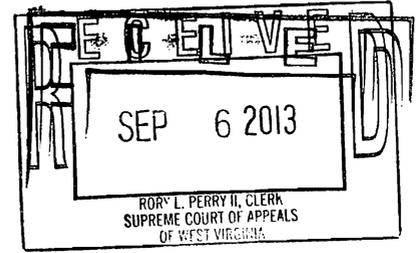


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0403



**WEST VIRGINIA CONSOLIDATED PUBLIC
RETIREMENT BOARD,**

Petitioner,

v.

Appeal from a final order of the
Circuit Court of Kanawha County
(11-AA-143)

**KEITH A. WOOD, WILLIAM E.
WALKUP, TED M. CHEATHAM,
HERBERT E. LATTIMORE, JR.,
and JOHNNY L. R. FERNATT,**

Respondents.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

I.

STATEMENT OF THE CASE

Under W.Va.Code §5-10-15, all employees of the State of West Virginia who are members of the Public Employees Retirement System (PERS), who served in the United States military “during a period of armed conflict,” and who were honorably discharged, are entitled, as a matter of law, to receive up to five years of military service credit toward their retirement. This benefit is an attractive incentive for military veterans to seek employment with the State and the State benefits by employing very qualified and well disciplined veterans, whose service to this country and the public continues through State employment.

This consolidated appeal can resolve, once and for all, a critical issue impacting all veterans employed by the State, who are entitled to claim military service credits. In the final order entered on March 20, 2013 (A.R. 1081-1113), which is being appealed by Petitioner West Virginia Consolidated Public Retirement Board, the Honorable Judge Paul Zakaib, Jr., identified the common problem presented by the five veterans involved in this consolidated appeal:

2. These consolidated cases focus on the refusal of Respondent (West Virginia Consolidated Public Retirement Board) to recognize the various periods of armed conflict, **which occurred after July 1, 1973, when the compulsory draft ended, through September 10, 2001.** The record reflects that from September 11, 2001, to the present, Respondent has recognized an ongoing period of armed conflict. (Emphasis added). (A.R. 1082).

Petitioner routinely has denied military service credits to eligible State employees who served in the United States military after July 1, 1973, and before September 11, 2001, for the “periods of armed conflict” that occurred during these years. To obtain the military service credits to which they are entitled, Respondents Keith A. Wood, William E. Walkup, Ted M. Cheatham, Herbert E. Lattimore, Jr., and Johnny L. R. Fernatt had to get counsel and fully litigate this issue.

Because Petitioner has taken the position that an administrative ruling adopted by Petitioner on this military service credit issue in one case does not necessarily apply to a similar administrative appeal filed by another State employee, Respondents made a request for class action status in all of their administrative appeals, based upon this Court’s holding in *Greyhound Lines-East v. Geiger*, 179 W.Va. 174, 366 S.E.2d 135 (1988), a case involving the West Virginia Human Rights Act. Petitioner denied this request and this decision was affirmed by Judge Zakaib. (A.R. 1112-13).

When Petitioner lost this same military service credit issue in the Dan Olthaus¹ case, Petitioner deliberately chose not to appeal that ruling, contending the Olthaus ruling only applied to Mr. Olthaus. However, in the present consolidated appeals, Petitioner has appealed the substantive decision issued by the Circuit Court of Kanawha County, which guarantees this Court will issue a ruling on this military service credit issue that will be controlling on all pending and future requests for such credits. As a result, Respondents are not cross-appealing on the class action ruling.

Respondents came to work for the State of West Virginia with impressive military service backgrounds. Upon returning to civilian life, Respondents continued to distinguish themselves through service to the State. It is important not to lose sight of the particular and notable contributions of each individual Respondent within the broader scope of the case.

Respondent Keith A. Wood

Respondent Keith A. Wood, who at the time of his administrative hearing had eighteen years of contributory service credit working for the State as an Aviation Services Manager and later as the State Director of Aviation, served on active duty in the United States Army from January 7, 1978, to September 29, 1992, as a military intelligence officer and aviator. (A.R. 3, 111, 359, 1083). While he served in the Army, Respondent Wood had some involvement in the events in Nicaragua, El Salvador, Honduras, Saudi Arabia, Kuwait, Lebanon, Yugoslavia, Iraq, and Iran. (A.R. 130-32).

¹Dan Olthaus was the first veteran to litigate this particular military service credit issue. Although he prevailed in his appeal in the Circuit Court of Kanawha County and received an order entitling him to the maximum five years of military service credits, Petitioner chose not to appeal this ruling to this Court. Rather than follow the holding issued by Kanawha County, Petitioner, when faced with subsequent requests to calculate military service credits for other eligible veterans, simply ignored the holdings in *Olthaus*.

Until recently, each of his PERS annual statements reflected five years of military service credit. (A.R. 1, 123).²

At the administrative hearing, Respondent Wood testified he was approached by former Administration Secretary Chuck Polan and former Governor Gaston Caperton regarding the position of Aviation Services Manager within the Aviation Division of the State of West Virginia. (A.R. 110, 111). Respondent Wood expressed his reluctance to leave the military. (A.R. 112). Secretary Polan recruited Respondent Wood by claiming West Virginia was very military proactive, and specifically told Respondent Wood he would receive five years military credit on his first day of employment. (A.R.113). Respondent Wood was also told by Governor Caperton he would receive five years military credit. (A.R. 114).

In August, 1992, Respondent Wood accepted a position with the State as the Aviation Services Manager. (A.R. 111). In 2005, Respondent Wood was promoted to serve as the State Director of Aviation. (A.R. 119). During all of the years he had been employed by the State, Respondent Wood regularly received statements from Petitioner advising him that based upon his military service, he was entitled to receive the full five years of military service credit toward his retirement. (A.R. 115). However, in 2011, after making an inquiry about some other retirement credit to which he was entitled, Respondent Wood was advised by Petitioner that his military service credit had not been calculated correctly, based upon a misreading of a date, and that instead of five years of military service credit, Respondent Wood only was entitled to receive eight months of such

²Respondent Wood is the only veteran in this consolidated appeal, who also is relying on an estoppel argument, based upon the letters he received every year from Petitioner, advising him he was entitled to receive the full five years of military service credit.

credit, based upon the Persian Gulf War, which lasted from August 2, 1990, through April 11, 1991, under W.Va.Code §5-10-15(b)(8). (A.R. 123).

Following his administrative hearing, the administrative law judge agreed that Respondent Wood was entitled only to receive eight months of military service credits and this ruling was adopted by Petitioner. (A.R. 312-24, 354). After appealing this decision to the Circuit Court of Kanawha County, Judge Zakaib held Respondent Wood was entitled to receive the full five years of military service credit, under W.Va.Code §5-10-15, based upon his reading of the statute and applicable case law, as well as upon the equitable estoppel argument asserted by Respondent Wood. (A.R. 1096, 1101).

Respondent William E. Walkup

Respondent William E. Walkup, who at the time of his administrative hearing had over twenty-one years of contributory service credit working for the State most recently as the Manager of the Eastern West Virginia Regional Airport, served on active duty as a United States Marine from May 5, 1983, to May 4, 1987, as an improved hawk missile system operator, and a nuclear chemical biological specialist. (A.R. 404, 1086). While he served in the Marine Corps, he had some involvement in the events in Lebanon, Grenada, and El Dorado Canyon. (A.R. 417). He began participation in PERS in May, 1989, when he was first employed by the State as an Interim Manager and Maintenance Director of Eastern West Virginia Regional Airport. (A.R. 402-403). Respondent Walkup later was promoted to the position of Manager and Director of the Eastern West Virginia Regional Airport. (A.R. 403).

In June, 2011, Respondent Walkup wrote to Petitioner to request military service credit for his service. Respondent Walkup became aware of the military service credit by speaking with his

friend, Respondent Keith Wood, who also served in the military during the early 1980's. (A.R. 407). Respondent Walkup requested credit for his four years of military service from May, 1983, to May 1987. (A.R. 410).

Following his administrative hearing, the administrative law judge agreed that Respondent Walkup was not entitled to receive any military service credits and this ruling was adopted by Petitioner. (A.R. 547-56, 557). After appealing this decision to the Circuit Court of Kanawha County, Judge Zakaib held Respondent Walkup was entitled to receive four years of military service credit, under W.Va. Code §5-10-15, based upon his reading of the statute and applicable case law. (A.R. 1103).

Respondent Ted M. Cheatham

Respondent Ted M. Cheatham, who at the time of his administrative hearing had over four years of contributory service credit working for the State most recently as the Director of the Public Employees Insurance Agency, served in the United States Army from May 29, 1977, through October 15, 1988 as a battalion motor officer, advanced officer, pilot, briefer for the Army Aviation Center, commander of a combat aviation brigade, and division aviation officer. (A.R. 627-28). While he served in the Army, the United States was involved in conflict events in Nicaragua, Somalia, Lebanon, Granada, and Panama, among others, and Respondent Cheatham personally was involved in some of these. (A.R. 640).

During all of the years he had been employed by the State, Respondent Cheatham regularly received statements from Petitioner advising him that based upon his military service, he was not entitled to receive military service credit toward his retirement. Respondent Cheatham decided to submit his DD 214 after hearing about the problems Dan Olthaus and Respondent Keith Wood had

with obtaining their military service credit from Petitioner. (A.R. 636-37). After submitting his DD 214, Respondent Cheatham received a letter from Petitioner stating he was not entitled to any military service credit.

Following his administrative hearing, the administrative law judge agreed that Respondent Cheatham was not entitled to receive any military service credits and this ruling was adopted by Petitioner. (A.R. 770, 771). After appealing this decision to the Circuit Court of Kanawha County, Judge Zakaib held Respondent Cheatham was entitled to receive the full five years of military service credit, under W.Va.Code §5-10-15, based upon his reading of the statute and applicable case law. (A.R. 1104).

Respondent Herbert E. Lattimore, Jr.

Respondent Herbert E. Lattimore, Jr., who at the time of his administrative hearing had over eight years of contributory service credit working for the State most recently as a Training Officer for the State Division of Homeland Security Emergency Management and formerly as the Director of Counter Terrorism Operations for the State Office of Emergency Services, served in the United States Army from May 4, 1975, through March 1, 2001, as a platoon leader, executive officer, company commander, personnel officer, special duty, assistant and later full professor of military science, and European foreign area officer, among other titles. (A.R. 685-89). While he served in the Army, the United States was involved in conflict events in the Persian Gulf, Vietnam, Mayaguez, Beirut, Panama, Grenada, Nicaragua, Libya, and Kosovo, and Respondent Lattimore personally was involved in some of these. (A.R. 701). Respondent Lattimore testified it was his understanding that he was entitled to five years' military service credit for his twenty-six years' service in the Army. (A.R. 703). Respondent Lattimore submitted his DD 214 to Petitioner when he began to consider

retirement in December, 2011, and was surprised to learn that Petitioner only intended to credit him with eight months of military service credit. (A.R. 696-97).

Following his administrative hearing, the administrative law judge agreed that Respondent Lattimore was not entitled to receive any additional military service credits and this ruling was adopted by Petitioner. (A.R. 770, 771). After appealing this decision to the Circuit Court of Kanawha County, Judge Zakaib held Respondent Lattimore was entitled to receive the full five years of military service credit, under W.Va.Code §5-10-15, based upon his reading of the statute and applicable case law. (A.R. 1106).³

Respondent John L. R. Fernatt

Respondent John L. R. Fernatt, who at the time of his administrative hearing had over twelve years of contributory service credit working for the State most recently employed as a State Information Systems Manager, served in the United States Navy from July 18, 1980, through February 16, 1990, as a submarine technician instructor, navigation electronics technician, lead radar systems operator, electronic countermeasures operator and chief of the watch, among other titles. (A.R. 647, 651-53). While he served in the Navy, the United States was involved in conflict events in Granada, Kosovo, Somalia, and Libya, and Respondent Fernatt personally was involved in some of these. (A.R. 665-66).

At his administrative hearing, Respondent Fernatt testified he was approached by his current supervisor while employed by Union Carbide, regarding the position with BRIM. Respondent Fernatt specifically agreed to take the position, even though it meant a pay cut, because of the

³During the pendency of this litigation, Respondent Lattimore retired from his State employment. Based upon an agreed order entered on April 5, 2013, Respondent Lattimore will receive the benefit of Judge Zakaib's ruling in the event this Court affirms this decision.

benefits and incentives offered, including the military service credit, which was “very enticing.” (A.R. 658-60). Respondent Fernatt had the understanding at the time he was hired that he would receive five years’ military service credit for his ten years’ service in the United States Navy. (A.R. 660). Respondent Fernatt received contribution statements from Petitioner regarding his military service credit, and began the process of questioning the amount of credit he would receive in 2008, when he first received a response that he was not entitled to any credit, despite his ten years’ service in the Navy. (A.R. 662)

Following his administrative hearing, the administrative law judge agreed that Respondent Fernatt was not entitled to receive any additional military service credits and this ruling was adopted by Petitioner. (A.R. 770, 771). After appealing this decision to the Circuit Court of Kanawha County, Judge Zakaib held Respondent Fernatt was entitled to receive the full five years of military service credit, under W.Va.Code §5-10-15, based upon his reading of the statute and applicable case law. (A.R. 1107).

II.

SUMMARY OF ARGUMENT

The phrase “period of armed conflict” is defined in W.Va.Code §5-10-15(b)(1), as “the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War and any other period of armed conflict by the United States, including, but not limited to, those periods sanctioned by a declaration of war by the United States Congress or by executive or other order of the President.” The Legislature clearly never intended the military service credit awarded under this statute to be limited to the specific armed conflicts

listed nor did the Legislature limit the military actions to be included in the phrase period of armed conflict to require an actual declaration of war by the President or Congress.

In interpreting what the Legislature meant by period of armed conflict, the Legislature specifically determined “the provisions of this article shall be liberally construed so as to provide a general retirement system for the employees of the state herein made eligible for such retirement.”

W.Va.Code §5-10-3a. A liberal construction would require the conclusion that unless the statute clearly excludes a particular military campaign from being considered, then all military campaigns and periods of armed conflict must be used in calculating an employee’s military service credit.

Based upon this liberal construction of W.Va.Code §5-10-15, the West Virginia Consolidated Public Retirement Board must provide military service credit to all eligible State employees who are members of PERS for the following periods of armed conflict:

El Salvador	01-01-1981 through 02-01-1992
Lebanon	06-01-1983 through 12-01-1987
Operation Urgent Fury–	
Grenada	10-23-1983 through 11-21-1983
Operation Earnest Will–	
Persian Gulf	07-24-1987 through 08-01-1990
Operation Just Cause–Panama	12-20-1989 through 01-31-1990
United Shield–Somalia	12-05-1992 through 03-31-1995

The military actions in El Salvador, Lebanon, Grenada, Persian Gulf, Panama, and Somalia are similar to and consistent with the periods of armed conflict specifically identified in W.Va.Code §5-10-15.

The Fourteenth Amendment to the West Virginia Constitution, which authorizes the payment of bonuses to veterans who actively served in the United States military during the Persian Gulf, Lebanon, Grenada, and Panama conflicts, does provide an additional source to consider in

determining what military actions are included as periods of armed conflict under W.Va.Code §5-10-15.

All employees who contribute to a state pension fund and who have substantially relied to their detriment on specific contribution and benefits schedules have immediate legitimate expectations that rise to the level of constitutionally protected contract property rights. Syllabus Point 18, *Mullett v. City of Huntington Police Pension Board*, 186 W.Va. 488, 413 S.E.2d 143 (1991).

Although the doctrine of equitable estoppel usually is inapplicable to the State or other governmental entity, estoppel can apply where:

1. The injury to the public interest if the government is estopped is outweighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped.
2. Raising estoppel prevents manifest or grave injustice.
3. Raising estoppel will not defeat a strong public interest or the operation of public policy.
4. The exercise of government functions is not impaired or interfered with.
5. Circumstances make it highly inequitable or oppressive not to estop the government.
6. The government's conduct works a serious injury and the public's interest will not be harmed by the imposition of estoppel.

Hudkins v State of West Virginia Consolidated Public Retirement Board, 220 W.Va. 275, 280, 647 S.E.2d 711, 716 (2007).

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Veterans employed by the State, in addition to the five Respondents in this case, anxiously are anticipating this Court's ruling resolving this critical military service credit issue. Many of the State employees, who served in the United States military between July 1, 1973, and September 11, 2001, either have reached, or will be approaching retirement age soon, so a final resolution will impact a great number of veterans employed by the State.

Through the years, many veterans who requested military service credits from Petitioner were told they were not entitled to any such credits. Many of these veterans, who were mystified by the indecipherable rules and regulations governing retirement and who did not have the wherewithal to obtain counsel, simply accepted Petitioner's conclusion and lost military service credits they may have been entitled to receive. Permitting, at a minimum, Rule 19 oral argument in this case not only would provide the Court an opportunity to address any questions the Court may have regarding the facts or the legal arguments, but also would help bring public attention to this issue.

IV.

ARGUMENT

- A. The trial court correctly concluded, based upon a liberal construction, Respondents were entitled to military service credit under W.Va.Code §5-10-15, for all periods of armed conflict that occurred between July 1, 1973, and September 11, 2001**

Petitioner argues the trial court failed to apply several rules of statutory construction available to courts to assist in the interpretation of statutes. Interestingly, Petitioner fails to cite the specific provision in W.Va.Code §5-10-3a, requiring a liberal interpretation of this article. Ultimately, despite Petitioner's general reliance upon various rules of statutory construction, Petitioner never

once explains what it is about the military actions in El Salvador, Lebanon, Grenada, Persian Gulf, Panama, and Somalia that somehow mandates the conclusion these events cannot be considered periods of armed conflict.

In Part I(A) of its brief, Petitioner argues the trial court failed to recognize the ambiguity of the phrase “period of armed conflict,” as used in W.Va.Code §5-10-15, and improperly interpreted the meaning of this phrase. To the contrary, the trial court specifically recognized the ambiguity of this phrase and, as required by law, liberally construed what the Legislature meant by period of armed conflict, providing the words in this phrase their ordinary meaning.

The phrase “period of armed conflict” is defined in W.Va.Code §5-10-15(b)(1), as “the Spanish-American War, the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era, the Persian Gulf War and **any other period of armed conflict by the United States, including, but not limited to, those periods sanctioned by a declaration of war by the United States Congress or by executive or other order of the President.**” (Emphasis added). As noted by the trial court, “Thus, the Legislature clearly never intended the military service credit awarded under this statute to be limited to the specific armed conflicts listed.” (A.R. 1092-93). From its arguments, Petitioner does not dispute the trial court’s conclusion that a period of armed conflict is not limited to the specific events noted in the statute and further a period of armed conflict does not require an actual declaration of war by the President or Congress.

In interpreting what the Legislature meant by “period of armed conflict,” the trial court held

The Legislature did not provide any further guidance with respect to what it meant by “period of armed conflict.” As such, these words should be given their ordinary meaning. Furthermore, W.Va.Code §5-10-3a, requires that the “provisions of this article shall be liberally construed so as to provide a general retirement system for the employees of the state herein made eligible for such retirement.”

A liberal construction would require the conclusion that unless the statute clearly excludes a particular military campaign from being considered, then all military campaigns and periods of armed conflict must be used in calculating an employee's military service credit. (A.R. 1093).

Thus, the trial court correctly interpreted the phrase "period of armed conflict" liberally in favor of the employees who would benefit from this provision, namely, honorably discharged military veterans employed by the State who were members of PERS.

In trying to identify what military actions trigger military service credits, the trial court first noted Petitioner, up until it decided to include September 11, 2001, to the present as a period of armed conflict, had limited such periods only to the events specifically included in the statute. (A.R. 1093-94). However, the trial court, based upon the evidence in the record from a VFW manual identified as the United States Guide for Post Service Officers Veterans Benefits, listed the following military campaigns as actions in which a veteran could earn a medal:

El Salvador	01-01-1981 through 02-01-1992
Lebanon	06-01-1983 through 12-01-1987
Operation Urgent Fury–	
Grenada	10-23-1983 through 11-21-1983
Operation Earnest Will–	
Persian Gulf	07-24-1987 through 08-01-1990
Operation Just Cause–Panama	12-20-1989 through 01-31-1990
United Shield–Somalia	12-05-1992 through 03-31-1995

(A.R. 1094-95).⁴

⁴While there is testimony in the record that since 2000, when W.Va.Code §5-10-15, was amended to include periods of armed conflict, some committee appointed by Petitioner at various times has studied whether other military actions should be included, ultimately no final determination has ever been made by Petitioner. (A.R. 1107, 1111). What Petitioner fails to acknowledge or fully appreciate is that in the meanwhile, State employees are retiring and are not receiving the benefit of military service credits to which they are entitled due to Petitioner's inaction and indecisiveness.

After examining the military actions recognized by Petitioner as warranting military service credits as well as the multiple actions where, for unexplained reasons, Petitioner refused to recognize such credits, the trial court observed:

Petitioner has made no effort to explain, for example, why military service credit is given for Operation Enduring Freedom, but not for Operation Desert Storm/Operation Desert Shield. What about the years this country was engaged in an armed conflict in Lebanon? It cannot be disputed that the United States Armed Forces were engaged in armed conflicts at that time and some American soldiers sacrificed their lives or were wounded in those disputes. In its brief, Petitioner attempts to assign a plain meaning to “period of armed conflict”, cites the Geneva Convention, and concludes this term is undefined. Yet permitting Petitioner to continue to produce inconsistent and absurd results in the determination of military service credit for the retiring veterans of this State defies established law regarding construction of ambiguous statutory language. See, e.g., *Charter Communications VI, PLLC v. Community Antenna Svc., Inc.*, 211 W. Va. 71, 561 S.E.2d 793 (2002). (A.R. 1108).⁵

The inconsistent manner in which Petitioner has applied W.Va.Code §5-10-15, also was noted by the trial court. Petitioner, in the Archie Hubbard case, awarded Mr. Hubbard thirteen days of military service credit for Grenada, but in the five cases involved in this appeal, none of Respondents who served in the military during the Grenada invasion received the same credit. (A.R. 1108). The Dan Olthaus ruling in Kanawha County was not applied to the five Respondents in this case. (*Id.*). The trial court held “to the extent that any of the other military actions that occurred between roughly 1973 and 2001 are similar to what occurred in Grenada, [Petitioner] has a fiduciary

⁵In Part IV of its brief, Petitioner claims the trial court held Petitioner was required to adopt a legislative rule explaining why it declined to include certain military events as periods of armed conflict. This assertion is incorrect. The trial court merely noted under W.Va.Code §5-10-15(a)(6), while Petitioner is authorized to determine what military actions are included in the phrase period of armed conflict, it has chosen not to explain why the various events that occurred after the draft ended and before September 11, 2001, cannot be recognized as periods of armed conflict.

obligation owed to all State employees to recognize military service credits for those other events as well.” (A.R.1108-09).⁶

After this extensive analysis applying the correct liberal construction, the trial court concluded:

Thus, in light of the Hubbard decision, the September 11, 2001 event, the *Olthaus* decision, the VFW list, and the Fourteenth Amendment to the West Virginia Constitution, this Court concludes Petitioners Wood, Cheatham, Lattimore, and Fernatt are entitled to receive the maximum five years of military service credits mandated by W.Va.Code §5-10-15, based upon the periods of armed conflict that occurred during this time, as identified in the VFW of the United States Guide for Post Service Officers Veterans Benefits and the Fourteenth Amendment to the West Virginia Constitution, and Petitioner Walkup is entitled to receive four years of military service credit. (A.R. 1112).

Respondents respectfully submit the trial court correctly interpreted W.Va.Code §5-10-15, and Petitioner’s suggestion to the contrary should be rejected.

In Part I(B) of its brief, Petitioner asserts the Legislature intended to include “only those periods occurring after enactment of the legislation, similar in scope, nature and purpose to those specifically listed would qualify a PERS member for military service credit.” That is exactly what the trial court did.

⁶In Part V of its brief, Petitioner attempts to explain why it believes as an agency owing a fiduciary duty to all State employees who are members of PERS it has the right to treat different PERS employees differently. For the first time in present counsel’s memory, Petitioner now is asserting the Hubbard ruling on Grenada was incorrect and subsequent to that decision, Petitioner changed its view. As for *Olthaus*, Petitioner makes several procedural arguments to explain why it chose to ignore the legal holdings in that case, limiting those holdings just to Mr. *Olthaus*. Respondents respectfully submit Petitioner’s attempts to explain why it chooses to apply different laws to different employees is not justifiable under any rationale and a violation of the fiduciary obligation Petitioner owes to all State employees.

Petitioner fails to explain what the trial court did that is inconsistent with its suggested analysis and fails to acknowledge Petitioner's own interpretation as to what events are included in the phrase period of armed conflict. Petitioner does not explain what is it about the military actions in El Salvador, Lebanon, Grenada, Persian Gulf, Panama, and Somalia that somehow differentiates those events from the other military actions specifically mentioned in the statute. How are these events similar or dissimilar from the period of armed conflict recognized by Petitioner from September 11, 2001, to the present? Furthermore, since Petitioner did recognize Grenada as constituting a period of armed conflict in the Hubbard case, what changed after the Hubbard decision to cause Petitioner not to recognize Grenada for any other veteran applying for military service credits?

In the final analysis, Petitioner seems content to never make a final decision on what events should be included in the phrase period of armed conflict and Petitioner has no problem applying one set of rules to one veteran and another set of rules for everyone else. Respondents respectfully urge this Court to put an end to the inequitable manner in which Petitioner has recognized military service credits so the veterans employed by the State no longer will be denied the military service credits mandated by W.Va.Code §5-10-15.

In Part I(C) of its brief, Petitioner asserts the trial court's interpretation would have the effect of making virtually every day since 1940 a period of armed conflict. Based upon the trial court's final order, that assertion is false because the trial court did not identify any period of armed conflict occurring between July 2, 1973, and January 1, 1981, or between March 31, 1995, and September 10, 2001.

Presently, every day subsequent to September 11, 2001, is included in a period of armed conflict, based upon Petitioner's own interpretation of W.Va.Code §5-10-15. Does Petitioner challenge its own interpretation on the ground that including every day from September 11, 2001, to the present as a period of armed conflict somehow is an incorrect or inconsistent interpretation? When the compulsory draft was in effect, every single day during that time period also warranted military service credits. Is Petitioner suggesting W.Va.Code §5-10-15, must arbitrarily limit the number of days to be included in a period of armed conflict?

The trial court correctly construed this statute liberally, as it was required, and further had every right to rely upon the information from the VFW along with the testimony and other documents presented. (A.R. 1108). There is nothing about the trial court's interpretation that is inconsistent with W.Va.Code §5-10-15.

The actuarial "Chicken Little" evidence presented in some of the administrative hearings, which could be summarized as demonstrating the world as we know it will come to an end if veterans employed by the State actually receive the military service credits to which they are entitled, has no relevance in this case. In Syllabus Point 13 of *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1995), this Court identified which branches of government are responsible for funding pension plans adequately:

In *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1989), this Court emphasized the legislature's obligation to fund pension systems on a sound actuarial basis. We are not administrators, however, and we can only articulate what the law is. It is for the governor and the legislature to enforce the law.

Thus, if this Court agrees with the trial court's analysis of the military service credit issues raised in this case, then that conclusion establishes what the law is; it is up to the Governor and the Legislature, not Petitioner, to ensure the pension system is adequately funded.

Furthermore, when Petitioner made the decision to include every day after September 11, 2001, as a period of armed conflict, this decision was not based upon any actuarial analysis, but rather was based upon Petitioner's determination that the events on that date and thereafter fell within the Legislature's definition of period of armed conflict. In making this decision, Petitioner was carrying out its obligation to effectuate the policy established by the Legislature and it is up to the Legislature and the Governor to provide the funding required.

Whether or not the fiscal note issued when W.Va.Code §5-10-15, accurately predicted the economic impact of the 2000 amendment does not alter the language actually used by the Legislature in the statute and has no impact on the liberal construction required. Similarly, Petitioner's history of denying military service credits to many deserving veterans does not demonstrate such denials were correct or consistent with the mandate established by the Legislature in W.Va.Code §5-10-15.

Petitioner's citation of and reliance on W.Va.Code §5-10-15(a)(7), is misplaced. This provision permits an employee to seek an extension of the time covered by a previously recognized period of armed conflict if the employee had a tour of duty in territory considered to be hostile and dangerous. Because Petitioner routinely has refused to recognize El Salvador, Lebanon, Grenada, Persian Gulf, Panama, and Somalia as periods of armed conflict, this statute would not have benefitted Respondents in any way.

Petitioner cites the trial court's findings regarding Respondent Wood and Respondent Lattimore and notes the dates covered in the VFW manual for the Persian Gulf operation is July 24,

1987, through August 1, 1990, whereas the dates for at least part of the Persian Gulf war is listed in W.Va.Code §5-10-15(b)(8), as from August 2, 1990, to April 11, 1991. Ignoring for the moment whether the particular military event referred to in the VFW manual is the same event identified as the Persian Gulf war in the statute, nevertheless, with respect to Respondent Wood and Respondent Lattimore, this possible inconsistency is irrelevant because their military service covered so many other periods of armed conflict they easily earned all five years of military service credit.

Another argument presented by Petitioner is that the phrase “period of armed conflict” has been defined in different ways in a wide variety of other statutory retirement systems. Respondents have no doubt this assertion is true and also have no doubt that people eligible for benefits in those other programs would be bound by the statutory definition included in those retirement systems. Clearly, in this case, Petitioner, the trial court, and this Court are bound to carry out the Legislature’s intent, based upon the statutory definition contained in W.Va.Code §5-10-15.

In Part II of its brief, Petitioner disagrees with the trial court’s decision to make reference to the specific military events identified in the Fourteenth Amendment to the West Virginia Constitution, which authorizes the payment of bonuses to veterans who actively served in the United States military during the Persian Gulf, Lebanon, Grenada, and Panama conflicts. Petitioner asserts that because the Legislature did not reference the Fourteenth Amendment in W.Va.Code §5-10-15, somehow that means the trial court should not have examined this constitutional provision in analyzing what military events to include in periods of armed conflict. Other than this argument, Petitioner does not explain how such citation to the Fourteenth Amendment is inconsistent with the Legislature’s intent in mandating military service credits for periods of armed conflict. The trial

court correctly noted the Legislature did not limit in any way what evidence or source could be considered in identifying periods of armed conflict.

Despite the general barrage of statutory construction rules cited by Petitioner, Respondents respectfully submit the trial court's final order in this case properly construed and applied W.Va.Code §5-10-15, and none of the arguments presented is sufficient to warrant reversing the trial court's determinations regarding the military service credits to which these five Respondents are entitled.

B. The trial court correctly concluded Respondent Wood was entitled to military service credit on the basis of equitable estoppel

Petitioner's final argument is that the trial court erred in concluding equitable estoppel provides an additional legal basis for Respondent Wood to receive five years of military service credit. Respondent Wood based this argument on the fact that for over nineteen years, Petitioner provided Respondent Wood with written statements showing he was entitled to receive five years of military service credit. (A.R. 1, 19, 23). When he first was employed by the State, at least part of the reason for taking the job was based upon the military service credits he would receive. (A.R. 113, 114). With his experience and skills, Respondent Wood easily could have moved into a more lucrative job in the private sector, but the five years of military service credit made keeping his State job more desirable.

Petitioner and Respondent Wood rely on the same case law, but Petitioner contends this case law dictates a different result. The trial court first noted how a public employee's right to a State pension has a contractual and constitutional dimension and the employee's detrimental reliance is a relevant factor. In support, the trial court quoted Syllabus Points 5, 11, 12, and 18 of *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1991). Syllabus Point 18 provides::

Because *all* employees who contribute to a state pension fund and who have substantially relied to their detriment on specific contribution and benefits schedules have immediate legitimate expectations that rise to the level of constitutionally protected contract property rights, we overrule *Mullett v. City of Huntington Police Pension Board*, 186 W.Va. 488, 413 S.E.2d 143 (1991), and its test of reasonableness for determining the constitutionality of legislative amendments to a pension plan.

This Court has addressed the application of equitable estoppel in several different decisions. Syllabus Points 3 and 4, *Folio v. City of Clarksburg*, 221 W.Va. 397, 655 S.E.2d 143 (2007); Syllabus Point 4, *Hatfield v. Health Management Associates of West Virginia, Inc.*, 223 W.Va. 259, 672 S.E.2d 395 (2008); Syllabus Point 7, *Samsell v. The State Line Development Co., Inc.*, 154 W.Va. 48, 174 S.E.2d 318 (1970).

After reviewing these cases, the trial court relied upon *Hudkins v State of West Virginia Consolidated Public Retirement Board*, 220 W.Va. 275, 647 S.E.2d 711 (2007), where this Court applied equitable estoppel in favor of a State employee planning her retirement. In *Hudkins*, a public employee contemplating retirement sought information from Petitioner on whether she could convert her unused sick leave as additional service credit, which would increase the amount of her retirement benefits. She was given assurances verbally and in writing by Respondent employees that she could freeze her unused sick leave and could use the accumulated time to extend her service credit upon applying for retirement. Based upon these assurances, this employee resigned from her job.

About two years later, this employee learned for the first time that only employees who actually retire and begin drawing retirement benefits at the time of termination could convert unused sick leave to service credit and that employees who resign, but do not retire at that time, cannot do so. This employee challenged that decision, pursuant to the same administrative procedure followed by Respondent Wood in the present case.

While this Court noted equitable estoppel ordinarily does not apply to a governmental agency, this general rule does have exceptions. The trial court then quoted the analysis adopted by this Court in *Hudkins*, 220 W.Va. at 280, 647 S.E.2d at 716, for applying estoppel to the government:

The trial court's findings are supported by *28 Am. Jur. 2d Estoppel and Waiver § 140* which states as follows:

§ 140. What must be shown to estop government.

In recognition of the heavy burden borne by one seeking to estop the government, courts have held that the doctrine of estoppel may be raised against the government only if, in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by the government or a government agent. Likewise, courts have held an estoppel against the government may be raised only when --

-- the injury to the public interest if the government is estopped is out weighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped.

-- raising the estoppel prevents manifest or grave injustice.

-- raising the estoppel will not defeat a strong public interest or the operation of public policy.

-- the exercise of government functions is not impaired or interfered with.

-- circumstances make it highly inequitable or oppressive not to estop the government.

-- the government's conduct works a serious injury and the public's interest will not be harmed by the imposition of estoppel. (A.R. 1100-01).

Based upon the foregoing case law, the trial court concluded:

Applying these same factors in the present case also supports the application of equitable estoppel to Petitioner Wood. Respondent affirmatively represented to Petitioner Wood repeatedly, over nineteen years, that he was entitled to receive five years of military service credit. Petitioner Wood relied on these representations in taking a State job in the first place, when he could have had many

other opportunities either in the military or in the private sector. Any injury to the public interest is far outweighed by the personal injury suffered by Petitioner Wood, who clearly is entitled to five years of military service credit.

Estoppel under these circumstances is not inconsistent with public policy. Public employees often need to plan their future retirement well in advance of their actual retirement date. Public employees should be able to rely on the representations of Petitioner Wood with respect to their service credit because employment decisions are premised on the information provided. Thus, Respondent, which represented in statements issued over nineteen years, is estopped from denying Petitioner Wood the maximum five years of military service credit toward his retirement. (A.R. 1101).

While Petitioner wishes the trial court had reached a different result under these facts, Respondents respectfully submit the trial court's conclusion is consistent with this Court's analysis of equitable estoppel and its application to the State, particularly as demonstrated in *Hudkins*. It would be very unfair and inequitable to permit the State to make representations to one of its employees year after year regarding retirement credits and then, when the time for retirement is getting closer, simply telling the employee all of those prior representations were incorrect. The trial court's equitable estoppel ruling is fully supported by this Court's case law and, therefore, should not be reversed.

V.

CONCLUSION

Respondents Keith A. Wood, William E. Walkup, Ted M. Cheatham, Herbert E. Lattimore, Jr., and Johnny L. R. Fernatt respectfully request this Court affirm the March 20, 2013 final order issued by the Circuit Court of Kanawha County.

KEITH A. WOOD, WILLIAM E. WALKUP, TED M. CHEATHAM, HERBERT E. LATTIMORE, JR., and JOHNNY L. R. FERNATT, Respondents,

--By Counsel--



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0403

**WEST VIRGINIA CONSOLIDATED PUBLIC
RETIREMENT BOARD,**

Petitioner,

v.

Appeal from a final order of the
Circuit Court of Kanawha County
(11-AA-143)

**KEITH A . WOOD, WILLIAM E.
WALKUP, TED M. CHEATHAM,
HERBERT E. LATTIMORE, JR.,
and JOHNNY L. R. FERNATT,**

Respondents.

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **RESPONDENTS'**
BRIEF was hand-delivered to counsel of record on the 6th day of September, 2013, to the following:

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