPH, RITCHIE, ROANE, SUMMERS,
TAYLOR, TUCKER, TYLER, UPSHUR, WEBSTER, WETZEL, WIRT, WOOD,
and WYOMING,

Plaintiffs,

v.

CIVIL ACTION NO.: 10-C-327
JUDGE TOD J. KAUFMAN

PUBLIC EMPLOYEES INSURANCE AGENCY,
PUBLIC EMPLOYEES INSURANCE AGENCY
FINANCE BOARD, and WEST VIRGINIA STATE AUDITOR,

Defendants.

DEFENDANTS' PROPOSED
FINAL ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

This matter is a declaratory judgment action brought pursuant to the Uniform Declaratory Judgments Act, West Virginia Code § 5-13-1, *et seq.* Pending before the Court is Defendants' *Motion to Dismiss with Prejudice*. On the 18th day of August, 2010, the Defendants, represented by Herschel H. Rose, III and Steven R Broadwater, their counsel, and the Plaintiffs, represented by Andrew G. Fusco and Jill F. Hall, their counsel, appeared before this Court and presented oral arguments to this Court. Having considered carefully the arguments and authorities in the Defendants' *Motion to Dismiss with Prejudice*, the Defendants' *Memorandum of Law in Support*

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KANAWHA COUNTY CIRCUIT COURT
TOD J. KAUFMAN, CLERK

of Their Motion to Dismiss with Prejudice, and the Plaintiffs' Response to Defendants' Motion to Dismiss, as well as the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Article XII, Section 1, of the Constitution of West Virginia provides: "*The Legislature shall provide, by general law, for a thorough and efficient system of free schools*" (emphasis added).

2. Article XII, Section 5, of the Constitution of West Virginia provides: "*The Legislature shall provide for the support of free schools by appropriating thereto the interest of the invested "School Fund," the net proceeds of all forfeitures and fines accruing to this state under the laws thereof and by general taxation of persons and property or otherwise. It shall also provide for raising in each county or district, by the authority of the people thereof, such a proportion of the amount required for the support of free schools therein as shall be prescribed by general laws*" (emphasis added).

3. Since at least 1986 (see Acts 1986 c. 141), the W. Va. Code has made employers and employees responsible for paying the costs of health and other insurance premiums. W. Va. Code § 5-16-13(a) now provides that "[t]he [PEIA] director shall provide under any contract or contracts entered into under the provisions of this article that the costs of any group hospital and surgical insurance, group major medical insurance, group prescription drug insurance, group life and accidental death insurance benefit plan or plans *shall be paid by the employer and employee*" (emphasis added).

4. Since at least 1990 (Acts 1990, 3rd Ex. Sess., c. 7), W. Va. Code § 5-16-5(a) has provided that the purpose of the PEIA Finance Board is "to bring fiscal stability to the Public

Employees Insurance Agency through development of annual financial plans and long-range plans designed to meet the agency's estimated total financial requirements, taking into account all revenues projected to be made available to the agency and *apportioning necessary costs equitably among participating employers, employees and retired employees and providers of health care services*" (emphasis added).

5. Since at least 1973 (Acts 1973, 1st Ex. Sess., c. 26), W. Va. Code § 5-16-2 has explicitly defined a county Board of Education as an "employer".

6. W. Va. Code § 5-16D-1(l) provides that "[e]mployer" means any employer as defined by section two, article sixteen of this chapter which has or will have retired employees in any Public Employees Insurance Agency health plan". This language makes it clear that the Legislature did not intend to modify the basic structure of chapter 5 article 16 when it enacted chapter 5 article 16D of the Code.

7. W. Va. Code § 5-16-5(d)(2) requires the finance board to prepare a proposed financial plan "designed to generate revenues sufficient to meet all estimated program and administrative costs of the Public Employees Insurance Agency for the fiscal year. The proposed financial plan shall allow for no more than thirty days of accounts payable to be carried over into the next fiscal year". This language is similar to that originally enacted in 1990. *See*, for example, Acts 1990, 3rd Ex. Sess., c. 7, § 5-16-5(d). The Finance Board, then, is currently required by statute to prepare financial plans based on the current pay-as-you-go or minimum annual employer payment.

8. W. Va. Code § 5-16-5(d)(4) now also requires the Finance Board to prepare "financial statements based on generally accepted accounting practices (GAAP) and the final, approved plan restated on an accrual basis of accounting, which shall include allowances for

incurred but not reported claims". This section, however, explicitly provides that "the financial statements and the accrual-based financial plan restatement shall not affect the approved financial plan".

9. W. Va. Code § 5-16-10 provides that "[a]ny contract or contracts entered into hereunder may provide for group hospital and surgical, group major medical, group prescription drug and group life and accidental death insurance for retired employees and their spouses and dependents as defined by rules and regulations of the public employees insurance agency, and on such terms as the director may deem appropriate". This language has remained largely unchanged since 1972 (Acts 1972, Ex. Sess., c. 2).

10. W. Va. Code § 5-16-13(i) provides that "[a]ny employee who retired prior to April 21, 1972, and who also otherwise meets the conditions of the "retired employee" definition in section two of this article, shall be eligible for insurance coverage under the same terms and provisions of this article. The retired employee's premium contribution for any such coverage shall be established by the finance board". Acts 1992, c. 105 deleted the provision that "[t]he premium cost for any such coverage . . . shall be borne by such retired employee".

11. W. Va. Code § 5-16-13(j) provides that "[a]ll retirees under the provisions of this article, including those defined in section two of this article; those retiring prior to April 21, 1972; and those hereafter retiring are eligible to obtain health insurance coverage. The retired employee's premium contribution for the coverage shall be established by the finance board". Acts 1992, c. 105 deleted the provision that "[t]he premium cost for any such coverage . . . shall be borne by such retired employee".

12. W. Va. Code § 5-16-2(8) defines ‘retired employee’ as meaning . . . “an employee of . . . a county board of education who retires on or after the twenty-first day of April, one thousand nine hundred seventy-two . . .”.

13. Acts 1992, c. 105 also added a provision permitting the finance board to subsidize a portion of the premium cost to retired employees by active employees. W. Va. Code § 5-16-5(c)(4) now provides, in part, that, “the finance board may allocate a portion of the premium costs charged to participating employers to subsidize the cost of coverage for participating retired employees”.

14. Prior to 1992, no subsidy by active employees was permitted and retirees and their spouses and dependents were required to bear the full cost of the insurance. See, for example, Acts 1990, 3rd Ex. Sess., c. 7 § 5-16-13 (g) and (h) (“The premium cost for any such coverage as established by the finance board shall be borne by such retired employee”).

15. Acts 1992, c. 105 also added W. Va. Code 18-9A-24, which provided that “[n]othing in this article shall be construed to limit the ability of county boards of education to use funds appropriated to county boards of education pursuant to this article to pay employer premiums to the public employees insurance agency *for employees whose positions are funded pursuant to this article. Funds appropriated to county boards of education pursuant to this article shall not be used to pay employer premiums for employees of such boards whose positions are not, or will not be within twenty months, funded by funds appropriated pursuant to this article*” (emphasis added). W. Va. Code § 18-9A-24(c) currently includes the latter sentence. This provision explicitly prevents county Boards of Education from using monies provided to them by the state aid formula from funding insurance benefits for employees whose salaries are not funded through that formula.

16. Acts 1994, 1st Ex. Sess., c. 24 amended W. Va. Code § 18-9A-24 into its current form and, for the first time, explicitly added an allowance to PEIA for school employees, beginning July 1, 1995. At least some counties may have been using funds provided by the school aid formula for these expenses prior to that time, even for employees not funded by the State. (See Acts 1993, 1st Ex. Sess., c. 8 § 5-16-18, which provides, in part, that “the finance board and department of education shall determine the extent to which state school aid appropriations are being used by the county school boards to pay employer premiums for employees whose positions are not funded by state revenues and shall develop and implement a plan to minimize the expenditures”).

17. Acts 1994, 1st Ex. Sess., c. 24 amended W. Va. Code § 5-16-18 to define that payments for county boards of education to PEIA shall be determined “by the method set forth in section twenty-four, article nine-a, chapter eighteen of this code”. Subsection (b) now provides that “The amount of the payments for county boards of education shall be determined by the method set forth in section twenty-four, article nine-a, chapter eighteen of this code: Provided, That local excess levy funds shall be used only for the purposes for which they were raised: Provided, however, That after approval of its annual financial plan, but in no event later than the thirty-first day of December of each year, the finance board shall notify the Legislature and county boards of education of the maximum amount of employer premiums that *the county boards of education shall pay for covered employees during the following fiscal year*”. (emphasis added). This provision makes it clear that the Plaintiffs remain responsible for paying for the employers’ share of the cost of PEIA insurance; the PSSP reimburses the Plaintiffs for these costs.

18. W. Va. Code § 5-16-22 provides, in part, that “[t]he provisions of this article are not mandatory upon any employee or employer who is not an employee of or is not the state of West Virginia, its boards, agencies, commissions, departments, institutions or spending units or a county board of education, and nothing contained in this article shall be construed so as to compel any employee or employer to enroll in or subscribe to any insurance plan authorized by the provisions of this article”.

19. W. Va. Code § 18-9A-24(b) explicitly provides that “[c]ounty boards of education shall be responsible for payments to the public employees insurance agency for individuals who are employed as professional employees above and beyond those authorized by section four or five-a, whichever is less, and individuals who are employed as service personnel above and beyond those authorized by section five and five-a whichever is less. For each such employee, the county board of education shall forward to the public employees insurance agency an amount equal to the average premium rate established by the finance board in accordance with subsection (a) of this section: Provided, That the county board shall pay the actual employer premium costs for any county board employee paid from special revenues, federal or state grants, or sources other than state general revenue or county funds.

20. W. Va. Code § 5-16D-6(e) provides, that “[t]he Public Employees Insurance Agency shall bill each employer for the employer annual required contribution and the included minimum annual employer payment. The Public Employees Insurance Agency shall annually collect the minimum annual employer payment. The Public Employees Insurance Agency shall, in addition to the minimum annual employer payment, collect any amounts the employer elects to pay toward the employer annual required contribution. Any employer annual required

contribution amount not satisfied by the respective employer shall remain the liability of that employer until fully paid”.

21. W. Va. Code § 6-9-11(a) provides, in part, that “the state auditor shall be the chief inspector and supervisor of local government offices. For the purposes of this section and any section of this code relating to the chief inspector, “local government office” means any unit of local government within the state, including a county, *county board of education*, municipality, and any other authority, board, commission, district, office, public authority, public corporation or other instrumentality of a county, county board of education or municipality or any combination of two or more local governments” (emphasis added). This section also vests in the State Auditor the duty of making “annual or special financial and compliance examinations or audits of local government offices”.

22. Under the definitions contained in W. Va. Code § 6-9-1a, an “audit” means “a systematic examination and collection of sufficient, competent evidential matter needed for an auditor to attest to the fairness of management's assertions in the financial statements and to evaluate whether management has sufficiently and effectively carried out its responsibilities and complied with applicable laws and regulations. *An audit shall be conducted in accordance with generally accepted auditing standards*, standards issued by the chief inspector, and, as applicable, the single audit requirement of OMB Circular A-133 Audits of States, Local Governments and Non-Profit Organizations as amended or revised from time to time, or any successor circular” (emphasis added).

23. W. Va. Code § 6-9-11 transferred certain powers and duties of the Tax Commissioner to the State Auditor; effective July 1, 1999. Subsection (a) appoints the State Auditor as “the chief inspector and supervisor of local government offices”, specifically

including a county board of education. This subsection also specifically gives the State Auditor the authority to make annual or special financial and compliance examinations or audits of local government offices.

24. W. Va. Code § 6-9-2 grants to the chief inspector the authority to “formulate, prescribe and install a system of accounting and reporting in conformity with the provisions of this article, which shall be uniform for all local governmental offices and agencies . . .”

25. W. Va. Code §§ 18-9B-9 and 18-9B-12 direct that State Board of School Finance “formulate the requirements of adequate practices of fiscal administration”, and directs that those requirements be incorporated into the uniform system of accounting prescribed by the chief inspector for use by county boards of education. Finally, W. Va. Code § 18-9B-9 confirms that the chief inspector “shall prescribe the use of the uniform system by all county school districts by virtue of the authority vested in him by section two, article nine, chapter six of this Code”.

26. W. Va. Code § 5-16-5(d)(4) requires the PEIA Finance Board to prepare annual financial statements based on generally accepted accounting practices. Moreover, PEIA is required to maintain all necessary records regarding the RHBT fund in accordance with generally accepted accounting principles. See W. Va. Code § 5-16D-3. Pursuant to the authority granted by chapter 6 article 9 and by chapter 18 article 9B of the Code of West Virginia, both the State Board of School Finance and the Chief Inspector require local Board’s of Education to prepare their financial statements in accordance with generally accepted accounting principles, a fact which the Plaintiffs admit. See ¶ 20 in the Complaint (“the Defendant West Virginia State Auditor, or a private accounting firm approved by the State Auditor, conducts annual audits of Plaintiffs in accordance with Generally Accepted Accounting Principles (“GAAP”), including Governmental Accounting Standards Board (“GASB”) Statement No. 45”).

27. Plaintiffs allege, and Defendants admit, that “GASB [the Governmental Accounting Standards Board] is recognized as the official source of generally accepted accounting principles (“GAAP”) for state and local governments”.

28. With the enactment of Chapter 5 Article 16D of the West Virginia Code, the West Virginia Legislature created the West Virginia Retiree Health Benefit Trust Fund (“RHBT”). According to the provisions of W. Va. Code § 5-16D-2, the RHBT was created for the purpose of providing for and administering retiree post-employment health care benefits, and the respective revenues and costs of those benefits as a cost sharing multiple employer plan.

29. By amendment to W. Va. Code § 5-16-25, effective July 1, 2007, the Legislature directed that at the close of any fiscal year in which the balance in the PEIA reserve fund established by W. Va. Code § 5-16-25 exceeds the recommended reserve amount by fifteen percent, the executive director shall transfer that amount to the West Virginia Retiree Health Benefit Trust Fund (RHBT) created by W. Va. Code § 5-16D-2. *See* Acts 2007, c. 208.

30. The Court takes judicial notice that, according to the *West Virginia Comprehensive Annual Financial Report (CAFR) for the Fiscal Year Ended June 30, 2008*, “In FY 2008, \$108.2 million of prior year’s excess reserve funds were transferred to the RHBT”. (available online at <http://www.wvfinance.state.wv.us/FARS/cafr/cafr2008/cafr2008.pdf>; see page 146).

31. The Court take judicial notice that West Virginia Senate President Earl Ray Tomblin has appointed a special study group chaired by Senator Brooks McCabe to address the issue of the liability for OPEB for all state employees. *See* http://www.legis.state.wv.us/News_release/newsrelease_RecordView1.cfm?RecordID=313.

Conclusions of Law

1. In *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 S.E.2d 55 (1996) the West Virginia Supreme Court of Appeals reviewed the circumstances under which it is proper for a circuit court to grant relief in a declaratory judgment action:

Before a circuit court can grant declaratory relief pursuant to the provisions of the Uniform Declaratory Judgment Act ("Act"), West Virginia Code §§ 55-13-1 to -16 (1994), there must be an actual, existing controversy. *See Cox v. Amick*, 195 W.Va. 608, 618, 466 S.E.2d 459, 469 (1995) (Cleckley, J., concurring); *Mongold v. Mayle*, 192 W.Va. 353, 358, 452 S.E.2d 444, 449 (1994). "To be clear, if there is no 'case' in the constitutional sense of the word, then a circuit court lacks the power to issue a declaratory judgment." *Cox*, 195 W.Va. at 618, 466 S.E.2d at 469. The rationale behind the justiciable controversy requirement is that the Act is "is designed to enable litigants to clarify legal rights and obligations before acting upon them." *Id.*

Hustead on Behalf of Adkins v. Ashland Oil, Inc., 197 W.Va. at 61, 475 S.E.2d at 61.

2. In *Hustead*, the Court then summarized the four factors Justice Cleckley articulated in *Cox* in his concurring opinion:

Consequently, in deciding whether a justiciable controversy exists sufficient to confer jurisdiction for purposes of the Act, a circuit court should consider the following four factors in ascertaining whether a declaratory judgment action should be heard: (1) whether the claim involves uncertain and contingent events that may not occur at all; (2) whether the claim is dependent upon the facts; (3) whether there is adverseness among the parties; and (4) whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest. *See Cox*, 195 W.Va. at 619, 466 S.E.2d at 470.

Hustead on Behalf of Adkins v. Ashland Oil, Inc., 197 W.Va. at 62, 475 S.E.2d at 62. and Syllabus Point 4.

3. As to the third factor, Justice Cleckley said that "[t]he circuit court should ask 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' *Maryland Casualty Co. v. Pacific Coal & Oil*

Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826, 829 (1941). It would appear that the following is relevant: (1) where all affected parties are before the court and (2) where the issues as framed to permit specific relief through a decree of a conclusive nature, as opposed from an opinion advising what the law would be upon an hypothetical state of facts.” *Cox v. Amick*, 195 W.Va. at 619, 466 S.E.2d at 470.

4. In short, the Court concludes there is no adverseness among the parties to this suit; because (with a single exception (see below), it is the Legislature that has created the circumstances with which the Plaintiffs take issue:

- a. The Plaintiffs have asked this Court to declare that they are not liable for the total OPEB liability as a matter of law (*See Plaintiffs’ Request for Declaration (d) in their Complaint (“The West Virginia county boards of education are not liable to the Public Employees Insurance Agency for the funding of retiree health benefits in any amount over and above the “Minimum Annual Employer Payment” as that term is defined in West Virginia Code Section 5-16D-1(q) and financed by the Public School Support Program”*); as well as *Plaintiffs’ Response to Defendants’ Motion to Dismiss* at 2 (“Plaintiffs have asked this Court to declare that they are not liable for the total OPEB liability as a matter of law”). Such a declaration would be directly contrary to the provisions of W. Va. Code § 5-16D-6(e) (see Finding of Fact No. 20).
- b. Plaintiffs state that they “are mandatory participants in the PEIA health plan” (*See Plaintiffs’ Request for Declaration (b) in their Complaint (“County boards of education are mandatory participants in the health plan sponsored by the Public Employees Insurance Agency”*); as well as *Plaintiffs’ Response*

to *Defendants' Motion to Dismiss* at 2). They also state that “the PEIA and the State have decided that county boards of education must participate in their Plan”. See *Plaintiffs' Response to Defendants' Motion to Dismiss* at 14. In fact, it was the Legislature, not PEIA, that made the Plaintiffs mandatory participants in the plans offered by PEIA under the provisions of W. Va. Code § 5-16-22. (See Finding of Fact No. 18).

- c. Plaintiffs state that “the PEIA permits Plaintiffs’ employees and retirees to participate in its health plan” (See Plaintiffs’ Request for Declaration (c) in their Complaint (“The Public Employees Insurance Agency permits participation by active and retired employees of county boards of education in its health plan(s)”); as well as *Plaintiffs' Response to Defendants' Motion to Dismiss* at 2). Plaintiffs also assert that “The PEIA ...has set the rules permitting retirees of county boards of education to participate in the health plan”. See *Plaintiffs' Response to Defendants' Motion to Dismiss* at 14. In fact, W. Va. Code § 5-16-13(i) and (j) direct that retired employees of the Plaintiffs are eligible to participate in the plans offered by PEIA. See Findings of Fact Nos. 9 -12.
- d. Plaintiffs allege that “the State of West Virginia historically has funded the premiums charged by PEIA for most of Plaintiffs’ employees and retirees” (See *Plaintiffs' Response to Defendants' Motion to Dismiss* at 2. More specifically Plaintiffs’ Request for Declaration (k) in their Complaint asks the Court to declare that “[t]he PSSP provides that the State of West Virginia will fund PEIA premiums for active and retired employees of West Virginia

county boards of education and who are covered by the PSSP formula”). In fact, the Court’s research has disclosed that

- i. The basic structure of the insurance plans offered by PEIA makes the costs of those plans the responsibility of employees and their employers. This structure has been in place since at least 1986 (see Findings of Fact Nos. 4 and 5), and most likely since the PEIA was created in 1971.
- ii. Since at least 1973 the Legislature has explicitly defined a county Board of Education to be an employer (see Finding of Fact No. 6).
- iii. While retirees of the Plaintiffs have long been eligible to participate in the health insurance plans offered by PEIA, before 1992 the retirees were required by statute to pay for the full cost of their participation (see Finding of Fact Nos. 10 and 11).
- iv. In 1992, the Legislature granted to the PEIA Finance Board the discretion to “allocate a portion of the premium costs charged to participating employers to subsidize the cost of coverage for participating retired employees”. See Finding of Fact No. 13.
- v. In 1995, the Legislature explicitly began funding an allowance to cover the cost of the PEIA coverage for active employees of the Plaintiffs. However, this allowance covers only those employees of the Plaintiffs for whom a salary allowance is made under the school aid formula or PSSP. Under the provisions of Chapter 5 Article 16, the Plaintiffs remain responsible for paying the cost of the insurance

for their employees for whom a salary allowance is not made under the school aid formula or PSSP. See Finding of Fact Nos. 15 and 16.

Even if the Plaintiffs are correct in stating that “Plaintiffs have never been responsible for paying the premiums for health coverage under the PEIA plan *for those employees and retirees covered by the PSSP*” (see *Plaintiffs’ Response to Defendants’ Motion to Dismiss* at 4), Plaintiffs have *always* been responsible for paying the premiums for health coverage under the PEIA plan *for those employees and retirees NOT covered by the PSSP*.

- vi. While the PEIA Finance Board did exercise its discretion to allocate a portion of the premium costs charged to participating employers to subsidize the cost of coverage for participating retired employees, the Court takes judicial notice that on July 30, 2009, the PEIA Finance Board approved eliminating the retiree subsidy for new employees hired on or after July 1, 2010.

The Court therefore concludes that every aspect of the funding of the premiums for the retired employees of the Plaintiffs is the direct result of an act of the Legislature save one – the decision left to Defendant PEIA Finance Board of whether a portion of the cost of the premiums for said retired employees will be subsidized with the premiums paid by active employees – has been dictated by the Legislature, not the Defendants.

- e. Plaintiffs assert that “the PEIA now seeks to charge Plaintiffs for the total OPEB liability” (See *Plaintiffs’ Response to Defendants’ Motion to Dismiss* at

- 2). In fact, this requirement was imposed by the Legislature in W. Va. Code § 5-16D-6(e) (see Finding of Fact No. 20), and this requirement is consistent with the long-standing structure of the insurance plans created by the Legislature by which the cost of PEIA insurance be paid by the employer and employee. *See supra*.
- f. Plaintiffs complain that it is “the Defendants who have billed Plaintiffs for the total OPEB liability”. *See Plaintiffs’ Response to Defendants’ Motion to Dismiss* at 2. Plaintiffs also assert that “The PEIA and the PEIA Finance Board, seeing that this change in accounting would saddle the State with the staggering obligation to report the total OPEB liability associated with all employees and retirees of the county boards of education, determined that they would begin to bill Plaintiffs for the total OPEB liability associated with such employees”. *See Plaintiffs’ Response to Defendants’ Motion to Dismiss* at 4. In fact, Defendant PEIA is required to bill the Plaintiffs in this manner by the Legislature by W. Va. Code § 5-16D-6(e) (see Finding of Fact No. 20).
- g. Plaintiffs complain that it is “the Defendants who have ...required them to report the liability on their annual financial statements””. *See Plaintiffs’ Response to Defendants’ Motion to Dismiss* at 2. Under the provisions of chapter 6 article 9 and chapter 18 article 9B of the Code, Defendant State Auditor is required by statute to perform a financial audit annually and render an opinion as to whether Plaintiffs’ financial statements in conformity with generally accepted accounting principles, including the provisions of GASB Statement No. 45. See Findings of Fact Nos. 21-26.

In short, with the single exception described above, Plaintiff's assertion that "it is clear that the funding problems experienced by the PEIA plan, *and the Defendants' attempts to shift such funding problems to the county boards of education*, truly have created adversity among the parties to this action" (see *Plaintiffs' Response to Defendants' Motion to Dismiss* at 14) are, in fact, the result of decisions made by the Legislature, not the Defendants. The Court therefore concludes that the required adverseness between the parties named in this suit required to present a justiciable controversy does not exist in this case.

5. Justice Cleckley framed the fourth factor in *Cox* as follows: "[a] circuit court should always ask whether granting the relief would serve a useful purpose, or put another way, whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest. Thus, the factors discussed above must be not be applied mechanically but, rather, with flexibility. In granting declaratory relief, a circuit court should be reasonably convinced that allowing the case to proceed, here and now, would serve a useful purpose and would be of great practical assistance to all concerned. Not only should the utility of the decree be obvious, but the utility should have special force in the challenged and underlying action". *Cox v. Amick*, 195 W.Va. at 619, 466 S.E.2d at 470 (footnote omitted).

6. Based on the Conclusions of Law above, there is a single issue of which the Plaintiffs complain that is within the discretion of the Defendants in this matter: the issue as to the extent to which the premiums of retirees will be subsidized by the premiums of active employees. Having taken judicial notice that the Finance Board has eliminated this subsidy for new employees, the Court further concludes that have already taken the single step available to them to address the Plaintiffs' complaints. As to these Defendants, then, the Court is not at all convinced that "allowing the case to proceed, here and now, would serve a useful purpose and

would be of great practical assistance to all concerned". The Court therefore concludes that the sought after declarations would be of no practical assistance in setting the underlying controversy to rest, and for this reason too concludes that a justiciable controversy does not exist in this case.

7. In *Robertson v. Hatcher*, 148 W.Va. 239, 135 S.E.2d 675 (1964), the West Virginia Supreme Court of Appeals held that a justiciable controversy must exist before a court can acquire jurisdiction in a declaratory judgment action:

Notwithstanding the apparent wide latitude of jurisdiction conferred by the above cited and quoted act, and even though the act does not in express terms require the existence of a justiciable controversy, this Court consistently has held that such controversy must exist before a court can acquire jurisdiction.

Id., 148 W.Va. at 246, 135 S.E.2d at 680-681 (citations omitted); *see also Crank v. McLaughlin*, 125 W.Va. 126, 23 S.E.2d 56 (1942). *Joseph v. National Bank of West Virginia*, 124 W.Va. 500, 21 S.E.2d 141 (1942).

8. In *Baker v. Carr*, 369 U.S. 186 (1962), the United State Supreme Court held that the separation of powers doctrine renders a case nonjusticiable and renders such a case inappropriate for a Court to consider if it presents a political question. There, the Court established several criteria for determining when a political question is presented:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to (1) involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.

Id., 369 U.S. at 218 (enumeration added).

9. Plaintiffs claim that “[f]unding of the total OPEB liability is not the issue raised” in this matter (see *Plaintiffs’ Response to Defendants’ Motion to Dismiss* at 7; see also *id.* “[f]unding the total OPEB liability simply is not at issue in this case” and “[w]hen, whether and how to fund the admittedly enormous OPEB liability is not Plaintiffs’ concern.”), or that “funding and budget issues” are only “tangentially related” to their claims. *Id.* However, the declaratory relief requested by the Plaintiffs disputes these assertions. Specifically, they ask this court to declare that “West Virginia Code Section 18-9A-24(a) must be revised to provide funding for the total OPEB liability billed by the PEIA to county boards of education for those employees of county boards of education.” (Demand for Declaration ¶ o). In addition, Plaintiffs’ demand that the Court declare that “[t]he State of West Virginia is obligated legally to fund the OPEB liability on behalf of those employees of West Virginia county boards of education at whatever time such funding is required under the law” (Demand for Declaration ¶ l).

10. The Modern Budget Amendment found at W. Va. Const. Art. 6, § 51 requires the Governor to prepare an annual budget and restricts the Legislature to making appropriations only through the budget bill or through a supplementary appropriation bill dedicated to a single work, object or purpose. [Said Section 51 was completely rewritten and was submitted to a vote of the people in 1968, at which time it was ratified and adopted as a part of our Constitution, becoming known as the ‘Modern Budget Amendment’].

11. The Constitution of West Virginia clearly assigns to the Legislature the responsibility to “provide, by general law, for a thorough and efficient system of free schools” and to appropriate moneys for this purpose. See Findings of Fact Nos. 1 and 2.

12. The West Virginia Supreme Court of Appeals has held that that education is a fundamental constitutional right in this State, and that:

“[o]ur basic law makes education’s funding second in priority only to payment of the State debt, and ahead of every other State function. Our Constitution manifests, throughout, the people’s clear mandate to the Legislature, that public education is a Prime function of our State government. We must not allow that command to be unheeded.”

Pauley v. Kelly, 255 S.E.2d 859, 884 and 878 (W. Va. 1979).

13. The Court concludes that there clearly exists in the Constitution of West Virginia a “textually demonstrable constitutional commitment of the issue” of the level of funding required to provide a thorough and efficient education generally, and of how and when to fund the total OPEB liability generally, “to a coordinate political department”, that is, the Legislature, as contemplated by the first prong in *Baker, supra*.

14. The Plaintiffs assert that their OPEB liability should enjoy a higher funding priority by the Legislature in the name of a “thorough and efficient” education. In doing so, they are not concerned with how the Legislature should prioritize funding for the OPEB liability for employees of county boards of education not reimbursed by the PSSP, for local government entities that are not involved with education, nor with how the Legislature should prioritize funding for other citizens of West Virginia with a myriad of other legitimate and pressing issues. Those other citizens are not before this Honorable Court, and this Court has no mechanism with which to evaluate and prioritize their issues. Manifestly, there is a “lack of judicially discoverable and manageable standards for resolving” competing budget priorities by this Court as contemplated by the second prong of the *Baker* test, and it would be impossible for this Court

to undertake independent resolution of these prioritization issues without expressing lack of the respect due coordinate branches of government as contemplated by the fourth prong of the *Baker* test

15. The Court concludes that the funding issues raised in this matter, as well as by Plaintiffs' complaint that "no additional funding has been provided to Plaintiffs to pay for such liability" (presumably by the Legislature), (see Plaintiffs' Response to Defendants' Motion to Dismiss at 2), constitute a nonjusticiable political question.

16. The Court also notes that the Legislature is clearly aware of the serious and immediate nature of this issue and is actively working on a long term solution to the issues raised by the Plaintiffs, as evidenced by (a) the creation of the West Virginia West Virginia Retiree Health Benefit Trust Fund (*see* Finding of Fact No. 28), (b) the decision to dedicate excess funds in the PEIA reserve account to the Trust Fund (*see* Finding of Fact No. 29), (c) the transfer of \$108.2 million from the reserve account to the trust fund in 2008 (*see* Finding of Fact No. 30), and (d) the creation of the Senate President's special study group chaired by Senator Brooks McCabe. (*see* Finding of Fact No. 31).

17. The Court also notes that the Plaintiffs assert that the Circuit Court of Kanawha County has held that the funding of employee benefits is an element of providing a thorough and efficient education, citing *Pauley v. Bailey*, Civil Action No. 75-1268, *Opinion, Findings of Fact and Conclusions of Law and Order* at 216 (May 11, 1982). Although it is not immediately clear that providing OPEB benefits for *retired* employees was contemplated in that decision, it is certainly clear that the Legislature does not believe funding more than the current pay-as-you-go or minimum annual employer payment is required to provide a thorough and efficient education. See Findings of Fact Nos. 7 and 8.

18. In *Cox, supra*, Justice Cleckley stated that “[t]he first critical factor [in order for a suit to be justiciable] is whether the claim involves uncertain and contingent events that may not occur at all”. *Cox v. Amick*, 195 W.Va. at 619, 466 S.E.2d at 470. This is not a new requirement; the Court has long stated that “[u]nder the Uniform Declaratory Judgments Act, a declaration of rights will not be based on a future contingency”. *Town of South Charleston v. Board of Ed. of Kanawha County*, 132 W.Va. 77, 50 S.E.2d 880 (1948); *see also Chesapeake & Potomac Tel. Co. of W. Va. v. City of Morgantown*, 144 W.Va. 149, 107 S.E.2d 489 (1959). (“The rights, status, and legal relations of parties to a proceeding under the Uniform Declaratory Judgments Act depend upon facts existing at the time the proceeding is commenced, and future and contingent events will not be considered”).

19. Plaintiffs assert that “the State of West Virginia historically has funded the premiums charged by PEIA for most of Plaintiffs’ employees and retirees”. They fail, however, to assert that the State has discontinued or will discontinue funding the “minimum annual employer payment” or pay-as-you-go payment in the future.

20. Although the Plaintiffs assert that they “do not ask this Court to ‘insert itself into the middle of the ongoing efforts to identify, quantify, and eliminate these unfunded liabilities’” (*see Plaintiffs’ Response to Defendants’ Motion to Dismiss* at 7), it is clear that if the Legislature is successful in identifying and implementing a long term funding solution, all of the issues raised by the Plaintiffs will be resolved.

21. Plaintiffs allege that “the provisions of West Virginia Code Section 5-16D-6 are unconstitutional as applied to county boards of education in that such provisions frustrate and interfere with the constitutionally guaranteed provision of a thorough and efficient system of free schools, and constitute an unfunded mandate” and also allege that “the PSSP formula is

inconsistent and irreconcilable with the requirement that they remain liable for the total OPEB liability, and that, in light of section 5-16D-6(e), the PSSP is unconstitutional as it currently reads because it operates to prevent Plaintiffs from meeting their obligation to provide a thorough and efficient system of free schools". These allegations will likewise be rendered moot if the Legislature is successful in identifying and implementing a long term funding solution to the OPEB liability.

22. Plaintiffs assert that they "cannot be expected to sit idly by and hope that the PEIA will not ultimately collect on the liability when West Virginia law says the liability remains with them until it is fully paid" (*see Plaintiffs' Response to Defendants' Motion to Dismiss* at 12) and that they "must prepare to satisfy it at whatever time the Defendants determine it should become due". *See Plaintiffs' Response to Defendants' Motion to Dismiss* at 13. These assertions highlight the contingent and uncertain nature of the harms that may occur at some undefined time in the future.

23. As stated above, on July 30, 2009, the PEIA Finance Board approved eliminating the retiree subsidy for new employees hired on or after July 1, 2010. The Plaintiffs also have not disputed Defendants' assertion that if the state continues to provide an allowance under terms substantially the same as those in the current version of §18-9A-24, the effect of the decision of the Board to eliminate the retiree subsidy will gradually reduce, and ultimately eliminate, the OPEB liability. *See Defendant's Motion to Dismiss with Prejudice* at 12-13. Thus, under the circumstances currently in place, none of the Plaintiffs will be required to provide any funding for benefits for any retirees beyond those which it was always responsible; that is, for those employees not funded through the PSSP.

24. The potential of harm to the Plaintiffs is made even more uncertain by (a) the Legislature's decision to dedicate excess funds in the PEIA reserve account to the Trust Fund (see Finding of Fact No. 29), (b) the Legislature's ongoing efforts to deal with the long term OPEB funding issue (as evidenced by the creation of the Senate President's special study group discussed above) (see Finding of Fact No. 31), and the unknown effects of the recently enacted federal health care reform bill, which is likely to substantially affect the future cost of providing health care for retired employees and their dependants, and thus will affect the unfunded liability to an unknown extent.

25. The Court concludes therefore that it is abundantly clear that the Plaintiffs' claim involves uncertain and contingent events; for that reason, it does not present a real and currently justiciable controversy.

26. As Justice Cleckley wrote in *Cox*,

The Declaratory Judgment Act, W.Va.Code, 55-13-1 (1941), empowers a circuit court to grant declaratory relief in a case of actual controversy. . . The Act does not itself mandate that circuit courts entertain declaratory judgments; rather, the Act makes available an added anodyne for disputes that come within the circuit courts' jurisdiction. . . Because the Act offers a window of opportunity, not a guarantee of access, the courts, not the litigants, ultimately must determine when declaratory judgments are appropriate and when they are not. Consequently, circuit courts retain substantial discretion in deciding whether to grant declaratory relief. As we have stated in other contexts, the Declaratory Judgment Act neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants an entitlement to litigants to demand declaratory remedies. *In Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995), the United States Supreme Court affirmed the uniquely discretionary nature of the federal Declaratory Judgment Act: It is " 'an enabling Act, which confers a discretion on the courts rather than an absolute right on the litigant.' When all is said and done ... 'the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of ... judicial power.' Because the granting of declaratory relief is not mandatory, circuit courts may limit its use. I believe that limiting the use of declaratory judgment actions serves important policies such as avoiding rendering opinions based on purely hypothetical factual scenarios, discouraging forum shopping, encouraging parties to pursue the most

appropriate remedy for their grievances, preserving precious judicial resources, and promoting comity.

Cox v Amick, 195 W.Va. at 618-619, 466 S.E.2d at 469-470 (citations omitted).

27. Given all of the conclusions above, the Court concludes that the most appropriate forum for dealing with the Plaintiffs' grievances is the Legislature, and that, since the Legislature has already made some progress in dealing with these difficult issues and is currently engaged in developing a long range solution to these difficult problems, in the interest of preserving precious judicial resources, the Court should exercise its discretion to decline to hear this matter and should decline to issue declaratory relief in this matter.

WHEREFORE, for all of these reasons, the Court does hereby **ORDER** that the *Defendants' Motion to Dismiss this Matter with Prejudice* be **GRANTED** and **ORDERS** that Plaintiffs' Complaint in this matter be **DISMISSED with PREJUDICE**. The Court **ORDERS** that the Plaintiffs' objections and exceptions are noted and made part of the record.

The Court further **ORDERS** that this matter be **STRICKEN** from the docket of this

Court, and that the Circuit Clerk shall send a certified copy of this **FINAL ORDER** to:

Herschel H. Rose, III, Esq.
Steven R Broadwater, Esq.,
Rose Law Office
P.O. Box 3502
Charleston, WV 25335-3502

Andrew G. Fusco, Esq.
Bowles Rice McDavid Graff & Love LP
2400 Cranberry Square
Morgantown, WV 26508

Howard E. Seuffer, Esq.
Jill E. Hall, Esq.
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325

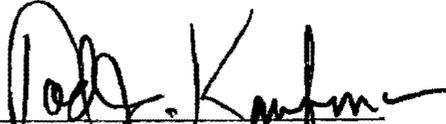
Gregory W. Bailey, Esq.
Bowles Rice McDavid Graff & Love LLP
7000 Hampton Center
Morgantown, WV 26505

The Honorable Glen B. Gainer III
West Virginia State Auditor
1900 Kanawha Boulevard East
Building 1, Room W-100
Charleston, WV 25305

West Virginia Public Employees Insurance
Agency
Ted Cheatham, Director
601 57th St., SE, Suite 2
Charleston, WV 25304-2345

W. Va. PEIA Finance Board
Robert W. Ferguson, Jr., Chairman
601 57th St., SE, Suite 2
Charleston, WV 25304-2345

ENTERED this the 22 day of September, 2010.


Hon. Tod J. Kaufman
Judge, Thirteenth Judicial Circuit

Prepared by:


Herschel H. Rose, III
Steven R. Broadwater
Counsel for Petitioners

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF September 2010

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
2010 SEP 23 AM 10:58
CATHY S. GIBSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

BOARDS OF EDUCATION OF THE COUNTIES OF:

**BARBOUR, BERKELEY, BOONE,
BRAXTON, BROOKE, CABELL, CALHOUN, CLAY,
DODDRIDGE, FAYETTE, GILMER, GREENBRIER, HAMPSHIRE,
HANCOCK, HARDY, HARRISON, JACKSON, JEFFERSON,
KANAWHA, LEWIS, LINCOLN, LOGAN, MARION,
MARSHALL, MASON, MCDOWELL, MERCER, MINERAL,
MONONGALIA, MONROE, MORGAN, NICHOLAS,
PENDLETON, PLEASANTS, POCAHONTAS, PUTNAM,
RALEIGH, RANDOLPH, RITCHIE, ROANE, SUMMERS,
TAYLOR, TUCKER, TYLER, UPSHUR, WEBSTER, WETZEL, WIRT, WOOD,
and WYOMING,**

Plaintiffs,

v.

**CIVIL ACTION NO.: 10-C-327
THE HONORABLE TOD KAUFMAN, JUDGE**

**PUBLIC EMPLOYEES INSURANCE AGENCY,
PUBLIC EMPLOYEES INSURANCE AGENCY
FINANCE BOARD, and WEST VIRGINIA STATE AUDITOR,**

Defendants.

CERTIFICATE OF SERVICE

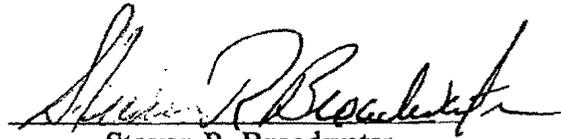
I, Steven R. Broadwater, hereby certify that on September 17, 2010, I caused to be served a copy of "*Defendants' Proposed Final Order Granting Motion to Dismiss with Prejudice*" by mailing a true and exact copy thereof to:

Andrew G. Fusco, Esq.
Bowles Rice McDavid Graff & Love LP
2400 Cranberry Square
Morgantown, WV 26508

Howard E. Seufer, Esq.
Jill E. Hall, Esq.
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325

Gregory W. Bailey, Esq.
Bowles Rice McDavid Graff & Love LLP
7000 Hampton Center
Morgantown, WV 26505
(304) 285-2500

in properly stamped and addressed envelopes, postage prepaid, and deposited in the United States mail.



Steven R. Broadwater
(WVSB No. 462)