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COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 11-0243
Civil Action No. 10-C-327 (Circuit Court of Kanawha County)

**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,
MONROE, MORGAN, NICHOLAS, PENDLETON,
PLEASANTS, POCAHONTAS, PUTNAM,
RALEIGH, RANDOLPH, RITCHIE, ROANE, SUMMERS,
TAYLOR, TUCKER, TYLER, UPSHUR, WEBSTER, WETZEL,
WIRT, WOOD, AND WYOMING,**

Petitioners,

v.

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

Respondents.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENTS

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Dated: August 29, 2011

Table of Authorities

Cases

Baker v. Carr, 369 U.S. 186 (1962) 2, 3, 5

Statutes

W. Va. Code § 18-7A-18a (2005) 4, 6
W. Va. Code § 18-9A-24(a) (1994) 2
W. Va. Code § 5-16D-6 (2007) 1
W. Va. Code § 5-16D-6(e) (2007) 3
W. Va. Code §18-9A-24 (1994) 5

Other Authorities

GASB Statement No. 25 3
GASB Statement No. 27 ..... 3, 4
GASB Statement No. 45 ..... 3, 4

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In their original *Complaint* filed in the Circuit Court below, the Petitioners below demanded no fewer than fifteen broad and comprehensive declarations from the Court, including, *inter alia*, declarations that "[t]he requirements of West Virginia Code Section 5-16D-6 are unconstitutional because the requirements interfere with and unlawfully impair and frustrate the constitutionally guaranteed provision of a thorough and efficient system of free

schools"[1], 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"[2], and 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"[3].

By contrast, in the *Amicus Brief of the West Virginia State Board of Education and Three County School Districts,* the Attorney General posits that the dispute now before this honorable Court "need only declare that it may not be constitutionally applied so as to require county boards of education to report OPEB liabilities associated with their PSSP-funded personnel except to the extent that finding has been provided within the PSSP", suggesting that W. Va. Code § 5-16D-6 is not facially unconstitutional but is only unconstitutional when applied to county Boards of Education. See *Amicus Brief of the West Virginia State Board of Education and Three County School Districts* at 15-16 and at 15 n. 15.

As the Court below correctly noted, adjudication of the broad and comprehensive issues posed in the original complaint necessarily would impact other citizens of West Virginia with a myriad of other legitimate and pressing issues that would not be before the Court, and for that reason, the Court below quite properly held that "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* [*v. Carr*, 369 U.S. 186 (1962)] 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

[1] Compl. Demand No. 1(e).

[2] Compl. Demand No. 1(o).

[3] Compl. Demand No. 1(l).

fourth prong of the *Baker* test". Conclusion of Law No, 13, *Opinion* at 20-21. The Respondents have asserted that the Circuit Court did not err in concluding that Petitioners' complaint raised a nonjusticiable political question. *See Response to Petition for Appeal* at 15-19.

By the same token, the suggestion of the State Board of Education that this case could be decided on much more narrow grounds likewise would affect parties not before this Court, including State agencies and non-State employers other than the Petitioners. It is likely that carving out a significant exception to the requirement in W. Va. Code § 5-16D-6(e) that "[a]ny employer annual required contribution amount not satisfied by the respective employer shall remain the liability of that employer until fully paid" would have a substantial adverse effect on other employers, including the substantial probability that the plan would no longer qualify as a "cost-sharing multi-employer" plan under the provisions of GASB 45. Significant costs to the remaining employers and the State, including but not limited to the requirement of each employer to provide individual actuarial studies annually, are possible if this limited change were to be imposed. The significant implications of even this more limited holding underscore again that this suit involves exactly the type of nonjusticiable political question that is best left to the Legislature to resolve.

The State Board also presented a question in its brief:

> Query: The reporting requirements for pension obligations are governed by GASB Statements 25 and 27, the provisions of which parallel GASB Statements 43 and 45. All of these Statements require the calculation of an ARC and the reporting of any shortfalls in contributions towards the ARC. If GASB requires participating employers to report said liabilities (rather than the plan sponsor — the State), then why aren't the pension obligations associated with the Teacher's Retirement System reported by county boards of education?

Amicus Brief of the West Virginia State Board of Education and Three County School Districts at 11 n. 13. There is a succinct answer to this question. W. Va. Code § 18-7A-18a (2005) provides, in part:

> Calculation of allocation to Teachers Employers Contribution Collection Account.
>
> (a) There shall be an annual allocation from the State General Revenue Fund to the Teachers Employers Contribution Collection Account, created by section eighteen of this article, *equal to the actuarially required contribution*, reduced by any employer contributions and other allocated amounts (emphasis added).

The Legislature has decided by specific statute that the entire ARC of the Teacher's Retirement System is the obligation of the State, and therefore the provisions of Paragraph 28 of GASB Statement No. 27[4] are applicable, and the entire ARC of the TRS is treated as the liability of the State of West Virginia. There is no statute comparable to W. Va. Code § W. Va. Code § 18-7A-18a (2005) declaring the entire ARC of the health care plan for retirees of county Boards of Education to be the liability of the State; to the contrary, W. Va. Code § 5-16D-6(e) declares them to be the responsibility of the county Boards of Education. Accordingly, the parallel provisions of Paragraph 32 of GASB Statement No. 45 do not operate to make the State liable for these benefits. See *Response to Petition for Appeal* at 26-27.

The OPEB issue, whether limited to County Boards of Education or to all governmental entities in the state of West Virginia, is a political question, which, because of its inherent budget

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[4] Paragraph 28 provides:

> Some governmental entities are legally responsible for contributions to pension plans that cover the employees of another governmental entity or entities. For example, a state government may be legally responsible for the annual "employer" contributions to a pension plan that covers employees of school districts within the state. In those cases, the entity that is legally responsible for the contributions should comply with all applicable provisions of this Statement for measurement and recognition of expenditures/expense, liabilities, assets, note disclosures, and required supplementary information. If the plan is a defined benefit pension plan and the entity with legal responsibility for contributions is the only contributing entity, the requirements of this Statement for sole employers apply, regardless of the number of entities whose employees are covered by the plan.

implications, has been constitutionally committed to the legislature for resolution. The Court below recognized this fact and concluded 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* [*v. Carr*, 369 U.S. 186 (1962)]".[5] As demonstrated by a collection of newspaper articles attached hereto as exhibits, the West Virginia Legislature came very close to enacting a long-term resolution of the OPEB issue in the 2011 Regular Session. Although that bill died on the last day of the session, the articles also demonstrate that the Legislature and the acting Governor continue to actively work toward a long term solution.

Exhibit 1 is a selection of newspaper articles describing the progress of SB 566 and SB 616 (a substitute for SB 566) through both the Senate and the House during the 2011 Regular Session. Significantly, both the Senate and the House agreed to a change that would render the issues in this suit moot by adding a subsection to W. Va. Code §18-9A-24:

> (b) Notwithstanding any other provision of section six, article sixteen-d, chapter five of this code to the contrary, any amount of annual contractually required contribution allocated to and billed county boards on or after July 1, 2011, or any amount of the employer annual required contribution allocated and billed to the county boards prior to that date for employees who are employed as professional employees within the limits authorized by section four of this article, employees who are employed as service personnel within the limits authorized by section five of this article, and employees who are employed as professional student support personnel within the limits authorized by section eight of this article, is a liability of the state until fully paid: Provided, That nothing in this subsection requires any specific level of funding by the Legislature in any particular year: Provided, however, That assumption of liability pursuant to this section is not to be construed as creating an employer employee relationship

[5] Conclusion of Law No. 13, Opinion at 20.

> between the state of West Virginia and any employee currently under the employ of a county board[6].

Thus, as is true for the TRS, this provision parallels that in § W. Va. Code § 18-7A-18a (2005) by declaring that the liability is a liability of the State, not the county Boards of Education. Evidently, however, the Legislature was unwilling to saddle the State with this liability without identifying a funding source that would permit the liability to be amortized over a reasonable number of years, and SB 616 failed to pass on the last day of the of the session.

Exhibit 2 is a second collection of newspaper articles describing the continuing progress of Senate and House leadership and the Acting Governor to agree on a funding source that would address the OPEB issue once and for all. These articles demonstrate that a legislative, long-term solution is within reach. At the very least, this Court should allow the Legislature a reasonable amount of time to complete its work on the pending resolution. See *Amicus Brief of the West Virginia State Board of Education and Three County School Districts* at 15 n. 14 ("if the Court is convinced that the controversy will be made moot by proposed legislation, the appropriate course would be to stay or continue the action for a reasonable time for the Legislature to act").

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[6] See Engrossed SB 616, available at http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=sb616%20eng.htm&yr=2011&sesstype=RS&i=616; last viewed August 26, 2011.

Respectfully submitted,

THE WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY

THE WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD

THE WEST VIRGINIA STATE AUDITOR

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CERTIFICATE OF SERVICE

I, Steven R. Broadwater, hereby certify that on August 29, 2011, I caused to be served a copy of Respondents' "*Supplemental Brief on Behalf of Respondents*" by mailing a true and exact copy thereof to:

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EXHIBITS

ON

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