



IN SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0937

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

v.

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

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

**PETITIONER'S
REPLY BRIEF**

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REPLY SUMMARY

Only full time employees may participate in the Public Employees Retirement System (PERS). The lower Court and Hearing Officer correctly concluded that Respondent was not a full time public employee, and that there is no statutory authority to permit his participation in PERS.

Respondent's legal entitlement to participate in the Public Employees Retirement System (PERS) is based solely upon the lower Court's finding of equitable estoppel. Both opposing counsel and the lower court rely almost exclusively upon the opinion in *Hudkins* to support their theory of entitlement. *Hudkins v. Consolidated Public Retirement Board*, 220 W.Va. 275, 647 S.E.2d 711. The lower Court's interpretation of *Hudkins* inappropriately expanded the doctrine of estoppel to hold a state agency vicariously liable for misrepresentations made by a county employer. Such a ruling could have a devastating fiscal impact on public pension plans.

There are three major flaws with opposing counsel's argument and the lower Court's Order. The primary flaw is that none of the elements required to invoke estoppel exist with respect to the Petitioner Board. Additionally, the facts of this case are clearly distinguishable from the facts presented in *Hudkins*. Furthermore, even if the elements exist for Respondent to invoke estoppel against his employer, the Petitioner cannot be held vicariously liable for the acts of a county agency.

REPLY TO SUMMARY RESPONSE

I. None of the required elements to invoke estoppel exist in this case.

On January 1, 2002, the Raleigh County Emergency Service Authority (Authority) hired Respondent Jones to perform legal services. They 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". (A.R. 240)

In 2010, Petitioner Board first became aware of the mistake when Board 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.¹

It is undisputed that a misrepresentation was made to Mr. Jones, that the Authority not the Petitioner Board made the misrepresentation, and that there is no statutory authority which would permit Mr. Jones to participate in the Public Employees Retirement System.

The lower Court essentially held that despite the lack of statutory authority, Respondent Jones should be permitted to participate in PERS based upon the doctrine of equitable estoppel. However, such a ruling is clearly erroneous because none of the requisite elements of estoppel exist in this case with respect to Petitioner Board.

As stated in *Hudkins*, the following elements must exist to invoke estoppel:

- a. A false representation or concealment of a material fact;
- b. Made with actual or constructive knowledge of the facts;
- c. The party to whom the representation was made is without knowledge or the means of knowledge of the real facts;
- d. The representation or concealment must be made with the intent that it be acted on; and,
- e. The party to whom made must rely upon the representation to their prejudice.

Hudkins v. Consolidated Public Retirement Board, 220 W.Va. 275, 647 S.E.2d 711.

None of the above-listed requisite elements of estoppel exist in this case, as evidenced by the following:

A. The Petitioner Board did not make any false representations or conceal any facts.

When the Raleigh County Emergency Service Authority (Authority) hired Respondent, they

¹See §162-5-2.3 of the Code of State Rules.

incorrectly told him that he would be eligible to participate in the Public Employees Retirement System (PERS). This misrepresentation was one of law rather than fact, and was made by the Authority not the Petitioner Retirement Board.² Neither Respondent or his employer contacted Petitioner Board prior to his employment to inquire as to his eligibility for participation. (A.R. 259).

Thus, the false representation which was made was one of law not fact, and it was made by the Authority not the Petitioner Retirement Board; therefore, Respondent cannot satisfy the first element of estoppel.

B. Petitioner Board did not have actual or constructive knowledge that the misrepresentation was being made to Respondent.

With respect to the element of actual or constructive knowledge, the lower Court found that the Authority sent payroll clerks to retirement seminars sponsored by the Petitioner Board, and thus the representation by the Authority was made “with the knowledge to correctly advise” Respondent Jones.³

Regardless of whether the Authority had actual or constructive knowledge of the law regarding eligibility for participation in PERS, the Petitioner Retirement Board did not make the misrepresentation and was unaware of the Authority’s misrepresentation until 2010 when retirement board staff noticed a spike in Mr. Jones’s salary and audited his account. (A.R. 259).

C. Respondent was not “without knowledge or the means of knowledge” of the real facts.

The lower Court seemed to somewhat brush over the element requiring that the individual to whom the representation was made lacked knowledge or the means of knowing the real facts. The

²To invoke estoppel, the misrepresentation must be one of fact rather than law. *WV Consol. Pub. Ret. Bd. v. Carter, Trembush*, 633 S.E.2d 521, 531.

³Paragraph 29 of lower Court’s Order (A.R. 10).

lower Court found that Respondent Jones was “without knowledge of or the means of knowing that he was not considered a full time employee” because the Authority stated that the position was full time and provided full benefits.⁴

This element cannot be satisfied regardless of who made the misrepresentation. Respondent Jones is an attorney. He presumably knows how to research and read statutes. If Respondent Jones and/or his employer had any questions, then they could have contacted the Petitioner Board for guidance as to his eligibility to participate in PERS, but they did not. Respondent may have been unaware of the law at that time, but he clearly had the “means of knowing the law”.

Additionally, as this Court has held on many occasions and the United States Supreme Court has stated, “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.” *Heckler v. Community Health Servs.*, 467 U.S. 51, 63 (1984), also see *Samsell v. State Line Development Co.*, 174 S.E.2d at 325, 326 (W. Va. 1970), {Additionally, the holdings in: *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]}.

D. Respondent’s employer may have made “the representation or concealment with the intent that it be acted on”; however, the Petitioner Board was without knowledge of the misrepresentation and thus had no “intent”.

The “intent” element of estoppel is clearly lacking in this case. Although the Authority may have made the representation with the intent that Respondent Jones accept their offer of employment, the Petitioner Board could not have had the requisite “intent” because the Petitioner Board was

⁴Paragraph 30 of lower Court’s Order (A.R. 10).

unaware of the representation made to Respondent Jones until their staff audited his account in 2010.

E. Respondent Jones may have relied upon the representation to his prejudice; however, any prejudice suffered was not caused by the Petitioner Board.

Any prejudice, if any, suffered by Respondent Jones was not caused by the Petitioner Retirement Board. The Authority represented to Respondent Jones that the employment included full retirement benefits. The Petitioner Board has never made such a representation, and is statutorily prohibited from allowing Respondent Jones to participate in the Public Employees Retirement System (PERS).

Although Respondent Jones could possibly establish the requisite elements to invoke estoppel against his employer, he clearly cannot establish any of the requisite elements to invoke estoppel against Petitioner Board.

Therefore, any action, if any, Respondent Jones may have would lie against the culpable party, his employer, not the Petitioner Board.

II. The facts of this case are clearly distinguishable from the facts presented in *Hudkins*.

Although this Court applied estoppel against the Petitioner Board in the *Hudkins* case; the facts of this case are clearly distinguishable from the facts presented in the *Hudkins* case. *Hudkins v. Consolidated Public Retirement Board*, 220 W.Va. 275, 647 S.E.2d 711. In *Hudkins*, the Petitioner Board was the culpable party.

It was the Petitioner 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.

In this case, Respondent 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 Petitioner Board in this case did not make any misrepresentations to Respondent Jones, and the Petitioner Board has never taken the position or had the practice of permitting individuals who work less than full time to participate in PERS.

The lower Court essentially agreed that Respondent Jones cannot prove the requisite elements of estoppel against Petitioner Board directly; however, the lower Court used the *Hudkins* opinion to apply estoppel against Respondent's employer and then erroneously combined it with a misinterpretation of an error correction statute to hold the Petitioner Board/retirement fund liable.

III. The Petitioner cannot be held vicariously liable for the acts of Respondent's employer.

Petitioner Board is only authorized to give retirement benefits which have been approved by the Legislature as contained in statutes. Petitioner Board cannot be held responsible for an employer's unauthorized promises. Petitioner Board has faced similar issues in the past.

In granting summary judgment in favor of Petitioner Board, the Circuit Court of Kanawha County addressed the following issue:

Can promises by a state agency given to prospective employees on pension benefits bind the Consolidated Retirement Fund to honor the promised benefits if said promises are inconsistent with the statutory pension requirements and statutorily entitled benefits of the fund?

ANSWER: No, as a matter of Law.⁵

In that case, as well as this case, the underlying issue is whether a state agency, Petitioner West Virginia Consolidated Public Retirement Board, has the authority or discretion to act contrary

⁵See *Trooper Lynch, et al v. Jankowski, Consolidated Public Retirement Board, et al*, 06-AA-55 Kanawha County Circuit Court. The Supreme Court ultimately refused the Petition for Appeal in a *Corrected Order* dated May 13, 2009, No. 090481.

to the directives of a clear and unambiguous statute. For the protection of the retirement funds as a whole, the answer is and must be NO despite any unfortunate or negative consequences for the Respondent.

"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).

Additionally, the Court will not confer retirement benefits for employment where the legislature has not so authorized. Cain v. PERS, 197 W.Va. 514, 476 S.E.2d 185 (1996). 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. at fn 9.

The Respondent Board, as an administrative agency, must faithfully carry out the mandates of the statute with respect to the retirement plans it is charged with administering. 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).

In this case, the statute is clear and unambiguous. 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 Jones never worked as a full time public employee.

Additionally, the error correction statute and accompanying legislative rule, W.Va §5-10-2(12) and C.S.R. §162-7-7.2, are equally clear and unambiguous. Unquestionably, the purpose of such provisions is to authorize the Petitioner Board to correct errors which have occurred to a member's account. It was error for Respondent Jones to participate in PERS. It defies logic and strains credulity to find that these provisions authorize the Petitioner Board to commit error by awarding benefits not authorized by the Legislature. The lower Court's misinterpretation of the error correction statute and rule is a valiant attempt to find statutory authority to bestow retirement benefits not authorized by statute to rectify the misrepresentation made by Respondent's employer; however, it is clearly erroneous and should be reversed by this honorable Court.

Petitioner Board lacks the authority to correct any injustice suffered by Respondent Jones at the hands of his employer. "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 (emphasis supplied and footnotes omitted).

The Board, as an administrative agency, does not have the authority to modify the statute in a manner which would permit Respondent Jones to participate in the Public Employees Retirement System.

Lacking the authority to alter, amend or modify statutes, the remedy sought by Respondent Jones lies with the Legislature to amend the statute, not with the Petitioner Board.

IV. SUMMARY

Opposing counsel’s *Summary Response* goes to great lengths attempting to portray Respondent’s work for the Authority as full time; however, the most he ever worked in any of the years in question was 200.5 hours, an average of less than one (1) hour per day. (A.R. 56-57, 97). As for the retirement contributions he and his employer made on his behalf to the Petitioner Board, should this Court reverse the lower Court’s Order, then Respondent’s employer will be given a credit with Petitioner Board totaling the amount of both the employer and employee contributions.⁶ It is then the responsibility of his employer to provide a refund to Respondent or establish an alternative retirement plan.

With respect to detriment and this particular case, neither side can legitimately argue that there will be significant harm suffered. By his own testimony, the Respondent has a lucrative law

⁶See W.Va. Code §5-10-44 and letter to employer dated November 3, 2010, (A.R. 241).

practice, and the retirement fund did receive contributions which correlate to the amount paid to the Respondent. However, the retirement funds could suffer great detriment in future cases if the lower Court's erroneous expansion of the doctrine of collateral estoppel is upheld. Equity has limited application in the realm of administrative law primarily because public rather private money is involved. Unlike the private sector, there is no insurance money to cover the numerous mistakes made by employers, and the Legislature has appropriated funds which cover only that which is statutorily authorized.

It is undisputed that a misrepresentation was made to Respondent Jones by his employer. However, there is no statutory or common law authority which would authorize the Petitioner Board to permit Respondent Jones to participate in the Public Employees Retirement System. Respondent's remedy lies with the Legislature to amend the statute to permit participation for independent contractors or part time employees, or to seek redress from his employer, the culpable party, for comparable retirement benefits.

Wherefore, Petitioner prays that this honorable Court will reverse the Circuit Court's *Final Order Reversing Agency Decision*.

RESPECTFULLY SUBMITTED,
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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 Reply Brief*, filed herein on January 28, 2014, was forwarded to counsel for Respondent by U.S. Mail with proper postage to the following address:

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Respectfully Submitted,
WEST VIRGINIA CONSOLIDATED
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