

11-0747

FILED

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2011 MAR 30 PM 2:18

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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  
SHAWN MICHAEL COLEMAN; TROOPER  
JEFFREY LEALTON COOPER; TROOPER  
BRAD LEE MANKINS; TROOPER  
CHRISTOPHER ADAM PARSONS;  
TROOPER ROGER DALE BOONE;  
TROOPER STEVEN P. OWENS; and  
TROOPER ADAM WILSON SCOTT,  
and all others similarly situated,

Plaintiff,

v.

CIVIL ACTION NO.: 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.

**GRANTING DEFENDANT, WEST VIRGINIA STATE POLICE'S,  
MOTION FOR SUMMARY JUDGMENT**

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State Police's, Motion for Summary Judgment. Upon hearing argument of counsel and

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**GRANTING DEFENDANT, WEST VIRGINIA STATE POLICE'S,  
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On January 20, 2011, came the parties, by counsel, on Defendant, West Virginia  
State Police's, Motion for Summary Judgment. Upon hearing argument of counsel and

upon review of the Motions, briefs, and exhibits filed in this matter, the Court hereby makes the following findings of fact and conclusions of law:

1. Plaintiffs, employees of Defendant, West Virginia State Police ("State Police"), 42<sup>nd</sup>, 43<sup>rd</sup>, 44<sup>th</sup>, and 45<sup>th</sup> Cadet Classes and members of the West Virginia State Police Retirement System ("Plan B") through the West Virginia Consolidated Public Retirement Board ("Board"), filed the instant Complaint on January 2, 2007, seeking judicial revision of their membership in Plan B and a declaration from the Court that they are entitled to benefits under the Division of Public Safety Death, Disability, and Retirement System ("Plan A").

2. This request was been denied by the Board and its decision was upheld by the Circuit Court of Kanawha County and the West Virginia Supreme Court of Appeals.

3. Plaintiffs allege that before accepting jobs with the State Police, they were promised pension benefits under Plan A of the West Virginia State Police Retirement System and relied upon that representation to their detriment.

4. Plaintiffs seek a determination from this Court that they are entitled to Plan A benefits and order a commensurate accounting of additional amounts due to be paid to the pension fund by the State of West Virginia and, if the amounts have not been paid, that the Court order Defendants to bring an action to enforce same; that the Court order that the administrative procedure of the Board in its grievances were not adequate nor fair and that the Board must provide Plaintiffs with a fair and impartial hearing on their grievances

5. An order on Plaintiffs' appeal of the Board's decision, ....., Civil Action Number 06-AA-55, Circuit Court of Kanawha County, Honorable Tod J. Kaufman's ruling, as follows:

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 is [sic] exists in the statute.

5. Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. VA. R. CIV. P. 56(c).

6. A motion for summary judgment should be granted when it is clear that no genuine issue of fact exists to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. E.g., syl. pt. 2, Swears v. R.M. Roach & Sons, Inc., 225 W. Va. 699, 696 S.E.2d 1, 2 (2010); syl. pt. 5, Arnold v. Palmer, 224 W. Va. 495, 497, 686 S.E.2d 725, 727 (2009); syl. pt. 2, Painter v. Peavy, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994); syl. pt. 1, Andrick v. Town of Buckhannon, 187 W. Va. 706, 707, 421 S.E.2d 247, 248 (1992); syl. pt. 3, Aetna Cas. & Surety Co. v. Fed. Ins. Co. of New York, 148 W. Va. 160, 160, 133 S.E. 2d 770, 771 (1963).

7. The West Virginia State Constitution provides that “[t]he state of West Virginia shall never be made defendant in any court of law or equity.” W. Va. Const. art VI, § 35. “There is no specific exception to this inhibition. Such a provision is ordinarily construed to be ‘absolute and unqualified.’” Pittsburgh Elevator Co. v. West Virginia Bd. of Regents, 172 W.Va. 743, 752-753, 310 S.E.2d 675, 685 (1983). “[A] suit seeking recovery against the State's insurance carrier is outside the bounds of the constitutional bar to suit contained in W. Va. Const. Art. VI, § 35.” Id. at 756, 688.

8. Damages in the form of retirement benefits are not recoverable against the State Police as a matter of law as the relief sought by Plaintiffs herein is specifically excepted from the insurance available.<sup>1</sup>

9. Plaintiffs' claims are further barred because such claims have already been litigated between the same parties on the same issues and adjudicated to a final decision in Kanawha County, Civil Action Number 06-AA-55 where the following was judicially determined:

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 West Virginia State Police Retirement System, and that it should therefore retroactively enroll

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<sup>1</sup> While the Court has held that "pensions are a lawful debt of the State" the proper remedy for any failure to pay a pension is a mandamus action against the state treasurer and auditor neither of whom are parties to this action. Further, "the funding of any pension program is the legislature's problem-not the state employees' problem-and once the legislature establishes a pension program, it must find a way to pay the pensions to all employees who have substantial reliance interests." Even if Plaintiff petitioners established a lawful debt of the State, their remedy is a mandamus action against the Treasurer and the Auditor and not the West Virginia State Police. Gribben v. Kirk 195 W.Va. 488, 500, 466 S.E.2d 147, 159 (1995) citing Syl. Pt. 14, Booth v. Sims, 193 W.Va. 323, 456 S.E.2d 167 (1995).

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 (1988). 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 West Virginia 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 is [sic] 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 Petitioner 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 exercising 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.

10. In addition to the foregoing, as the legislature has not authorized the conference of retirement benefits as claimed by the Plaintiffs herein and as a matter of law, this Court may not confer retirement benefits for employment where the legislature has not so authorized summary judgment is proper.

For all the foregoing reasons, the Court hereby **GRANTS** Defendant, West Virginia State Police's, Motion for Summary Judgment and dismisses the Complaint with prejudice.

The Court notes the objection & exception of the Plaintiffs to the Court's ruling. 6/25

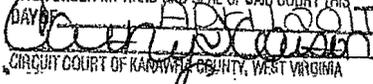
The Clerk is directed to send a certified copy of this Order to all counsel of record.

So ENTERED this 30 day of March, 2011.

  
Honorable James C. Stucky

Prepared by:

  
Wendy E. Greve (WV State Bar No. 6599)  
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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  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 