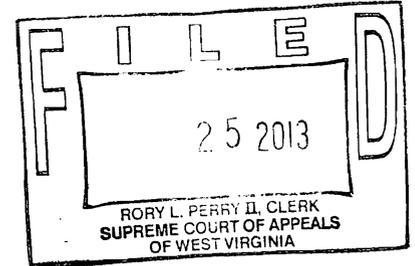


**IN SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 13-0937**



**STATE OF WEST VIRGINIA  
CONSOLIDATED PUBLIC  
RETIREMENT BOARD, Respondent Below,  
Petitioner,**

**vs.**

**(Raleigh County Circuit Court)  
(Civil Action No. 11-AA-8-B)**

**BENNY JONES, Petitioner Below,  
Respondent.**

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**PETITIONER'S BRIEF**

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d. The Circuit Court erred in finding that estoppel prevents manifest or grave injustice;	
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## ASSIGNMENTS OF ERROR

1. The Circuit Court erred by applying the doctrine of estoppel against a state agency, and finding that the elements of equitable estoppel had been met .

With respect to estoppel, the Circuit Court erred as follows:

- a. the Circuit Court erred in ruling that estoppel applies to a misrepresentation of law;
  - b. the Circuit Court erred in finding that Mr. Jones relied to his detriment by accepting a lower rate of pay;
  - c. the Circuit Court erred in finding that the injury to the public interest is outweighed by the injury to Mr. Jones' personal interest;
  - d. the Circuit Court erred in finding that estoppel prevents manifest or grave injustice;
  - e. the Circuit Court erred in finding that estoppel will not defeat a strong public interest or the operation of public policy; and,
  - f. the Circuit Court erred in finding that the public's interest in a sound retirement system will not be harmed by the imposition of estoppel.
2. The Circuit Court misapplied this Court's opinion in *Hudkins v. West Virginia Consolidated Public Retirement Board*, 220 W.Va. 275, 647 S.E.2d 711 (2007).
3. The Circuit Court erred in holding that §162-7-7.2 of the Code of State Regulations and West Virginia Code §5-10-2(12), the error correction statute and regulation, require the Consolidated Public Retirement Board to permit Mr. Jones to participate in the Public Employees Retirement System (PERS) due to employer error, essentially holding the Petitioner vicariously liable for the employer's misrepresentation of the law to Respondent.
4. The Circuit Court erred in holding that Mr. Jones was not responsible for the error because he was "without knowledge of the law or the means of knowing that he was not considered a full time employee".

## STATEMENT OF THE CASE

This is an appeal by the Petitioner, West Virginia Consolidated Public Retirement Board (hereinafter "Board"), of the Circuit Court's *Order* reversing the Board's *Final Order* denying Respondent, Benny Jones', request to participate in the Public Employees Retirement System because he did not work as a full time employee.

Respondent, Benny Jones, is an attorney who practices law in Raleigh County, West Virginia.

One of his many clients is the Raleigh County Emergency Services Authority (hereinafter referred to as "Authority"). On January 1, 2002, he began participating in the Public Employees Retirement System (PERS) as an "employee" of the Authority. (A.R. 66). The Authority incorrectly told him that he would be eligible to participate in the Public Employees Retirement System (PERS). The Authority incorrectly reported to the Board that he was a "full-time employee" based upon their belief that he qualified as full time because he was expected to be on-call twenty four hours per day, seven days per week. (A.R. 240)

The Authority pays him a minimum sum for eight hours of work per month and additional pay on an hourly basis should he work more than eight hours per month. (A.R. 66-67). He has never billed the Authority for more than 200.5 hours in any of the years at issue, 2002 - present. (A.R. 56-57, 97). Respondent Jones testified that the work he performed for the Authority comprised ten to fifteen percent of his law practice. (A.R. 193). He also has his own law office. He does not have an office on the Authority's property. Additionally, he uses his computer, stationary and secretarial staff to perform the work as opposed to the Authority's. (A.R. 140-148).

In 2010, Petitioner Board's staff noticed a spike in Mr. Jones' reported salary and inquired with the Authority as to the reason. (A.R. 259) Based upon information received from that inquiry, the Board discovered that he was not working the requisite number of hours (one thousand forty(1,040)/year) to be eligible to participate in PERS. By letter dated November 1, 2010, the Board notified him that he was ineligible to participate in PERS because he was not a full-time employee as required by statute and legislative rule, and further informed him that the Board planned to refund his and his employer's contributions to his employer. (A.R. 254).

Mr. Jones, by counsel, Kent Hellems, requested an administrative appeal. On April 12, 2011,

an administrative hearing was held. On June 3, 2011, Hearing Officer, Jack DeBolt, issued a *Recommended Decision* which recommended that Mr. Jones' request to participate in PERS should be denied because pursuant to West Virginia Code §5-10-17(a), §5-10-2(11) and §162-5-2.3 of the Code of State Rules, his limited employment does not meet the definition of "full time employment" which requires "twelve (12) months per year service and at least one thousand forty (1,040) hours per year service in that position." *Code of State Regulations §162-5-2.3*. (A.R. 102). By *Final Order* dated July 6, 2011, the Board adopted the *Recommended Decision* and denied Mr. Jones' request to participate in the Public Employees Retirement System (PERS). (A.R. 95) Mr. Jones, by counsel, filed an appeal in the Circuit Court of Raleigh County, West Virginia.

By Order entered on July 22, 2013, the Circuit Court reversed the Board's *Final Order*. (A.R. 95). The Circuit Court ruled that the Board is estopped from denying Mr. Jones' participation in PERS due to the misrepresentation made to him by his employer that he could participate in PERS, and further that the regulation and statute regarding error correction require the Board to permit him to participate in PERS due to employer error.

The West Virginia Consolidated Public Retirement Board respectfully requests that this honorable Court reverse the lower Court's *Order* and affirm the Board's *Final Order*.

#### **SUMMARY OF ARGUMENT**

Pursuant to West Virginia Code §5-10-17(a), §5-10-2(11) and §162-5-2.3 of the Code of State Rules, only full time employees are permitted to participate in the Public Employees Retirement System (PERS). Respondent never worked as a full time public employee.

Respondent Jones's employer, Raleigh County Ambulance Authority (Authority), made a misrepresentation of law to him regarding his eligibility to participate in PERS. The Circuit Court

correctly found that the Authority misrepresented the law to Respondent; however, the Court incorrectly found that estoppel applies to misrepresentations of law, and incorrectly found that Respondent is not responsible for knowing the law. Additionally, none of the other elements required to invoke estoppel exist.

The lower Court further incorrectly held that the error correction regulation and statute require the Petitioner Board to permit Respondent's participation in PERS due his employer's error in interpreting the law. The lower Court essentially used this misinterpretation of the error correction regulation and statute to hold the Petitioner Board vicariously liable for a misrepresentation made by a public employer. Such an interpretation of the error correction regulation and statute would seriously jeopardize the fiscal soundness of public pension plans.

#### **STATEMENT REGARDING ORAL ARGUMENT**

Because the principle issues in this case have been authoritatively decided in numerous opinions by this Court, oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

#### **ARGUMENT**

##### **I. STANDARD OF REVIEW**

"On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474

S.E.2d 518 (1996).

The West Virginia Administrative Procedures Act governs the review of contested administrative decisions and issues by a court and specifically provides that:

(g) The Court may affirm the ...decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the...decision of the agency if the substantial rights of the petitioner...have been prejudiced because the administrative...decisions are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; 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.

West Virginia Code §29A-5-4.

In the absence of an error of law, factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or “arbitrary and capricious.” See, e.g. Healy v. West Virginia Bd. of Medicine, 506 S.E. 2d 89, 92 (W.Va. 1998). Under the arbitrary and capricious standard, a circuit court which is reviewing the factual findings of an administrative agency must “not substitute its judgment for that of the hearing examiner.” Woo v. Putnam County Board of Education, 504 S.E. 2d 644, 646 (W.Va. 1998).

Legal issues, such as statutory and regulatory interpretation, are legal matters which are subject to *de novo* review. Id.

As to judicial review of an administrative agency’s interpretations of the statutes and regulations which it administers, and notwithstanding the general rule of *de novo* review of issues of law, the Court has held that “absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of [a] statute by [an administrative agency]” having

policy making authority relating to the statute. See, e.g., Sniffen v. Cline, 193 W. Va. 370, 456 S. E. 2d 451 (1995).

Interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight, and such an agency's construction of these statutes must be given substantial deference. *Sniffen*, citing *WV Department of Health v. Blankenship*, 189 W. Va. 342, 431 S. E. 2d 681 (1993); *WV Non-Intoxicating Beer Commr' v. A&H Tavern*, 181 W.Va. 364, 382 S. E. 2d 558 (1989); *Dillon v. Board of Educ.*, 171 W.Va. 631, 301 S. E. 2d 588 (1983); *Smith v. State Workmen's Comp. Comm'r.*, 159 W.Va. 108, 219 S. E. 2d 361 (1975).

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." McDaniel v. WV Division of Labor, Syllabus Point 4, 214 W.Va. 719; 519 S.E.2d 277 (2003).

The Board is without any power to supplant its views of fairness and equity in place of the will and intent of the Legislature. Appalachian Regional Healthcare, Inc. v. WV Human Rights Commission, 180 W.Va. 303, 376 S.E.2d 317 (1988) (an administrative agency's power is solely a creature of statute and thus it must arrive any authority claimed from legislative enactment. It has no common law power but only that power conferred by law, expressly or by implication); State Human Rights Commission v. Pauley, 158 W.Va. 459, 212 S.E.2d 77 (1975) (an administrative agency can exert only such powers as those granted by the legislature and if it exceeds its statutory power its actions may be nullified by a court); 2 Am.Jur. 2d *Administrative Law* §77 (an agency cannot modify, abridge or otherwise change the statutory provisions under which it acquires

authority unless the statutes expressly grant it that power).

Administrative agencies are generally clothed with the power to construe the law as a necessary precedent to administrative action. Even so, it is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable. An agency cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power. And, while agencies are entitled to a certain amount of hegemony over the statutes they are entrusted to administer, agencies may not go to far afield of the letter of the law even if they perceive they are furthering the spirit of the law. Although an administrative agency has the authority and duty to determine its own limits of statutory authority, it is the function of the judiciary to finally decide the limits of the authority of the agency. See 2 Am Jur2d, *Administrative Law* §77 .

This Court may not confer retirement benefits for employment where the legislature has not so authorized. See *Cain v. PERS*, 197 W.Va. 514, 476 S.E.2d 185 (1996). The rule of statutory construction to liberally construe a remedial statute to the benefit of the beneficiaries of the statute does not operate to confer a benefit where none is intended. *Id.*

## **II. STATUTORY ELIGIBILITY FOR PARTICIPATION IN THE PUBLIC EMPLOYEES RETIREMENT SYSTEM**

Membership in the Public Employees Retirement System is governed by West Virginia Code §5-10-17(a) & (d) and §5-10-2(11) which state, in pertinent part, as follows:

“(a) All employees, **as defined in section two [§ 5-10-2]** of this article, who are in the employ of a political subdivision ..... shall become members of the Retirement System .....

“(d) If question arises regarding the membership status of any employee, the Board of Trustees has the final power to decide the question.”

West Virginia Code §5-10-2(11) defines “employee”, in pertinent part, as follows:

“(11) “**Employee**” means any person who serves regularly as an officer or employee, **full time** on a salary basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of, and whose compensation is payable, in whole or in part, by any political subdivision, or an officer or employee whose compensation is calculated on a daily basis and paid monthly or on completion of assignment, ....”.

West Virginia Code of State Rules §162-5-2.3 defines full time employment as follows:

“2.3. **Full time employment** - Employment of an employee by a participating public employer in 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.”<sup>1</sup>

Additionally, the burden is on Respondent Jones to prove that he meets the eligibility requirements for participation in PERS. *Wood v. WV PERS*, 446 S.E.2d 706, 191 W.Va. 484 (1994).

In this case, Respondent Jones’s limited employment cannot plausibly be considered full time. He testified that the most he ever worked in any given year was 200 hours, and he had no accounting for which days or how many days per month he worked those hours. (A.R. 207).

It would be virtually impossible to calculate his service credit. West Virginia Code §5-10-14(a)(1) requires a minimum of ten (10) days in any calendar month to receive a month of service credit, and §162-5-4.1.a Code of State Rules requires the member to work four (4) or more hours per day to receive service credit for that day.

Although he was on call twenty four hours per day, seven days per week, he was only paid for the hours he actually worked. The contributions submitted for an individual’s pension are based

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Prior to 2005, the legislative rule defined “full time employment” as a position which “which normally requires twelve (12) months per year service and/or requires at least one thousand forty (1,040) hours per year service.” In 2005, the rule was amended to remove the word “or”. The statute W.V. Code §5-10-2 has always required full time employment for participation in PERS and W.V. Code §5-10-17(d) grants the Board the final power to decide membership issues.

upon a percentage of his salary/income, and Mr. Jones was paid for hours actually worked, not for on-call hours. Therefore, given the number of hours he worked and pursuant to W.Va. Code §5-10-14(a)(1) and §162-5-4.1 C.S.R., it is doubtful that he would qualify for even one month of service credit.

Furthermore, it is questionable as to whether Respondent Jones is an “employee” or an independent contractor. Black’s Law Dictionary defines “employee” as “a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.” It defines “independent contractor” as one who “in the exercise of an independent employment, contracts to do a piece of work according to his own methods and is subject to his employer’s control only as to the end product or final result of his work.”

Respondent Jones is paid a minimum of \$613.46 every two weeks regardless of hours worked, plus he bills his employer \$150 per hour for each hour he works over the eight (8) hours which is included in the \$613.46 bi-weekly pay. (A.R. 175-176). The total hours he worked for the Authority from 2002-2010 are as follows: 2002 - 25.5 hours; 2003 - 118 hours; 2004 - 19.75 hours; 2005 - 200.5 hours; 2006 - 153.5 hours; 2007 - 200.25 hours; 2008 - 109.25 hours; 2009 - 154.75; and 2010 - 170.25 hours. (A.R. 56-57).

Although his employer considers him to be full time because he is on-call twenty four hours a day seven days per week, the most hours Respondent in any of the eight years for which he is requesting service is 200.5 hours in 2005. The legislative required minimum is one thousand and forty (1040). *C.S.R. §162-5-2.3*. Additionally, Respondent does not have an office at the Authority; he has his own separate law office; the Authority does not pay his bar dues or malpractice insurance;

and the Authority has never paid for even remotely close to one thousand forty (1040) hours of work in any year. (A.R. 140-143). Also, Respondent testified that only “10 - 15% at most” of his practice on the basis of hours worked was devoted to the Raleigh County Emergency Authority.(A.R. 193). He clearly appears to be an independent contractor rather than an employee.

Regardless of the classification, a legal finding that someone who works less than three hundred (300) hours per year is “full time” would be a subversion of legislative intent. Pursuant to West Virginia Code §5-10-17(a) and §5-10-2(11) and §162-5-2.3 C.S.R., the Board’s *Final Order* and the Circuit Court’s *Order* correctly concluded that Respondent’s limited employment simply does not qualify as “full time” employment; however, the Circuit Court incorrectly concluded that he was eligible to participate on the basis of estoppel.

**III. THE CIRCUIT COURT ERRED BY APPLYING THE DOCTRINE OF ESTOPPEL AGAINST A STATE AGENCY, AND FINDING THAT THE ELEMENTS OF EQUITABLE ESTOPPEL HAD BEEN MET.**

The Circuit Court conceded that Respondent was not statutorily entitled to participate in the Public Employees Retirement System; however, the Court found that he should be permitted to participate on the basis of equitable estoppel because his employer misrepresented to him the law regarding his eligibility, and the Petitioner Board was statutorily required to fix this misrepresentation/employer error by permitting his participation.

The Circuit Court erred by applying the doctrine of equitable estoppel against a state agency. This case is an administrative appeal of a state agency’s decision. The West Virginia Administrative Procedures Act governs the review of contested administrative decisions and issues by a circuit court and specifically provides that:

(g) The Court may affirm the ...decision of the agency or remand the case for further

proceedings. It shall reverse, vacate or modify the...decision of the agency if the substantial rights of the petitioner...have been prejudiced because the administrative...decisions are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; 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.

West Virginia Code §29A-5-4.

Pursuant to the Administrative Procedures Act, a Circuit Court does not have the authority to reverse an agency decision on the basis of equity. The Legislature provided six grounds upon which a Court could reverse a state agency's decision. Equity is not one of those grounds.

Additionally, this Court has long recognized that equitable estoppel has consistently been limited in its applicability to state entities. See, e.g., *Bradley v. Williams*, 465 S.E.2d 180 (W. Va. 1995); *McFillian v. Berkeley County Planning Commission*, 438 S.E.2d 801 (W. Va. 1993); *Samsell v. State Line Development Co.*, 174 S.E.2d 318 (W. Va. 1970); *Cawley v. Board of Trustees of Firemen's Pension Fund of Beckley*, 76 S.E.2d 683 (W. Va. 1953). This Court has clearly held that "an estoppel may **not** be invoked against a government unit when functioning in its governmental capacity." *Samsell*, 174 S.E.2d at 325.

In *Samsell*, the Court recognized that equitable estoppel may, in very limited circumstances, be applied to the state "when acting in a proprietary capacity, as distinguished from a governmental capacity." *Id.* at 326. Assuming without deciding that the state officers in question in that case were acting in a proprietary rather than governmental capacity, the Court concluded that equitable estoppel could **not** be properly applied under the facts of that case. In this case, the Board is clearly acting

in a governmental capacity, so estoppel cannot be applied.

In *McFillian*, this Court again noted the distinction which must be made when a government entity is acting in a governmental rather than proprietary capacity. *McFillian*, 438 S.E.2d at 808. When acting in a governmental capacity, a state entity “is **not** subject to the law of equitable estoppel.” *Id.* (Emphasis supplied). The Court noted that a governmental entity acts in a governmental capacity when “the act performed is for the common benefit of the public” rather than for the special benefit or profit of the entity. *Id.*

Here, it is clear that the Board has, in its capacity as administrator of the various state retirement systems, acted in a governmental rather than proprietary capacity. The Board and its members have the “highest fiduciary duty to maintain the terms of the [..TRS] trust, as spelled out in the statute.” *State ex rel. Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988). As a federally qualified pension plan, it is incumbent upon the Board, as part of its fiduciary duty, to ensure that the plan is administered according to its terms, for the exclusive benefit of all plan participants and beneficiaries, in order to protect and preserve the plan’s qualified tax status. See IRC 401(a); W. Va. Code §5-10-3a. Such a duty encompasses the duty to maintain the integrity and credibility of the plan. Consequently, and under the prevailing law of this state, the doctrine of equitable estoppel cannot properly be applied here.

The facts of this case clearly do not support the application of the doctrine of estoppel against a state agency especially an agency like Petitioner Board did not make a false representation to the Respondent. Additionally, the elements required to invoke the doctrine of equitable estoppel do not exist in this case. To constitute equitable estoppel, the following elements must also exist:

- a. a false representation or concealment of a material fact;
- b. it must have been made with actual or constructive knowledge of the facts;

- c. the party to whom it was made must have been without knowledge or the means of knowledge of the real facts;
  - d. it must be made with the intention that it should be acted on; and,
  - e. the party to whom it was made must have relied on or acted on it to his prejudice or detriment.
- Hudkins v. Consol. Pub Ret. Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007), Syl pt. 4.

In addition to the above-cited elements, this Court in *Hudkins* held that an estoppel against the government may be raised only when the following facts exist:

- a. the injury to the public interest is outweighed by the injury to the plaintiff's personal interest or the injustice that would arise if the government is not estopped;
- b. raising the estoppel prevents grave or manifest injustice;
- c. raising the estoppel will not defeat a strong public interest or the operation of public policy;
- d. the exercise of government functions is not impaired or interfered with;
- e. circumstances make it highly inequitable or oppressive not to estop the government; and,
- f. 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, 716.

In this case, the Circuit Court's application of estoppel is based upon numerous errors and should be reversed by this honorable Court.

**A. THE CIRCUIT COURT ERRED IN RULING THAT ESTOPPEL APPLIES TO A MISREPRESENTATION OF LAW.**

The Circuit Court found that 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 Jones' entitlement to retirement benefits." (A.R. 10). This finding is clearly a misrepresentation of law rather than fact.

It is undisputed a false representation was made to Respondent Jones; however, the Petitioner Board did not make and was not responsible for the false representation, and the false representation that the Authority made to Mr. Jones was one of law rather than fact. The doctrine of equitable estoppel is not applicable to misrepresentations of law. *WV Consol. Pub. Ret. Bd. v. Carter, Trembush*, 633 S.E.2d 521, 531. As discussed in greater detail below, the parties are presumed to

know the law and estoppel is only applicable when there has been a misrepresentation of a material fact, not law.

**B. THE CIRCUIT COURT ERRED IN FINDING THAT MR. JONES RELIED TO HIS DETRIMENT BY ACCEPTING A LOWER RATE OF PAY**

The Circuit Court erred in finding that Mr. Jones relied to his detriment by “accepting a lower rate of pay from the Authority than he did his other clients as a result of the Authority’s assurance of retirement benefits.” (A.R. 11). The factual evidence presented below does not support this conclusion. No evidence of actual detrimental reliance was presented. For example, no evidence was presented as to whether the employer would have offered more money in lieu of retirement benefits, or whether the employer will offer additional money to Mr. Jones or establish an alternative retirement option should this Court overturn the lower court. Additionally, there is no evidence that he turned away work which would have totaled or exceeded the pay he received from the Authority, with or without retirement benefits included. Any detriment, if any, suffered by Respondent Jones was not caused by Petitioner Board.

**C. THE CIRCUIT COURT ERRED IN FINDING THAT THE INJURY TO THE PUBLIC INTEREST IS OUTWEIGHED BY THE INJURY TO MR. JONES’ PERSONAL INTEREST.**

The Circuit Court erred in finding that “the injury to the public interest is outweighed by the injury to Mr. Jones’ personal interest if the Board is not estopped.” (A.R. 11). The public’s interest in a fiscally sound public retirement system outweighs the injury to Mr. Jones’ personal interest. Mr. Jones testified that this contract only accounted for approximately 10-15% of his practice on the basis of time and far less on the basis of income. (A.R. 193). The financial impact to Mr. Jones would be minor compared to the negative impact upon the public retirement funds when estoppel

is applied in cases similar to this one.

**D. THE CIRCUIT COURT ERRED IN FINDING THAT ESTOPPEL PREVENTS MANIFEST OR GRAVE INJUSTICE.**

The Circuit Court erred in finding that estoppel prevents manifest or grave injustice. (A.R. 11). The factual evidence presented below does not support this conclusion. As previously stated above, the financial impact to Mr. Jones is better characterized as minimal rather than grave or manifest. Additionally, should this Court overturn the lower court, then the Board would refund all of Mr. Jones' contributions totaling approximately nine thousand dollars, and also credit the employer's account for contributions made on his behalf. Additionally, Mr. Jones testified that he believed that the employer would give him those contributions as well. (A.R. 199).

**E. THE CIRCUIT COURT ERRED IN FINDING THAT ESTOPPEL WILL NOT DEFEAT A STRONG PUBLIC INTEREST OR THE OPERATION OF PUBLIC POLICY**

The Circuit Court erred in finding that estoppel will not defeat a strong public interest or the operation of public policy. (A.R. 11-12) The factual evidence presented below does not support this conclusion. With respect to public policy regarding the imposition of estoppel, the United States Supreme Court noted that "when the government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Samsell, Id. at p. 51.*

Although the lower court was correct in finding that Mr. Jones had made all of the required contributions, the court incorrectly concluded that on this basis "the exercise of government function is not impaired or interfered with." The statutory requirement that only full time employees are eligible to participate is an important actuarial assumption. Additionally, the requirement prevents

spiking - the inflation of one's final average salary to acquire benefits far in excess of contributions, interest and earnings.

**F. THE CIRCUIT COURT ERRED IN FINDING THAT THE PUBLIC'S INTEREST IN A SOUND RETIREMENT SYSTEM WILL NOT BE HARMED BY THE IMPOSITION OF ESTOPPEL.**

The Circuit Court erred in finding that "the public's interest in a sound retirement system will not be harmed by the imposition of estoppel." (A.R. 12). The Court's imposition of estoppel based upon an employer's misrepresentation regarding an entitlement not authorized by the Legislature will negatively affect the public's interest in a fiscally sound public retirement system. The retirement plans are not covered by insurance for such losses. The losses are absorbed by the plan which will increase the plan's unfunded liability. Although the lower court's ruling is not precedence, it will be used as support for all other future claims in which an employer misrepresents benefits to an employee which would jeopardize the fiscal soundness of all public pension plans.

**IV. THE CIRCUIT COURT MISINTERPRETED THIS COURT'S OPINION IN HUDKINS V. CONSOLIDATED PUBLIC RETIREMENT BOARD.**

The Circuit Court misapplied this Court's opinion in *Hudkins v. West Virginia Consolidated Public Retirement Board*, 220 W.Va. 275, 647 S.E.2d 711 (2007), and such an expansion of the doctrine of equitable estoppel could expose the State to extraordinary liability.

This honorable Court's opinion in *Hudkins* was per curiam and a rare exception to the Court's long standing view of equitable estoppel's limited application against state entities. Additionally, *Hudkins* is clearly distinguishable from this case in that in *Hudkins*, it was the Retirement Board who not only gave Ms. Hudkins the incorrect information, but had also reversed its own practice and position with respect to granting retirement credit for unused leave. Ms.

Hudkins relied upon the Board's misrepresentation in deciding to retire, and she was already in retirement status when the Board reversed its own practice and position. Additionally, Ms. Hudkins was a widow living on a fixed income and the financial impact of the decision was approximately \$51.00 per month.

In this case, Mr. Jones and his employer never contacted the Board for guidance as to his eligibility to participate in PERS. (A.R. 160, 210-211). Unlike the Board's actions in *Hudkins*, the Board in this case did not make any misrepresentations to Mr. Jones, and the Board has never taken the position or had the practice of permitting individuals who work less than full time to participate in PERS. Additionally, the hardship suffered by Ms. Hudkins was significantly greater than any detriment experienced by Mr. Jones. Ms. Hudkins was a widow living on a fixed income; whereas, Mr. Jones is a successful attorney with a thriving practice, and his work for the Authority only comprises 10-15% of his practice.<sup>2</sup>

To permit employers to bind the state and Respondent Board with *ultra vires* promises regarding pension benefits would have catastrophic implications for public pensions and be contrary to statute and long standing common law. PERS has tens of thousands of active and retired members who are all governed by the same statutory provisions for the protection of the fund. Employers do not have the authority to bestow something that is contrary to those legislative mandates.

- V. **The Circuit Court erred in holding that §162-7-7.2 of the Code of State Regulations and West Virginia Code §5-10-2(12), the error correction statute and regulation, require the Consolidated Public Retirement Board to permit Mr. Jones to participate in the Public Employees Retirement System (PERS) due to employer error, essentially holding the Petitioner vicariously liable for the employer's misrepresentation of the law to Respondent.**

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<sup>2</sup>Transcript of Administrative hearing, testimony of Benny Jones, p.p. 63 & 84.

The Circuit Court erred in holding that §162-7-7.2 of the Code of State Regulations and West Virginia Code §5-10-2(12), the error correction statute and regulation, require the Consolidated Public Retirement Board to permit Mr. Jones to participate in the Public Employees Retirement System (PERS) due to employer error. (A.R. 9-10). The Court used this unusual interpretation of the statute and regulation to hold the Petitioner vicariously liable for the employer's misrepresentation of the law to Respondent.

West Virginia Code §5-10-2(12) defines "employer error" as "an omission, misrepresentation, or violation of relevant provisions of the West Virginia Code or the West Virginia Code of State Regulations ..... by the participating public employer that has resulted in an underpayment or overpayment of **contributions required**. A deliberate act contrary to the provisions of this section does not constitute employer error." The lower court found that the employer's misrepresentation resulted in an overpayment of contributions on behalf of Mr. Jones, when actually there was not an underpayment or overpayment of contributions because no contributions should have been submitted. The lower court ignored the word "required" in the statute.

The legislative rule, §162-7-7.2 C.S.R., merely outlines the rate of interest to be used when an employer error occurs. This is evident from the unambiguous language used in the regulation as well as the article's title which is "Employer Error Interest Factors".

The lower Court is clearly incorrect in its interpretation of the statute and legislative rule. The statute and legislative rule do not authorize the Board to bestow entitlements which the individual has no statutory right to, but rather they provide a means for the Board to correct employer errors which resulted in an overpayment or underpayment of contributions on behalf of individuals

who are legitimately participating or have a statutory right to participate in the retirement system.

Additionally, this honorable Court should reverse the lower Court because permitting employers to bind the state and Retirement Board with *ultra vires* acts by employers regarding pension benefits would have catastrophic implications for public pensions and be contrary to statute and long standing common law principles. The Public Employees Retirement System has tens of thousands of active and retired members who are all governed by the same statutory provisions for the protection of the fund. Employers do not have the authority to bestow something that is contrary to those legislative mandates.

In *Samsell*, this honorable Court held, “all persons must take note of the legal limitations upon [state officers’] power and authority,” and that “this Court has stated many times that the state and its political subdivisions are not bound, on the basis of estoppel, by the *ultra vires* or legally authorized acts of its officers in the performance of government functions.” *Samsell v. State Line Development Co.*, 174 S.E.2d at 325, 326 (W. Va. 1970).

Specifically with respect to the principles of estoppel the Court issued the following ruling:

“Principles relating to persons acting or assuming to act on behalf of the state are summarized in *Cunningham v. The County Court of Wood County*, 148 W.Va. 303, 309-10, 134 S.E.2d 725, 729-30, as follows:

“The general rule is that an estoppel may not be invoked against a governmental unit when functioning in its governmental capacity. 31 C.J.S., Estoppel, Sections 138-142, pages 675-719; Anno., 1 A.L.R.2d 338.”

**“A governmental unit is not estopped to deny the validity of *ultra vires* acts of its officers. 31 C.J.S., Estoppel Section 143, page 719. See also 19 Am. Jur., Estoppel, Section 167, page 819; 7 M.J. Estoppel, Section 7, page 246. A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers; and all persons must take note of the legal limitations upon their power and authority.(emphasis added) *Schippa v. West***

*Virginia Liquor Control Commission; Armstrong Products Corporation v. Martin; State v. Conley; The City of Beckley v. Wolford et. al.; Coberly v. Gainer; State v. Chilton, ..... [full citations omitted].*” Id. at p. 329.

The Court in *Samsell* further held that the “acts of a private agent may bind the principal where they are within the apparent scope of his authority; but not so with a public officer, as the State is bound only by authority actually vested in the officer, and his powers are limited and defined by its laws.” *Syllabus Point 4.*

Contrary to the lower court’s ruling, the employer’s misrepresentation to Respondent Jones regarding his eligibility to participate in PERS was an *ultra vires* act that does not bind the Petitioner Board.

Additionally, it strains credulity for the lower court to hold the Petitioner state agency vicariously liable for the acts of a county employee. The Petitioner Board has no authority or control over a county agency.

**VI. The Circuit Court erred in holding that Mr. Jones was not responsible for the error because he was “without knowledge of the law or the means of knowing that he was not considered a full time employee.”**

The Circuit Court erred in holding that Mr. Jones was not responsible for the error because he was “without knowledge of the law or the means of knowing that he was not considered a full time employee.” (A.R. 10-11).

In many previous opinions, this honorable Court has held that “a state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers; **and all persons must take note of the legal limitations upon their power and authority.**(emphasis added) *Schippa v. West Virginia Liquor Control Commission; Armstrong Products Corporation v. Martin; State v. Conley;*

*The City of Beckley v. Wolford et. al.; Coberly v. Gainer; State v. Chilton, ..... [full citations omitted].” Samsell at p. 329.*

Additionally, the United States Supreme Court has held that “those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to the law. 467 U.S. at 60, 63, 104 S.Ct. at 2224, 2226, 81 L.Ed.2d at 52, 54.

In the present case, Respondent Jones is a lawyer. Even though the Authority misrepresented his eligibility to participate in the Public Employees Retirement System, Respondent Jones is charged with the knowledge of the law as it exists in the statute, and the Board cannot be estopped from carrying out the clear mandates of that statute despite any misrepresentations by the Authority. Respondent Jones testified that he never contacted the Petitioner Board to inquire as to whether he would be eligible to participate in the Public Employees Retirement System based upon his limited employment with the Authority. (A.R. 210-211).

### **CONCLUSION**

Pursuant to West Virginia Code §5-10-17(a), §5-10-2(11) and §162-5-2.3 of the Code of State Rules, only full time employees are permitted to participate in the Public Employees Retirement System (PERS). Respondent never worked as a full time public employee.

The doctrine of equitable estoppel is not appropriate given the facts of this case. Even so, the requisite elements to invoke estoppel do not exist, and clearly this equitable doctrine of limited application should not be expanded to impose liability on a state agency for the actions of a county agency.

The Circuit Court’s *Final Order Reversing Agency Decision* should be reversed by this honorable Court.

RESPECTFULLY SUBMITTED,  
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IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0937

STATE OF WEST VIRGINIA  
CONSOLIDATED PUBLIC  
RETIREMENT BOARD, Respondent Below,  
Petitioner,

vs.

(Raleigh County Circuit Court)  
(Civil Action No. 11-AA-8-B)

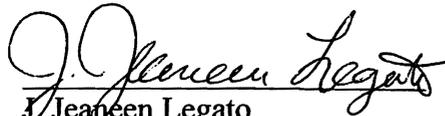
BENNY JONES, Petitioner Below,  
Respondent.

**CERTIFICATE OF SERVICE**

I, J. Jeaneen Legato, counsel to the State of West Virginia Consolidated Public Retirement Board, do hereby certify that the *Petitioner's Brief and Appendix*, filed herein on November 25, 2013, was forwarded to counsel for Respondent by U.S. Mail with proper postage to the following address:

E. Kent Hellems, Esq.  
113 Ballengee Street  
Hinton, WV 25951

Respectfully Submitted,  
WEST VIRGINIA CONSOLIDATED  
PUBLIC RETIREMENT BOARD

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