

12-0156

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

RONALD K. McKOWN,

2012 JAN -6 PM 3: 56

PETITIONER,

CATHY S. GATSON, CLERK  
KANAWHA CO. CIRCUIT COURT

v.

CIVIL ACTION NO. 11-AA-47  
Judge Paul Zakaib, Jr.

WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD,

RESPONDENT.

**FINAL ORDER AND WRIT OF MANDAMUS**

This matter comes before the Court on Petitioner Ronald K. McKown's (hereinafter "Petitioner") "Petition for Appeal from West Virginia Consolidated Public Retirement Board Final Order of March 2, 2011, And For Issuance Of Writ of Mandamus" filed March 31, 2011.

After reviewing the Petition, the briefs filed by the parties, the entire record, and the applicable legal authority, this Court hereby **REVERSES** the Final Order of the West Virginia Consolidated Public Retirement Board (hereinafter "CPRB").

**STANDARD OF REVIEW**

1. This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-5(g) states,

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or

- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. The Court must give deference to the administrative agency's factual findings and review those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 196 W. Va. 588, 595, 474 S.E.2d 518, 525 (1996).

3. The West Virginia Supreme Court has stated that, in administrative appeals, a reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts.

*Donahue v. Cline*, 190 W. Va. 98, 102, 437 S.E.2d 262, 266 (1993) (per curiam) (citing *Gino's Pizza of West Hamlin v. West Virginia Human Rights Comm'n*, 187 W. Va. 312, 317, 418 S.E.2d 758, 763 (1992)).

#### FINDINGS OF FACT

1. Under West Virginia law, a teacher who served in the military during a conflict in which the draft is in place shall receive retirement credit for his military service. Petitioner is an honorably discharged Veteran of the United States Navy who served in the Vietnam conflict and later taught public school children in West Virginia for nearly three decades. Petitioner is a member of the Teachers Retirement System. Petitioner served four years active and two years in the reserves during Vietnam (a conflict during which the draft was in effect). Nonetheless, he has been denied retirement credit for his military service.

2. The West Virginia Teachers Retirement System statute provides that an individual will receive retirement credit for military service when he:

- (1) a member of the retirement system, or TRS;
- (2) served in the Armed Forces of the United States;
- (3) served during a period of national emergency, the Vietnam conflict; and,
- (4) served in a national emergency within which a Federal Selective Service Act was in effect.

3. Petitioner, Ronald McKown, has been a school teacher in the State of West Virginia for approximately 29 years. He also is a veteran of the Vietnam conflict and was honorably discharged from the United States Navy.

4. Petitioner enlisted in the United States Navy on April 13, 1973.

5. Upon enlisting in the United States Navy, Petitioner could have been called to active duty at any time without his consent. He understood that he was a member of the "ready" or "stand-by" reserve.

6. At the time he enlisted, Petitioner had a selective service number. At the time Petitioner enlisted, the draft for the Vietnam conflict was in place and continued thereafter.

7. When he enlisted, Petitioner took an oath of enlistment and entered into an "enlistment contract" requiring him to serve in the United States Navy for a total of six years.

8. Petitioner completed his six year obligation with the United States military serving from April 13, 1973 to April 12, 1979. Petitioner entered active duty on October 2, 1973, while the Vietnam conflict continued, but after the draft had ended. He remained on active duty for four years.

9. Petitioner spent a total of two years in the reserves. Petitioner was credited with six

months in the reserves from April 13, 1973, to October 1, 1973, as well as eighteen months from October 3, 1977, to his discharge in April of 1979.

10. Petitioner was honorably discharged from the Navy. While in the service, Petitioner received the National Defense Service Medal and the Good Conduct Medal.

11. Soon after his discharge from the United States Navy, Petitioner began his career as a public school teacher in Lincoln County, West Virginia. Petitioner became a member of the Teachers Retirement System ("TRS") which is administered by the Consolidated Public Retirement Board ("Board). Petitioner taught for approximately twenty-seven years when he began to investigate his retirement options.

12. Prior to the start of the 2008-09 school year, Petitioner contacted the Board to determine how soon he could retire.<sup>1</sup> He asked the Board, "what's the earliest date I can retire?" He was told that he could use military time toward his retirement and was directed to send in his DD-214, an official military document detailing his military service. He provided it to the Board.

13. On or about February 22, 2008, Petitioner completed a form requesting an estimate of his benefits. In the comment section of the form, Petitioner wrote:

You should have a copy of my DD-214. If not, I can get one from the Navy Dept. My active duty dates were 10/1/73 to 10/1/77. In June of 2008, I will be finishing my 27<sup>th</sup> year of teaching.

(Emphasis supplied)

14. Petitioner was informed that he would receive four years credit for his military service and that he would have to reach age 55 before he was eligible to retire.

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<sup>1</sup>At that time, Petitioner's daughter and only grandchild had moved out-of-state. Petitioner and his wife wished to move near them. Thus, Petitioner wanted to retire as soon as possible.

15. Thereafter, Petitioner met and spoke with Judy King, an employee of the Board who advised members of the retirement system in making retirement decisions.

16. On behalf of the Board, Ms. King generated at least four printouts dated August 11, 2008, that provided estimates of his monthly income under different scenarios. Ms. King specifically stated that the monthly income figure was an estimate because accrued sick leave and final salary totals were not final and, therefore, monthly benefits could change. Petitioner was informed that the uncertain nature of accrued sick leave and final salary were the only reason that the monthly income figure was an estimate.<sup>2</sup>

17. During the 2007-08 school year, Petitioner rescinded his retirement because his daughter and grandchild had returned to West Virginia.

18. At or near the start of the 2008-09 school year, Petitioner again contacted the Board to explore his retirement options and specifically to determine what his monthly income would be upon retirement.

19. Petitioner met and spoke with Velma Totten, who like Ms. King, advises members of the retirement system in making retirement decisions. Petitioner indicated to Ms. Totten that the numbers generated by her were “important” because he believed he needed at least \$3,000 per month in retirement income.

20. On behalf of the Board, Ms. Totten generated at least three printouts; two were dated September 11, 2009, and another was dated October 7, 2009. These documents provided estimates of Petitioner’s monthly income under different scenarios. Like Ms. King, Ms. Totten indicated that

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<sup>2</sup>All four documents generated by Ms. King indicated that he would receive four years retirement credit for his military service.

the monthly income figure on each document was an estimate because accrued sick leave and final salary were not final and, therefore, monthly benefits could change. Petitioner was again informed that the uncertain nature of the accrued sick leave and final salary were the only reasons that the monthly income figure was an estimate.

21. All three documents generated by Ms. Totten indicated that Petitioner would receive 4.474 years retirement credit for his military service. The final printout indicated that Petitioner would receive at least \$3,000 per month in retirement earnings. This information, as well as the previous information from the Board, was the impetus for Petitioner to retire.

22. Based upon the information received from the Board, Petitioner informed the Lincoln County Board of Education that he would be retiring on June 10, 2010. Petitioner gave notice of his retirement on October 8, 2009, or one day after he received his last estimate from the Board.

23. In light of Petitioner's pending retirement, the Lincoln County Board of Education determined it would no longer post Petitioner's position.

24. On June 10, 2010, Petitioner retired from his position with the Lincoln County Board of Education. Petitioner anticipated that he would begin receiving his retirement benefits soon thereafter. In particular, he believed he would receive \$6,000 from retirement by August 2010 and \$500 for his early retirement, as well as continued monthly retirement payments.

25. The Board made no contact with Petitioner between October 7, 2009, and his retirement date of June 10, 2010.

26. Upon his retirement, Petitioner's position with the Lincoln County Board of Education was no longer available to him.

27. By letter dated June 15, 2010 – five days after his retirement – Petitioner was

informed that the Board had performed a “quick audit” of Petitioner’s retiree file and determined that he did not meet “retirement eligibility” for the Teachers Retirement System (“TRS”).<sup>3</sup>

28. Petitioner then contacted Mr. Doub. Mr. Doub apologized for the mistakes made by the Board and characterized the actions of the agency as “negligence.” Mr. Doub informed Petitioner of his right to appeal this decision. He further stated that since the agency had Petitioner’s military and employment information for a long time – apparently more than two years – that the agency should have “caught this earlier.”

29. Mr. Doub testified that he relied on an internal guideline, or “cheat sheet” as he called it, to reach his determination. He further testified that he believes that the guidelines are based upon West Virginia Code §18-7A-17(b). With regard to this statute, Mr. Doub testified that West Virginia Code §18-7A-17(b) does not mention “active duty.” He also indicated that Petitioner:

- (1) is a member of the retirement system;
- (2) was a member of the Armed Forces of the United States;

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<sup>3</sup>TRS Senior Retirement Advisor, John A. Doub wrote:

In your file we found quite a mix up with your military service. In order to receive credit for military service in the Teachers Retirement System (TRS) you must have gone into active duty before “The Draft” ended 07/01/1973. From what I can tell, you went into active duty 10/02/1973 several months after The Draft ended. This is obviously a big deal and I am very sorry to be informing you of this, but I can assure you that it is a fact!

(Emphasis supplied)

In the letter, Mr. Doub continued by saying:

With that being said, I’m afraid you will not meet retirement eligibility in TRS to retire July 1<sup>st</sup> as you had originally planned. Please get back in touch with me when you receive this, so I know that you fully understand the severity of this situation and we can discuss you options at this time.

- (3) that he served during a period of national emergency, Vietnam; and
- (4) the Selective Service Act was in effect during the Vietnam conflict.

30. Similarly, Teresa Miller, Deputy Director and Chief Operating Officer of the Board, agreed that Petitioner was a member of the retirement system; that he served in the Armed Forces; and that the draft was in effect, at least, during part of the Vietnam conflict. She did not contend that Petitioner did not serve during Vietnam.

31. Ms. Miller testified that as it relates to armed conflicts in which no draft was in place, the Legislature has not allowed “non-contributory service” to count toward retirement.

32. Petitioner relied, to his detriment, on the information provided to him by the Board in reaching his decision to retire. Upon learning that he would not receive his retirement and that his old job was no longer available, Petitioner was required to take a football trainer’s part-time job and then apply for a new position in order to make ends meet. He applied for, but did not receive, five jobs with the Putnam County Board of Education. At the time of the hearing in this matter, he anticipated being hired into a position with the Lincoln County Board of Education.<sup>4</sup>

33. Based upon his interaction with Board employees, Petitioner believed that he would receive retirement credit for 29 years of teaching; at least four years military service; and approximately a year and a half accrued sick leave. This would have allowed him to retire – as Board employees had informed him on multiple times that he could do. However, because he did not receive any credit for his military service, he was not eligible to retire according to the Board because he lacked 30 years service. Notably, the Board has given him no credit for his military

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<sup>4</sup>After the hearing in this matter, Petitioner was, in fact, hired into this new position. Moreover, since the hearing in this matter, Petitioner has sought medical treatment for medical issues caused by the actions of the Board.

service.<sup>5</sup>

34. Following the evidentiary hearing below, Respondent's Hearing Officer issued a "Recommended Decision" which was adopted by the Board on March 2, 2011.

1. Military service credit in TRS is controlled by the provisions of §18-7A-17(b), which provides in pertinent part as follows:

(b) For the purpose of this article, the retirement board shall grant prior service credit to new entrants and other members of the retirement system for service in any of the Armed Forces of the United States in any period of national emergency within which a federal Selective Service Act was in effect. For purposes of this section, "Armed Forces" includes Women's Army Corps, women's appointed volunteers for emergency service, Army Nurse Corps, SPARS, Women's Reserve and other similar units officially parts of the military service of the United States. The military service is considered equivalent to public school teaching, and the salary equivalent for each year of that service is the actual salary of the member as a teacher for his or her first year of teaching after discharge from military service. Prior service credit for military service shall not exceed ten years for any one member, nor shall it exceed twenty-five percent of total service at the time of retirement.

The Applicant asserts ambiguities in this language, asserting that one does not have to be on active duty, thereby permitted service credit for time in the reserves, and that if the Selective Service Act was in effect during any part of the national emergency the service credit is acquired even if the Selective Service Act was not in effect while the member was in the service. Neither of these propositions have merit. It is concluded that only active duty is contemplated to qualify for "free" military service credit. This has long been the application of this statute by this Board and such application is entitled to deference. See Sniffen v. Cline, 456 S.E. 2d 451, 455 (W.Va. 1995). It is further concluded that under the clear language of the statute the period of a member's service must coincide with the Selective Service Act being in effect as well as the period of national emergency. There is no dispute that the draft ended July 1, 1973, by Presidential proclamation. Consequently the period of the Applicant's active service was not during a time when the Selective Service Act was in effect, thereby precluding him from the requested military service credit. The draft, as opposed to a registration requirement, is concluded to be the operative affect of the Selective Service Act.

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<sup>5</sup>Based upon Petitioner's case, the Board has changed its method for review of DD-214s and retirement calculations based upon military service. The review process now includes another level of administrative review.

The Applicant also asserts the proper application of the principle of equitable estoppel to this matter. One of the basic elements to the application of estoppel in any setting is that the person seeking its application demonstrate some detriment suffered as consequence of reliance upon a misrepresentation of fact. See Syl. Pt. 2, Ara v. Erie Ins. Co., 387 S.E.2d 320 (W.Va. 1989). This the Applicant has failed to do as a consequence of his fortuitous re-employment by the Lincoln County Board of Education. Additional standards were opined by the Supreme Court in situations involving government in the per curiam opinion in Hudkins v. C.P.R.B., 220 W.Va. 275, 647 S.E.2d 711 (2007). Even had the Applicant been able to demonstrate to his reliance it must be concluded that the application of estoppel in this matter, permitting the commencement of an annuity when not statutorily eligible, would defeat a strong public interest, this being one of the criteria stated in Hudkins, supra.

It is from this decision that Petitioner sought administrative review and equitable relief in the form of mandamus.

#### CONCLUSIONS OF LAW

1. The West Virginia Consolidated Public Retirement Board erred, as a matter of law, when it denied Petitioner's participation in the Teachers Retirement System and whether Petitioner should receive retirement credit for his military service.

2. Petitioner received no retirement credit for his military service despite the clear and unequivocal language of West Virginia Code §18-7A-17(b). This section states in pertinent part:

For the purpose of this article, the Retirement Board shall grant prior service credit to (1) new entrants and other members of the retirement system for (2) service in any of the Armed Forces of the United States (3) in any period of national emergency (4) within which a Federal Selective Service Act was in effect.

(Enumeration added for ease of reference) It is clear that the intent of this statement is to award teachers who served in the military retirement credit for military service.

3. It is unquestioned in this case that Petitioner meets the four criteria to receive prior service credit for military service. Based upon the enumeration provided above, it is uncontroverted

that:

- (1) Petitioner is a member of the retirement system, or TRS;
- (2) Petitioner served in the Armed Forces of the United States;
- (3) Petitioner served during a period of national emergency, the Vietnam conflict; and,
- (4) Petitioner served in a national emergency within which a Federal Selective Service Act was in effect.

Petitioner has a clear legal right to this relief.

4. Because Petitioner meets the criteria set forth in West Virginia Code §18-7A-17(b), he is eligible for prior service credit for his military service and his appeal must be granted. Therefore, the Board's interpretation of this statute is contrary to the plain language of the statute, contrary to law and so narrow as to be arbitrary and capricious.

5. In rejecting Petitioner's contentions below, Respondent created criteria for such credit that does not exist in the statute. The Board contended below that a "member" must have "entered into active duty" while the "draft was in effect (pre 7/1/1973)." Yet, there is no requirement of "active duty" in the statute. In fact, the Hearing Officer simply stated— without any basis or analysis—

it is concluded that only action duties is contemplated to qualify for "free" military service credit. This has long been the application of the statute by the Board and such application is entitled to deference. See Sniffen v. Cline, 456 S.E.2d 451, 455 (W.Va. 1995).

(See Board Ex. 1)<sup>6</sup> This broad conclusory statement fails to address what the statute actually says.

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<sup>6</sup>The Board relies on an unpublished document with the headings "PERS/TRS Military Service Guidelines" to reach this conclusion. Beneath the heading, the guidelines states "For internal use only – do not distribute." In applying this guideline, the Board concluded that because Petitioner enlisted during the draft (April 13, 1973) but went on active duty on October 1, 1973, or after the draft ended on July 1, 1973, he cannot receive military service credits.

Since there is no ambiguity with the statute at issue and it is unnecessary for Respondent to resort to construction, the Board should have simply applied the plain language of the statute. It has failed to do so. Instead, the Board focuses on the start and end date of the draft.

6. The Board's position is contrary to the plain language of the statute and arbitrary and capricious. West Virginia Code §18-7A-17(b) requires only that a Petitioner serve in a "national emergency within which" the draft was in effect - - which Petitioner did.

7. Based upon the foregoing, the inclusion and location of the phrase "within which a Selective Service Act was in effect" modifies "national emergency." It does not modify "service in any of the Armed Forces" and is intended to distinguish those national emergencies within which the draft was in effect from those national emergencies or military conflicts with no draft.

8. The intended breadth of the statute is also demonstrated by the second sentence of West Virginia Code §18-7A-17(b) which states:

For the purposes of this section, "Armed Forces" includes Women's Army Corps, women appointed volunteers for emergency service, Army Nurse Corps, SPARS, Women's Reserve and other similar units officially part of the military service of the United States.

(emphasis supplied)

9. It is uncontroverted that Petitioner was in the Naval Reserves beginning on April 13, 1973, for six months until he assumed active duty in October of 1973. Petitioner then spent eighteen months in the reserves after Petitioner completed active duty.

10. The second sentence of West Virginia Code §18-7A-17(b) requires that Petitioner receive prior service credit for his reserve and active duty service. The Legislature has indicated that those in the "Women's Reserve" and "other similar units officially part of the military service" are

included in the definition of “Armed Forces.” Petitioner must receive equal treatment under the statute with those in the Women’s Reserves. Petitioner’s service in the United States Naval Reserves (particularly with the requirement that he could be called to active duty without his consent) falls within the “other similar units officially a part of the military service of the United States.” Thus, Petitioner is entitled to six years prior service credit for his military service.

11. Other provisions of the statutory scheme for public employees provide further support for Petitioner’s contention. West Virginia Code §5-10-15(a)(1) states in part:

The Legislature recognizes the men and women of the state who have served in the armed forces of the United States during times of war, conflict and danger.

(emphasis supplied)

Although this language appears in the Public Employees Act, it states the Legislature’s intent – without limitation – that it recognizes the service of our citizens in the armed forces. Clearly, it does not distinguish between those who are drafted and those who enlisted.

12. Furthermore, it is significant that the “Vietnam era,” under the Public Employees Retirement Act – administered by Respondent – is defined as followed:

“The Vietnam era” means the period beginning on the twenty-eighth day of February, one thousand nine hundred sixty-one, and ending on the seventh day of May, one thousand nine hundred seventy-five, in the case of a veteran who served in the Republic of Vietnam for that period; and the fifth day of August, one thousand nine hundred sixty-four, and ending on the seventh day of May, one thousand nine hundred seventy-five, in all other cases.

West Virginia Code §5-10-15(b)(7). The Legislature has taken an expansive view of the Vietnam era in order to include those who served in the military during the Vietnam era. Indeed, this definition clearly includes the time in which Petitioner was in the reserves (starting on April 13, 1973) and when he began active service (from October 2, 1973 to October 3, 1977). Thus, under

this statute, Petitioner would qualify for retirement credit.

13. Rules of statutory construction indicate that the primary goal in construing a statute “is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1, Smith v. State Workmen’s Comp. Comm’n, 159 W. Va. 108, 219 S.E. 2d 361 (1975). The West Virginia Supreme Court of Appeals has further stated:

However, “when a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syllabus point 5, State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137, 107 S.E. 2d 353 (1959).

Jones, et al. v. West Virginia State Board of Education, et al., 218 W. Va. 52, 622 S.E.2d 289 (2005).

14. In this case, the intent of the legislature was very clear: to award teachers with military service with retirement credit.

15. The only manner in which the legislature limited this retirement credit was to insure that the service occurred during a war with a draft. The plain language of the statute indicates that this was the legislative intent.

16. Respondent imbues the statute with limitations that simply were not a part of the legislative intent. Respondent has done so through the issuance of an unpublished, interpretative rule that was not permitted to be viewed by the public. Since this unpublished rule was not a legislative rule, it is clear that it falls within the category of an “interpretive rule” pursuant to the Administrative Procedures Act and the West Virginia Supreme Court of Appeals.<sup>7</sup>

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<sup>7</sup> The Administrative Procedures Act defines “interpretive rule” as follows:  
every rule, as defined in subsection (I) of this section adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency’s interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting

17. The West Virginia Supreme Court of Appeals has stated:

In reviewing a rule or regulation of an administrative agency, a West Virginia Court must first decide whether the rule is interpretive or legislative. If it is interpretive, a reviewing court is to give it only the deference it commands.

Kokochak v. The West Virginia State Lottery Commission, 695 S.E.2d 185 (2010).

Respondent's interpretation does not comport with the plain language of the statute. In fact, it frustrates the very purpose of it. If it is necessary to conduct any construction of the statute at issue, it would be to protect the interests of the members of the pension and public employees protected by the pension. The West Virginia Supreme Court of Appeals has long held that school personnel laws are to be "strictly construed in favor of personnel, and regulations and statutes for their protection, carefully complied with." Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). More laws regarding public employee beneficiaries are traditionally construed to the benefit of the member.

18. Also, "public employee's rights under the State's statutorily-created pension system are contract rights" under the West Virginia Constitution, Art. III, section 4. Petitioner has a contractual right to his pension and all rights attendant thereto. Indeed, Respondent is not empowered to interpret such rights away from the employee. Such rights are contractual and cannot simply be removed by a state agency.

19. Petitioner has a clear legal right to retirement credit at issue. Respondent has a duty to provide the same. Moreover, Respondent's interpretation of the statute at issue is arbitrary and

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private rights, privileges or interests.

West Virginia Code §29A-1-2(c).

capricious; violative of the statute; and wrong as a matter of law.

20. Petitioner also relied to his detriment on the actions and representations of the Respondent's agency. Petitioner sought information from the agents of the Board in order to determine when he should retire. Over a two year period, Board employees supplied Petitioner with information upon which he relied to make his retirement decisions.

21. Petitioner provided his dates of active service in February of 2008 and the agents of the Board included anywhere from 4.0 to 4.474 years of military service for purposes of retirement. On at least seven occasions Petitioner received written statements from the Board that included this military service in his retirement credit.<sup>8</sup>

22. Petitioner clearly and unequivocally relied upon this information. Within one day of receiving his last statement from the Board, he notified his employer that he was retiring at the end of the school year. Only after Petitioner retired and his job was eliminated did the Board inform Petitioner of the Board's error or "negligence," as Mr. Doub testified. By then, Petitioner had officially retired and his job was no longer available. Through no fault of his own, Petitioner was left with no retirement income and no job.

23. Therefore, the Board is estopped from denying responsibility for its negligence in this case.

24. The decision of the West Virginia Supreme Court of Appeals in Hudkins v. State of West Virginia Consolidated Public Retirement Board, 220 W.Va. 275, 647 S.E.2d 711 (2007), is

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<sup>8</sup>Petitioner provided his dates of active service to the Board at least as early as February 22, 2008. Thus, the Board had this information for nearly two years, four months at the time it sent its June 15, 2010, letter informing Petitioner he would not receive credit for military service.

controlling in this case. In Hudkins, a representative of the Board advised a long-term state employee that she was eligible to use her unused sick leave to claim service credit. The Court noted that the Board employee who advised the Petitioner had in her “possession all of the facts necessary to correctly advise” the Petitioner with regard to her retirement benefits. Id. At 717. Moreover, the Court recognized that the Petitioner relied to her detriment on those representations. The Court further emphasized that the Board’s staff was dedicated to the “business of advising employees concerning retirement benefits.” Id.

The Court stated:

We believe Ms. Hudkins had every right to rely upon the advice of the Board representative regarding the right to “freeze” her unused sick leave for purposes of calculating her retirement benefits.

Id. In finding for the Petitioner, the Court emphasized that its decision prevents “manifest and grave injustice” and that “no strong public interest” or policy would be defeated by the decision.

25. The analysis in Hudkins applies herein. As in Hudkins, the employees of the Board were in possession of all of the information it needed to correctly advise Petitioner; in fact, this information was in their possession for more than two years when he retired. Petitioner clearly relied to his detriment on Board advice. The employee’s of the Board in this case were dedicated to advising employees regarding retirement benefits. The mistakes surrounding Petitioner’s case have given rise to a new procedure for evaluating similar cases. To deny the Petitioner his benefits would be a manifest and grave injustice by denying him credit for his military service; would violate no strong public policy (and would, in fact, adhere to the clear public policy that allows military veterans to receive non-contributory retirement benefits); and it would apply only to the specific facts of this case so that the exercise of the Board’s functions would be unimpaired and any public interest would be unharmed.

26. Estoppel will lie where a party has "detrimentally changed his position in reliance upon the litigant's misrepresentation." ARA v. Erie Insurance Company, 182 W. Va. 266, 387 S.E.2d 320 (1989) That is precisely what has occurred here. Thus, the doctrine of estoppel must lie to promote equity and permit Petitioner to retire with the benefits he was promised.

27. The doctrine of estoppel applies herein and Petitioner should receive full retirement credit for his military service. In particular, it is clear that Petitioner was harmed by these actions. Petitioner gave up his prior job and the job was eliminated. Petitioner had to apply for a part-time job and then a new job to earn a living. And, Petitioner has suffered medically as a result of the Board's actions. Clearly, Petitioner was harmed and has suffered from his reliance on the Board employees' representations.

28. Based upon the foregoing, Plaintiff had a clear legal right to the relief he seeks and mandamus is appropriate herein. Thus, a writ of mandamus issues pursuant to this Petitioner and Petitioner shall receive all appropriate relief including fees and costs.

29. This Court reverses the Final Order of the West Virginia Consolidated Public Retirement Board issued on March 2, 2011, which denied Petitioner Ronald McKown's request for military service credit under West Virginia Code § 18-7A-17(b). Plaintiff is granted six (6) years retirement credit and all costs associated with this proceeding.

Respondent's objections and exceptions to this ruling are duly noted.

The Clerk of the Circuit Court is directed to forward certified copies of this Final Order to all counsel of record.

Enter this 6<sup>th</sup> day of January, 2012.

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 6TH  
DAY OF JANUARY, 2012.  
Cathy S. Gatson CLERK  
CLERK OF CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Paul Zakaib, Jr.  
PAUL ZAKAIB, JR., JUDGE