

11-0746

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

DAWN COLETTE BLAND and
AUTUMN NICOLE BLAND, Wife and
Infant Daughter of Douglas Wayne Bland;
TROOPER ROBERT JOSEPH ELSWICK;
TROOPER MICHAEL DAVID LYNCH;
TROOPER TIMOTHY LANE BRAGG;
TROOPER CHRISTOPHER LEE CASTO;
TROOPER JEFFREY LEALTON COOPER;
TROOPER BRAD LEE MANKINS;
TROOPER ROGER DALE BOONE;
TROOPER STEVEN P. OWENS;
and TROOPER ADAM WILSON SCOTT,

Plaintiffs,

v.

Civil Action Number 07-C-2
Honorable James C. Stucky

STATE OF WEST VIRGINIA;
WEST VIRGINIA STATE POLICE
RETIREMENT SYSTEM; WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT
BOARD, a West Virginia state agency and
public corporate body; WEST VIRGINIA
PUBLIC EMPLOYEES RETIREMENT SYSTEM,
a West Virginia state agency and public
corporate body; TERASA L. MILLER, Acting
Executive Director of West Virginia Consolidated Public
Retirement Board; and WEST VIRGINIA STATE POLICE,
a West Virginia state agency and public corporate body,

Defendants.

ORDER GRANTING
MOTIONS TO DISMISS
OF TERASA L. MILLER, THE STATE OF WEST
VIRGINIA, THE WEST VIRGINIA STATE POLICE
RETIREMENT SYSTEM, THE WEST VIRGINIA PUBLIC
EMPLOYEES RETIREMENT SYSTEM, AND THE WEST
VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD

On January 20, 2011, came the defendants, the West Virginia Consolidated Public Retirement Board, the State of West Virginia, the West Virginia State Police Retirement System, the West Virginia Public Employees Retirement System, and Terasa L. Miller, and came the plaintiffs, by their respective counsel, for hearing on the motions to dismiss filed by the aforementioned defendants. Plaintiffs responded only to the motion filed by the Board. The motions to dismiss filed by the State of West Virginia, the West Virginia State Police Retirement System, the West Virginia Public Employees Retirement System, and Terasa L. Miller, were unopposed. As the Court is aware of no good cause for plaintiffs' lack of response to motions that were served well in advance of hearing and noticed for hearing at the same date and time as the Board's motion, the Court finds it appropriate to rule in regard to the motions of all the aforementioned defendants. The Court, having reviewed the file in this matter, including the motions and responses of the aforementioned parties, and having heard the arguments of counsel, now rules upon the motions to dismiss and makes the following findings of fact and conclusions of law:

1. Plaintiffs allege that they are members, or dependants of members, of the 42nd, 43rd, 44th, and 45th Cadet Classes of the defendant West Virginia State Police (hereinafter "State Police"), who joined the State Police in the belief that they would be enrolled in a benefit and retirement plan known as the West Virginia State Police Death, Disability and Retirement Fund (referred to in the Complaint as "Plan A") that would provide certain established benefits, but that they were actually enrolled in a plan known as the West Virginia State Police Retirement System (referred to in the Complaint as "Plan B") that provides for significantly less. (Complaint ¶¶ 1- 35, 47-54).

2. The West Virginia Consolidated Public Retirement Board (hereinafter the "Board") is a State agency that administers the West Virginia Public Employees Retirement System (hereinafter "PERS"), the West Virginia State Police Death, Disability and Retirement Fund (hereinafter "Plan A") and the West Virginia State Police Retirement System (hereinafter "SPRS" or "Plan B").

3. The plaintiffs allege that the Board had a duty to inform them as to what benefits they were entitled to receive based upon employment with the State Police and that the Board did not so inform them, but plaintiffs cite no statute or law that would serve to create such a specific actionable duty on the part of the Board. (Complaint ¶¶ 40-43).

4. The plaintiffs allege that, when they learned that the Board deemed them to be enrolled in Plan B, they petitioned the Board to determine that their enrollment in Plan B constituted a mistake and to correct that mistake by transferring the plaintiffs into Plan A. (Complaint ¶ 55).

5. In the Complaint, the plaintiffs set forth allegations relating to the purported legal justification for their transfer to Plan A, and to various prior proceedings before and against the Board, undertaken in order to effectuate their transfer to Plan A. (Complaint ¶¶ 55-109). Plaintiffs allege that the relief sought, i.e., transfer to Plan A, was granted to the plaintiffs by unwritten decision of the Board on November 13, 2002 (Complaint ¶¶ 72, 91), but that the Board subsequently failed to transfer the plaintiffs to Plan A (Complaint ¶ 84), and that the Board had no authority to reconsider its November 13, 2002, decision at a later date, as it did on January 22, 2003. (Complaint ¶¶ 80, 92-93).

6. Plaintiffs allege various causes of action, including breach of contract (Complaint ¶¶ 110-11, Count I), misrepresentation (Complaint ¶¶ 112-13, Count II),

detrimental reliance (Complaint ¶¶ 114-15, Count III), violation of the constitutional right to due process (Complaint ¶¶ 116-17, Count IV), an action to compel the defendants herein to bring an action to compel the Legislature to fully fund the relevant pension plans (Complaint ¶¶ 118-22, Count V), and an unspecified action based upon the Board's refusal to transfer the plaintiffs into Plan A (Complaint ¶¶ 123-25, Count VI). Plaintiffs also seek to have the instant action treated as a class action (Complaint ¶¶ 126-36, Count VII; Complaint at 31, Prayer ¶ 9).

7. Plaintiffs request compensatory and punitive damages, and other general relief (Complaint at 30-31, Prayer ¶¶ 1-3, 8, 10), that the Court order an accounting of the amounts due the plaintiffs' pension plan and that the Court order the defendants herein to bring an action to enforce full funding should the accounting show that the plan has not been fully funded (Complaint at 30-31, Prayer ¶ 4), that the Court determine that the Board's prior proceedings relating to the plaintiffs' claims were not fair nor adequate and that the Court further rule that it now has jurisdiction over plaintiffs' claims for the purposes of further proceedings (Complaint at 31, Prayer ¶¶ 5-6), and that the Court rule that plaintiffs are entitled to be transferred into Plan A (Complaint at 31, Prayer ¶ 7).

8. The instant action is the most recent of a series of actions filed by a group of State Police from the 42nd, 43rd, 44th, and 45th Cadet Classes, and their dependants, seeking to be transferred from Plan B to Plan A. The first and most relevant prior action was commenced as an administrative proceeding before the Board in December of 2001, and was ultimately resolved, in the context of the instant action, in the Board's favor, i.e., the decision held that the plaintiffs could not be transferred into Plan A. (Final Order dated May 18, 2006, incorporating attached "First Supplemental Recommended Decision of

Hearing Officer" dated February 17, 2006). It was then appealed to this Court as Civil Action No. 06-AA-55, before the Honorable Tod Kaufman. (Petition for Appeal, C.A. No. 06-AA-55).¹

9. In the appeal to this Court, styled *State ex rel. Trooper Mike Lynch et al v. Joseph J. Jankowski, Jr.*, Civil Action No. 06-AA-55, the plaintiffs raised several arguments and issues in support of their contention that the Board was required to transfer them to Plan A, including the following: (1) that the Board had exceeded the scope of its jurisdiction and the bounds of its authority; (2) that the plaintiffs had liberty and property interests in participation in Plan A; (3) that the Board should be disqualified from further consideration of the plaintiffs' cases since it had failed to provide the plaintiffs with notice of its March 15, 2006, meeting to consider the "First Supplemental Recommended Decision of Hearing Officer"; and (4) that the Recommended Decision adopted by the Board contained several errors of law and fact. (Petition for Appeal ¶¶ 12-13, 17-19, C.A. No. 06-AA-55).

10. The plaintiffs' arguments and objections, as set forth in the brief they subsequently filed in Civil Action No. 06-AA-55, included: (1) that the Board has both the statutory authority and a duty to transfer the plaintiffs to Plan A in order to correct a

¹In addition to the administrative proceeding that was appealed to this Court as Civil Action No. 06-AA-55, plaintiffs filed a Petition for Writ of Mandamus in this Court, before the Honorable Charles E. King, Jr., seeking a ruling that the Board's executive officers had a nondiscretionary and mandatory duty to authorize the requested transfer of the plaintiffs into Plan A based upon a vote of the Board on November 13, 2002, to that effect. (Petition for Writ of Mandamus, C.A. No. 03-MISC-473). The Board's decision had never been reduced to writing as a final order of the Board, and was subsequently reconsidered by the Board. In an order dated November 17, 2004, this Court ruled that the Board had the authority to reconsider its initial decision, as that decision had not been reduced to a written final order containing appropriate findings of fact and conclusions of law as required by statute. (Order Granting Defendants' Motion to Dismiss, C.A. No. 03-MISC-473). Plaintiffs petitioned for appeal of that dismissal order but the petition was refused. (Supreme Court Order dated May 25, 2005, No. 050743.) The order entered in Civil Action No. 03-MISC-473 constitutes a final adjudication.

mistake; (2) that the plaintiffs have a property interest in their pension plan and are entitled to the Plan A benefits; (3) that the doctrine of promissory estoppel applies and prevents the denial of Plan A benefits; (4) that a denial of Plan A benefits constitutes a denial of equal protection guaranteed by both the State and federal constitutions; (5) that the Board must implement a decision to transfer the plaintiffs to Plan A, although that decision was never incorporated in a written order and was later reconsidered; (6) that the plaintiffs had certain contract rights; (7) that promissory estoppel created a right to pension benefits due to the plaintiffs' reasonable reliance; (8) that the State Police had repeatedly informed the plaintiffs that they would receive Plan A benefits; (9) that the statutes that created Plan B constituted unlawful special legislation that violated the constitutional right to equal protection; (10) that inclusion in Plan B constituted disparate treatment and was arbitrary with no rational basis; (11) that the Board had violated the plaintiffs' due process rights; (12) that the Board had a duty to issue a written order consistent with its unwritten November 13, 2002, decision; (13) that the Board was publicly intimidated into reconsidering its unwritten November 13, 2002, decision; (14) that to the extent that the Board may have considered the cost of transferring the plaintiffs into Plan A, any such consideration was improper and contrary to law; (15) that, should the funding of a benefit plan, such as Plan A be inadequate, the Board has a fiduciary duty to demand adequate funding and to bring an action to compel adequate funding by the Governor and Legislature; (16) that the Board's January 22, 2003, decision to reconsider its decision of November 13, 2002, should be declared void as being the product of unlawful intimidation and threats of retaliation; and (17) that the Board had no statutory or regulatory authority to reconsider its decision of November 12, 2002, and that the decision to reconsider should

thus be deemed void and the decision of November 13, 2002, enforced. (Petitioners' Brief in Support of Appeal at 4-5, 13-14, 16-18, 20-45, C.A. No. 06-AA-55).

11. In Civil Action No. 06-AA-55, this Court entered a Final Order affirming the Board's refusal to transfer the plaintiffs into Plan A, which order included the following pertinent findings and conclusions:

1.) Pursuant to WV Code § 5-10D-1, the Respondent agency, the West Virginia Public Retirement Board is charged with administering the West Virginia State Police Death, Disability and Retirement Fund (Plan A), as well as the West Virginia State Police Retirement System (Plan B).

2.) Plan B went into effect in West Virginia on March 12, 1994. It is embodied in W. V. Code § 15-2A-3(a), which states as follows:

(a) There is hereby created the West Virginia state police retirement system. Any state trooper employed by the West Virginia State Police on or after the effective date of this article shall be a member of this retirement system and may not qualify for membership in any other retirement system administered by the consolidated public retirement board, so long as he or she remains employed by the State Police.

3.) First, the Petitioners assert that the Board has the authority and duty to correct mistakes by those administering the WV State Police Retirement System, and it should therefore retroactively enroll Petitioners in Plan A.

4.) "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 the 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." Syl. Pt. 4, *McDaniel v. WV Division of Labor*, 214 W. Va. 719, 519 S.E.2d 277 (2003).

5.) The Board has the authority to correct mistakes only when the individual has a statutory right to the requested relief. *Flanigan v. West Virginia Public Employees' Retirement System*, 176 W. Va. 330, 342 S.E.2d 414 (1986). Moreover, 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).

6.) The Court may 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).

7.) Second, Petitioners assert that they have a constitutionally protected property interest in Plan B **because they substantially relied to their detriment on statements made by the WV State Police officials** that they would receive Plan A benefits.

8.) None of the Petitioners in this case were employed by the WV State Police until 6 months after the effective date of W.V. Code § 15-2A-3(a), which closed enrollment in Plan A. Petitioners were provided with, and signed enrollment forms providing for Plan B benefits. **Petitioners are therefore charged with the knowledge of the law as [it] exists in the statute. There is no evidence that the Board made false statements or disseminated any false or misleading information to the Petitioners.** The Board cannot now be estopped from carrying out the clear mandates of WV Code § 15-2A-1, et seq., despite any potential misrepresentations by state police officials.

9.) The West Virginia Supreme Court has not extended constitutional protection against pension plan amendatory changes to persons who were not yet employed at the time the legislation was enacted or amended. Instead, the Court found that the legislature may amend pension benefits as they involve persons who someday in the future enter into a public safety employment contract with the state. *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995).

10.) Next, the Petitioners assert that they should be included in Plan A on the basis of promissory estoppel because they reasonably relied to their detriment on their inclusion in the same.

11.) Promissory estoppel applies when a party is induced to act or refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact. Syl. Pt. 2, *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

12.) In the case at bar, **the Petitioners have failed to show that there was any misrepresentation on the part of the Board that induced them to enroll in Plan B.**

13.) Lastly, the Petitioners assert that their equal protection rights have been violated by the Board's refusal to provide Plan A benefits to them.

14.) "Where economic rights are concerned we look to see whether the classification is a rational one based on social, economic, historic or geographical factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally." *Summers v. WV Consolidated Public Retirement Board*, 217 W. Va. 399, 618 S.E.2d 408 (2005).

15.) The enactment of WV Code § 15-2A-3(a) does not create a separate and distinct class, but instead it creates a separate retirement system that applies uniformly to all members, and it rationally relates to a legitimate state purpose—ensuring the State Police Retirement fund is adequately funded.

16.) In [analyzing] the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. WV Const. Article V Section 1.

(Final Order dated November 20, 2008, C.A. No. 06-AA-55) (emphasis added).

12. The plaintiffs then appealed this Court's Final Order, entered in Civil Action No. 06-AA-55 to the West Virginia Supreme Court of Appeals. In their Petition for Appeal the plaintiffs expressly presented the following arguments: (1) that the Board has the authority and duty to correct mistakes made by those administering the West Virginia State Police Retirement System and retroactively enroll the plaintiffs as Plan A participants; (2) that the plaintiffs have a property interest in Plan A because they substantially relied to their detriment on Plan A benefits; (3) that plaintiffs should be included in Plan A on the basis of promissory estoppel because they reasonably relied to their detriment on their inclusion in Plan A; (4) that the plaintiffs' equal protection rights are violated by the State's refusal to provide retirement Plan A benefits to them; and (5) that the Board had a duty to implement its November 17, 2002, decision. (Petition for Appeal of C.A. No. 06-AA-55 to

Supreme Court of Appeals). The Supreme Court ultimately refused the Petition for Appeal. (Corrected Order dated May 13, 2009, No. 090481). Thus, the Final Order entered by Judge Kaufman in Civil Action No. 06-AA-55 constitutes a final adjudication.

13. The Board argues that the claims against it should be dismissed on the grounds of collateral estoppel and *res judicata*. It contends that the claims of the plaintiffs herein are identical to the claims already adjudicated in the Board's favor in prior proceedings, and that, to the extent the plaintiffs' claims are not identical, they rest upon issues of fact and law that have already been determined in the Board's favor in prior proceedings.

14 The central inquiry in determining whether the doctrine of collateral estoppel constitutes a bar to a claim is whether a given issue has been actually litigated by the parties in an earlier suit. As the Supreme Court of Appeals has stated:

Collateral estoppel or issue preclusion "is supported by the same public policy considerations as *res judicata*." . . . [W]e [have] indicated: "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

Asaad v. Res-Care, Inc., 197 W.Va. 684, 687, 478 S.E.2d 357, 360 (1996) (citations omitted)(emphasis added).

15. The central inquiry on a plea of *res judicata* is whether the cause of action in the second suit is the same as the prior suit. As stated by the Supreme Court of Appeals,

[r]es judicata or claim preclusion “generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action.”

Beahm v. 7-Eleven, Inc., 223 W.Va. 269, 672 S.E.2d 598, 601-02 (2008) (citations omitted).

“[R]es judicata [or claim preclusion] serves to advance several related policy goals-(1) to promote fairness by preventing vexatious litigation; (2) to conserve judicial resources; (3) to prevent inconsistent decisions; and (4) to promote finality by bringing litigation to an end.

Asaad v. Res-Care, Inc., 197 W.Va. 684, 687, 478 S.E.2d 357, 360 (1996) (citations omitted).

“For a second action to be a second vexation which the law will forbid, the two actions must have (1) substantially the same parties who sue and defend in each case in the same respective character, (2) the same cause of action, and (3) the same object.”

...
Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Beahm, 672 S.E.2d at 602 (emphasis added) (citations omitted).

16. The relevant prior proceedings in this Court, Civil Action No. 03-MISC-473, before the Honorable Charles E. King, Jr., and Civil Action No. 06-AA-55, before the Honorable Tod Kaufman, constitute final adjudications on the merits.

17. The plaintiffs in the instant action are identical to the plaintiffs and petitioners in the prior proceedings before Judge King and Judge Kaufman, or in privity with them, as the prior actions were expressly brought in the name of and on behalf of the similarly situated members of the 42nd, 43rd, 44th, and 45th Cadet Classes, and plaintiffs have expressly alleged that they are representative of such persons and that they may be deemed a single class for purposes of a class action.

A plaintiff cannot simply escape the application of *res judicata* or collateral estoppel simply because he was not formally joined as a party in the prior litigation. This Court has recognized that “[p]rivity, in a legal sense, ordinarily denotes ‘mutual or successive relationship to the same rights of property.’ ”

“[T]he concept of privity with regard to the issue of claim preclusion is difficult to define precisely but **the key consideration for its existence is the sharing of the same legal right by parties allegedly in privity, so as to ensure that the interests of the party against whom preclusion is asserted have been adequately represented.**” It has been recognized that “[p]rivity ... ‘is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the *res judicata*.’ ” In other words, **“preclusion is fair so long as the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party.”**

Beahm, 672 S.E.2d at 602-03 (emphasis added) (citations omitted). All plaintiffs and petitioners have been represented by the same counsel throughout the course of the prior proceedings and the instant action.

18. The fact that the circuit court proceeding before Judge Kaufman was an appeal of an administrative proceeding is not, considered in isolation, a bar to application of the doctrines of collateral estoppel and *res judicata*.

19. The Supreme Court has held that the relitigation of an issue or claim is not

precluded where the procedures available in the first court are tailored to the "prompt, inexpensive determination of small claims," *Asaad*, 197 W.Va. at 687-88, 478 S.E.2d at 360-61, but that a bar will be imposed where the first court's procedures are similar to those found at the circuit court level.

It is now well established that "the doctrine of res judicata may be applied to quasi-judicial determinations of administrative agencies." The standard by which this Court determines the preclusive effect of administrative adjudications is [as follows]:

For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, **the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court.** In addition, the identity of the issues litigated is a key component to the application of administrative *res judicata* or collateral estoppel.

Wheeling-Pittsburgh Steel Corp. v. Rowing, 205 W.Va. 286, 296, 517 S.E.2d 763, 773 (1999) (citations omitted) (emphasis added).

20. As stated by the Supreme Court of Appeals:

"For purposes of res judicata, 'a cause of action' is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. . . The test to determine if the . . . cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues"

. . .

"An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of

the court will not prevent the matter from being res judicata.”

Accordingly, *res judicata* may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined.

Beahm, 672 S.E.2d at 603-04 (emphasis added) (citations omitted).

West Virginia Consolidated Public Retirement Board

21. Reference to the Complaint, as noted in more detail in ¶¶ 5-7 of this Order, shows that the plaintiffs have asserted causes of action identical to those previously considered, in two prior proceedings before this Court, for the purposes of *res judicata*. Plaintiffs expressly seek “to be placed under Plan A benefits;” to be awarded damages for violation of their rights of due process and equal protection, and to have the Court find that the prior proceedings before this Court and the Board amount to a nullity. (Complaint at 31, Prayer for Relief, ¶¶ 5-8.)

22. Plaintiffs argue that the instant action also presents a new cause of action that was not previously asserted in prior proceedings, i.e., a tort cause of action seeking monetary damages pursuant to the State’s insurance policy providing insurance coverage to the Board and other State agencies. To the extent that plaintiffs seek an award of monetary damages against the Board, their claim rests wholly on the allegation that they were misinformed as to the nature of retirement benefits in the course of their recruitment by the State Police.

23. Considerable testimony² was taken in the course of the proceeding that was appealed to this Court as Civil Action No. 06-AA-55, resulting in pertinent findings as set

²Plaintiffs refer to this testimony in their Complaint at 31, Prayer for Relief, ¶ 6, where they refer to it as “a waste of time[.]”

forth in ¶ 11 of the instant Order. The Court finds that the procedures employed in the administrative hearing were substantially similar, for all relevant purposes, to the procedures available in this Court, as the plaintiffs, or persons in privity with them, testified as to the manner of their recruitment and the substance of the information provided to them.

24. In Civil Action No. 06-AA-55, this Court expressly found that there was no evidence that the Board had made false statements or disseminated any false or misleading information to the plaintiffs in the course of their recruitment by the State Police. No new evidence to the contrary has been presented to this Court.

25. Plaintiffs have presented evidence tending to show that they were misinformed as to the nature and extent of the benefits they could expect to receive were they to join the State Police. However, this evidence, consistent with the evidence considered in Civil Action No. 06-AA-55, relates to information provided to the plaintiffs by representatives of the State Police, rather than the Board, the PERS or the SPRS.

26. This Court's prior finding that the Board did not provide false or misleading information to the plaintiffs is consistent with the fact that the Board and its representatives took no active part in recruiting the plaintiffs on behalf of the State Police. Plaintiffs thus effectively argue, without citation to statute or case law, that the Board had an actionable duty to ensure that the State Police recruiters were providing the plaintiffs with accurate information.

27. Review of the pleadings and documents filed in Civil Action No. 03-MISC-473 and Civil Action No. 06-AA-55, as well as the orders entered by the Board, by this Court, and by the Supreme Court of Appeals in relation to those cases, shows that the plaintiffs'

cognizable claims are barred by the doctrines of *res judicata* and collateral estoppel. Virtually every factual allegation and point of law alleged, asserted or argued in the instant action against the Board, has been considered by the Board, or by this Court, either directly or on appeal from the Board.

28. To the extent that plaintiffs may be deemed to assert a new tort cause of action against the Board that is not precluded by the doctrine of *res judicata*, the Court finds that such claims are precluded by the doctrine of collateral estoppel, as the issue upon which those claims are based, i.e., misrepresentation of retirement plan benefits by the Board, has been conclusively determined in the Board's favor.

State of West Virginia

29. Plaintiffs appear to attempt to state claims against the State of West Virginia and its agencies, e.g., the defendant Board and the defendant State Police, as if the State were a separate and independent entity. The Complaint contains no allegation that attempts to define what the plaintiffs intend when they refer to the "State of West Virginia" as opposed to its State agencies, such as the Board and the State Police, that are also expressly named.

30. Certain allegations in the Complaint attribute particular characteristics to the State, when those characteristics are equally attributable to a named defendant State agency, e.g., in paragraph 60 of the Complaint, the "State" is alleged to administer two retirement plans, when those plans are administered by the Board as expressly provided by W. Va. Code § 5-10D-1. However, with the exception of the cited paragraph, i.e., Complaint ¶ 60, there appears to be no other express reference to the State, either as an actor or a defendant independent of its agencies.

31. The State is capable of acting only through its various agencies and departments.

As a practical consequence of the expansion of government and the proliferation of bodies charged with conducting the State's business, **we have recognized that "proceedings against boards and commissions, created by the Legislature, as agencies of the State, are suits against the state** within the meaning of Article VI, Section 35, of the Constitution of West Virginia, **even though the State is not named as a party in such proceedings."** Hamill v. Koontz, 134 W.Va. 439, 443, 59 S.E.2d 879, 882 (1950); see also Hesse v. State Soil Conservation Committee, 153 W.Va. 111, 115, 168 S.E.2d 293, 295 (1969) (constitutional immunity "relates not only to the State of West Virginia but extends to an agency of the state to which it has delegated performance of certain of its duties").

Arnold Agency v. W. Va. Lottery Comm'n, 206 W. Va. 583, 590-91, 526 S.E.2d 814, 821-22 (1999) (emphasis added).

32. As the State acts through its agencies, the State cannot to be treated as a separate and independent entity, or a separate and independent defendant, for the purposes of this action.

Terasa L. Miller

33. In the Complaint, defendant Terasa L. Miller is identified as the Acting Executive Director of the Board (Complaint ¶¶ 36), and it is alleged that Ms. Miller is a public official. (Complaint ¶ 85). It is further alleged that she is required to perform certain mandatory duties as set forth in the applicable statutes and as directed by the Board. (Complaint ¶¶ 37, 88-89, 94). It is further alleged that certain relief was granted to the plaintiffs by decision of the Board on November 13, 2002 (Complaint ¶ 91), that Ms. Miller had a duty to implement that decision (Complaint ¶ 94), and that the Board had no authority to reconsider its November 13, 2002, decision at a later date, as it did on January 22, 2003. (Complaint ¶¶ 92-93).

34. The only allegations against Ms. Miller are based upon her purported failure to perform a mandatory statutory duty by immediately reducing the Board's November 13, 2002, decision to a written final order of the Board and acting to implement that decision.

35. The allegations relevant to Ms. Miller were previously asserted in a Petition for Writ of Mandamus filed in this Court, before the Honorable Charles E. King, Jr., in 2003. (Petition for Writ of Mandamus ¶¶ 27-28, 45-46, 53-56, C. A. No. 03-MISC-473).³ That action was subsequently dismissed by order dated November 17, 2004. ("Order Granting Defendants' Motion to Dismiss", C. A. No. 03-MISC-473). The plaintiffs petitioned for appeal of the "Order Granting Defendants' Motion to Dismiss" on April 8, 2005, and the petition for appeal was refused on May 25, 2005. (Supreme Court Order dated May 25, 2005, No. 050743, *see also* Note 1 herein.)

36. The "Order Granting Defendants' Motion to Dismiss" in Civil Action No. 03-MISC-473 expressly stated that the Board's executive officers had properly exercised executive discretion after the Board's November 13, 2002, meeting by not immediately reducing the Board's decision to a final administrative order. (Order at 2nd unnumbered page). The Dismissal Order also held that the Board had the authority to reconsider a decision until that decision was incorporated in a written final order. (Dismissal Order at 3rd through 5th unnumbered pages). As the only issues relating to Ms. Miller that are raised in the Complaint are issues that have already been determined in Ms. Miller's favor, the claims against Ms. Miller are barred by the doctrine of collateral estoppel.

PERS and SPRS

37. In the Complaint, defendant West Virginia Public Employees Retirement

³The Petition filed in Civil Action No. 03-MISC-473 does not refer to Terasa L. Miller, but to Terasa Robertson, Ms. Miller's name at that time.

System (hereinafter "PERS"), is alleged to have been established pursuant to West Virginia Code §§ 5-10-1 to -55 (Complaint ¶ 45), is alleged to be administered by the defendant Board pursuant to West Virginia Code § 5-10D-1 (Complaint ¶ 46), and is further alleged to be "different from other public employee systems" in certain particulars. (Complaint ¶ 54). There appear to be no other allegations expressly referring to PERS set forth elsewhere in the Complaint.

38. The allegations against defendant PERS, taken as a whole, are insufficient to present any cognizable claim of any kind against defendant PERS. Further, as plaintiffs themselves allege that the defendant Board administers PERS, it appears that the Board is the real party in interest, and that no claim need be brought against the defendant PERS, even if it presumed that PERS exists as an entity that might properly be joined in a civil action.

39. Pursuant to the Complaint, the defendant West Virginia State Police Retirement System (hereinafter "SPRS") is alleged to have been established as a retirement plan pursuant to West Virginia Code §§ 15-2A-1 to -22 (Complaint ¶ 60), is alleged to be administered by the Board (Complaint ¶¶ 39, 46), and is referred to repeatedly throughout the Complaint as "Plan B."

40. Although review of the Complaint shows that plaintiffs allege that they are enrolled in Plan B but contend that they should be transferred to Plan A (Complaint ¶¶ 47-49, 55-57), there appear to be no allegations set forth in the Complaint against SPRS as a party defendant.

41. The allegations relating to SPRS are insufficient to state a claim of any kind against SPRS. Further, as the plaintiffs themselves allege that the defendant Board administers SPRS, pursuant to the express provisions of West Virginia Code § 5-10D-1(a),

it appears that the Board is the real party in interest, and that no claim need be brought against the defendant SPRS, even if it presumed that SPRS exists as an entity that might properly be joined in a civil action.

Accordingly, for all of the foregoing reasons, the Court **GRANTS** the motions to of defendants, State of West Virginia, West Virginia State Police Retirement System, West Virginia Consolidated Retirement Board, West Virginia Public Employees Retirement System, and Terasa L. Miller, and **ORDERS** that the claims against them be dismissed with prejudice.

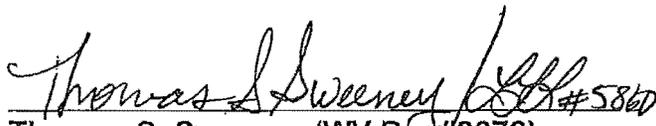
The objections of parties aggrieved by this Order are noted and preserved.

The Clerk is directed to provide a certified copy of this Order to all counsel of record.

ENTERED this 30 day of March, 2011.


James C. Stucky
Judge, Thirteenth Judicial Circuit

Prepared by:


Thomas S. Sweeney (WV Bar #3672)
E. Taylor George (WV Bar #8892)
MacCorkle, Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
Charleston, WV 25301
Telephone: (304) 344-5600
Facsimile: (304) 344-8141

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1st
DAY OF April 2011. CLERK
Cathy S. Gatson
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA R