

13-0437

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

BENNY G. JONES,

Petitioner,

v.

**Civil Action No. 11-AA-8-B
Judge John L. Cummings**

**STATE OF WEST VIRGINIA
CONSOLIDATED PUBLIC
RETIREMENT BOARD,**

Respondent.

FINAL ORDER REVERSING AGENCY DECISION

Pursuant to West Virginia Code § 29A-5-4, Petitioner Benny G. Jones appeals the July 6, 2011, Final Order from the State of West Virginia Consolidated Public Retirement Board denying Petitioner Jones the ability to participate in the Public Employees Retirement System ("PERS"). This Court has reviewed Petitioner Jones's Petition for Judicial Review, Petitioner's Brief, the West Virginia Consolidated Public Retirement Board's (the "Board") Brief in Opposition to Petitioner's Appeal, as well as relevant case and statutory law and documents filed in the underlying administrative appeal. Accordingly, the case is ripe for disposition, and the Court finds as follows:

FINDINGS OF FACT

1. The Raleigh County Emergency Services Authority (the "Authority") sought the services of a full-time attorney to handle various legal matters in which the Authority was and would in the future become involved.
2. The position was full-time, salaried, and provided full benefits except for holiday and leave accrual. The base pay was \$613.46 per two weeks for up to eight hours of service per

month. For each additional hour billed over eight, the attorney would receive \$125, which was later increased to \$150.

3. The attorney who filled this position was expected to be on call for the Authority 24 hours per day, 7 days per week.

4. Petitioner Jones accepted this position and began employment on January 1, 2002.

5. Petitioner Jones's work for the Authority comprised ten to fifteen percent of his law practice. He performed work for the Authority at the reduced hourly rate of \$125 due to the Authority's representations that he would receive retirement benefits. Work performed for clients other than the Authority was billed at \$250 per hour.

6. Following Petitioner Jones's acceptance of employment with the Authority, he received a letter from the Board dated June 26, 2003, in which he was informed that because he had returned to the employment of a participating public employer, he was eligible to reinstate the refund of his previous contributions to the Board that he withdrew on or about May 17, 1984. He was informed that repaying that amount would allow the Board to reinstate his former contributing service totaling one year and eight months.

7. On or about July 8, 2003, Petitioner Jones remitted the full repayment amount to reinstate his prior contributing service, and the Board acknowledged receipt of this payment and reinstatement of his pension by letter dated July 10, 2003.

8. Petitioner Jones provided additional work over the eight hour monthly base as follows:

2002 – 29.5 additional hours

2003 – 22 additional hours

2004 – 99.75 additional hours

2005 – 104.5 additional hours

2006 – 57.5 additional hours

2007 – 104.25 additional hours

2008 – 13.25 additional hours

2009 – 58.75 additional hours

2010 – 74.25 additional hours

The additional hours reported did not include the fact that Petitioner Jones was on-call 24 hours per day, 7 days per week, nor did it account for non-legal work, meetings, and travel for which he did not bill but was required to attend.

9. On or about November 1, 2010, Petitioner Jones was notified by the Board that he was ineligible to participate in PERS.

10. The Board concluded that Petitioner Jones had not worked the statutorily-required 1,040 hours per year necessary for participation in PERS as set forth in West Virginia Code § 5-10-2(11) and West Virginia Code of Rules § 162-5-2.3.

11. Petitioner Jones disagreed with this conclusion and initiated an administrative appeal.

12. A hearing was held on April 12, 2011, and the Hearing Examiner recommended “that the request of Benny G. Jones to be permitted participation in PERS for his current employment be denied.” The Board adopted the Hearing Examiner’s Recommended Decision on July 6, 2011, and denied Petitioner’s appeal “to participate in the Public Employees Retirement System in the capacity of his present employment.”

13. Petitioner Jones initiated the instant appeal arguing that the Board should be estopped from denying him retirement benefits. The issue is ripe for disposition.

CONCLUSIONS OF LAW

14. The State Administrative Procedures Act provides that “[a]ny party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof[.]” W. Va. Code § 29A-5-4(a).

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.

Id. at § 29A-5-4(g).

15. “The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state.” Syl. Pt. 3, *Hudkins v. Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007).

16.

The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention

that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.

Id. at Syl. Pt. 4.

17. In *Hudkins*, the Board appealed a circuit court order reversing the Board's administrative decision denying Nancy K. Hudkins's right to convert her unused sick leave to retirement service credit for purposes of calculating her pension benefits. *Id.* at 276, 647 S.E.2d at 712.

18. Ms. Hudkins had accumulated 1,752.2 hours of sick leave, and prior to separating from her employment on March 31, 2000, Ms. Hudkins contacted the Board to ensure she could convert her accumulated sick leave to service credit, in turn increasing her retirement income upon reaching retirement age. *Id.*

19. The Board assured Ms. Hudkins she could "freeze" her sick leave and use it as additional service credit when she filed for retirement benefits. *Id.* This assurance was reiterated by her employer. *Id.* Relying on these assurances, Ms. Hudkins resigned from her employment. *Id.* at 277, 647 S.E.2d at 713.

20. More than two years following her resignation, Ms. Hudkins learned for the first time that she might not be permitted to convert her unused sick leave to service credit. *Id.* Ms. Hudkins thereafter contacted the Board again, and by correspondence dated October 4, 2002, the Board informed Ms. Hudkins

that only employees who actually retire and begin drawing retirement benefits at the time of their termination of employment could convert unused sick leave to service credit, and that unused sick leave could not be converted to service credit by employees who terminated their employment before they become eligible for retirement benefits.

Id.

21. As a result, Ms. Hudkins initiated administrative proceedings “seeking to secure the right to convert her unused sick leave to service credit – as she had been assured prior to her decision to separate from her employment.” *Id.* at 277-78, 647 S.E.2d at 713-14. After a hearing on this matter, the hearing examiner recommended that Ms. Hudkins’s appeal be denied, and the Board adopted the recommended decision and denied her appeal. *Id.* at 278, 647 S.E.2d at 714.

22. Following appeal to the circuit court, it found that the elements of equitable estoppel were met by Ms. Hudkins, and this decision was affirmed by the Supreme Court of Appeals of West Virginia. *Id.* at 281, 647 S.E.2d at 717. First, a Board employee informed Ms. Hudkins that she was eligible to claim service credit for her unused sick leave. *Id.* This Board employee also had the information to correctly advise Ms. Hudkins as to her ability to convert her sick leave. *Id.* The *Hudkins* Court was also satisfied that the Board’s representation was made with the intention that Ms. Hudkins would act upon it, and Ms. Hudkins did, in fact, rely upon the representation in leaving her employment. *Id.* The court also found that

since the Board had not even addressed in their rules the matter of the unused sick leave credits until 2002 – more than two years following Ms. Hudkins’ separation from her employment, Ms. Hudkins could not have been aware of the methodology used by the Board even if she had thoroughly examined the Board’s rules.

Id. Thus, the court concluded that the elements of equitable estoppel had been met. *Id.*

23. In addition, the *Hudkins* Court cited to American Jurisprudence, which states that

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 outweighed 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 the estoppel.

Id. at 280, 647 S.E.2d at 716.

24. The *Hudkins* Court likewise found the principles set forth above to have been met:

The record reflects that the financial impact of this decision is approximately \$51.00 per month. Given the likelihood that Ms. Hudkins would be required to live on a fixed income for the remainder of her life, we find that the injury and injustice to Ms. Hudkins outweighs the public interest by estopping the Board in this case. We therefore conclude that by permitting estoppel to operate in this case, we will prevent a manifest and grave injustice.

Id. at 281-82, 647 S.E.2d at 717-18.

25. In the instant matter, this Court finds the elements of equitable estoppel to have been met.

26. It is undisputed that it was represented to Petitioner Jones that acceptance of the job would entitle him to "full benefits except for holiday and leave accrual", as set forth in the Employee Position Description. Although this representation was made by the Authority as opposed to the Board, regulations governing the Board provide that where

the Board determines that an employer error has occurred, the member is entitled to receive retirement system service credit for the prior period of employment in which the employer error occurred, with the receipt of service credit being contingent upon the Board's receipt of the employee and employer contributions, plus interest[.]

W. Va. Code R. § 162-7-7.2.

‘Employer error’ means an omission, misrepresentation, or violation of relevant provisions of the West Virginia Code or of the West Virginia Code of State Regulations or the relevant provisions of both the West Virginia Code and of the West Virginia Code of State Regulations by the participating public employer that has resulted in an underpayment or overpayment of contributions required.

W. Va. Code § 5-10-2(12).

27. Accordingly, the fact that the Authority misrepresented Petitioner Jones’s entitlement to retirement benefits will not provide a basis for the Board’s denial of retirement benefits. Rather, the Authority misrepresented the provisions of the West Virginia Code and West Virginia Code of State Regulations relative to classifying the position as full time, which resulted in a misrepresentation of Petitioner Jones’s entitlement to retirement benefits. This misrepresentation resulted in an overpayment of contributions by Petitioner Jones and the Authority; accordingly, Petitioner Jones is entitled to receive retirement system service credit.

28. This finding was previously made by the Board in its Recommended Decision of Hearing Examiner, Finding of Fact 3:

The Applicant’s employer classifies the Applicant as a full-time employee upon the basis that he is expected to be available for work twenty-four hours per day, seven days per week. . . . The job description for the Applicant’s position states that it is classified as full-time with full benefits except for holiday and leave accrual. It also requires him to be available 24 hours per day, seven days per week.

29. This representation was made with the knowledge to correctly advise Petitioner Jones as to his ability to receive retirement benefits. Margaret Agee, Director of the Authority, testified at the administrative hearing in this matter that the secretary / receptionist who handles payroll for the Authority has been to a payroll clerk seminar. These seminars instruct the payroll clerks as to matters involving benefits, including who is considered a full time employee.

30. This Court also finds that Petitioner Jones was without knowledge of or the means of knowing that he was not considered a full time employee. The Employee Position Description

stated that the position was classified as full time and provided full benefits. Additionally, Petitioner Jones was available to the Authority 24 hours per day, 7 days per week, even if he was not actively working for the Authority during those times. Although a “full time employment” is defined by West Virginia Code of Regulations § 162-5-2.3 as “a position which normally requires twelve (12) months per year service and requires at least one thousand forty (1,040) hours per year service in that position”, Petitioner Jones would have believed that being on-call for the Authority 24 hours per day, 7 days per week met this threshold.

31. This Court further finds that the representation was made with the intention that it be acted upon. Petitioner Jones provided legal services to the Authority at a reduced rate of pay in exchange for the assurance of retirement benefits. The Authority’s provision of retirement benefits was designed to entice potential candidates to accept the job given the fact that attorneys, Petitioner Jones included, could receive a higher rate of pay elsewhere.

32. Lastly, Petitioner Jones did, in fact, rely upon this representation to his detriment. Petitioner Jones accepted a lower rate of pay from the Authority than he did from his other clients as a result of the Authority’s assurances of retirement benefits.

33. With respect to the additional considerations outlined in *Hudkins* from American Jurisprudence, this Court also finds that the injury to the public interest is outweighed by the injury to Petitioner Jones’s personal interest if the Board is not estopped. Petitioner Jones has made all of the required contributions to entitle him to retirement benefits. Estopping the Board from denying these benefits, therefore, works no public interest injustice.

34. Likewise, finding estoppel prevents manifest or grave injustice for the same reason: Petitioner Jones has made all required contribution into the retirement system; therefore, he should be entitled to these benefits as represented to him. Additionally, Petitioner Jones

provided legal services to the Authority at a reduced rate of pay given the expectation of retirement benefits.

35. This Court further finds that raising the estoppel will not defeat a strong public interest or the operation of public policy. Additionally, the exercise of government functions is not impaired or interfered with. As set forth above, Petitioner Jones has made all required contributions to the Board. As such, the Board's payment of the resultant benefits follows both logically and equitably.

36. In this same vein, it would be highly inequitable or oppressive to not estop the government. As Petitioner Jones has made all required contributions, to find that the Board is not estopped would require the Board to refund to Petitioner Jones all contributions. Petitioner Jones would, therefore, have to resubmit almost ten years of income tax returns and possibly subject him to pay a large portion of these contributions to the IRS. Finally, these same considerations establish that the government's conduct would work a serious injury, and because all contributions have been made, the public's interest in a sound retirement system will not be harmed by the imposition of the estoppel.

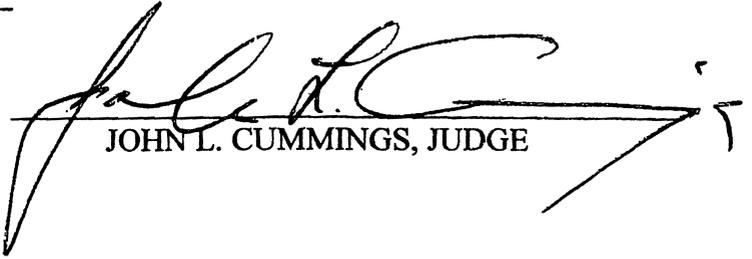
37. For these reasons, this Court finds that the Board is estopped from denying Petitioner Jones's participation in PERS.

The Circuit Clerk is directed to distribute attested copies of this Order to the following counsel of record:

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ENTER: 7-19-2013



JOHN L. CUMMINGS, JUDGE

The foregoing is a true copy of an order
entered in this office on the 22 day
of July, 20 13.
PAUL H. FLANAGAN, Circuit Clerk of
Raleigh County, West Virginia
By: 
Deputy