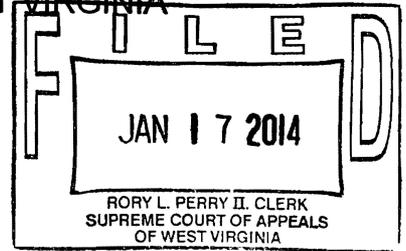


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

**SUMMARY RESPONSE OF
RESPONDENT, BENNY JONES**

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STATEMENT OF THE CASE

On or about November 1, 2010 after ten (10) years and five (5) months of accumulated service and contribution to the Public Employees Retirement System and at the age of sixty (60) years and six (6) months your Respondent, Benny G. Jones was notified by the consolidated Public Retirement Board that he was ineligible to participate in the program. This notification came after Mr. Jones' pension rights were fully vested by years of service and age.

As the record in this matter clearly reveals the Raleigh County Emergency Service Authority, acting through its designated board of directors, reached the conclusion in late 2001 that full time legal representation was necessary for the effective administration of the authority and to provide quality emergency services to citizens of Raleigh County, West Virginia. The Raleigh County Emergency Services Authority had previously retained legal counsel for various matters before January 2002 on an independent contractor basis; hiring different attorneys for different projects and paying them as much as Two Hundred Fifty Dollars (\$250.00) per hour for legal representation.

(See Jack Bowden's testimony pages 116, 125 of the appendix). Pursuant to their lawful authority the Raleigh County Emergency Services Authority advertised for the position of a full time staff attorney with full benefits (including participation in and contribution to the Public Employees Retirement System). The position of staff attorney for the Raleigh County Emergency Services Authority required extraordinary participation by the attorney. It was necessary that their staff attorney be on call twenty-four (24) hours a day, seven (7) days a week, including holidays. (see appendix pages 116 – 119). The Petitioner, Benny G. Jones, applied for the position as full time staff attorney with full benefits and was hired effective January 1, 2002 by the Raleigh County Emergency Services Authority.

The record in the matter reflects that Mr. Jones has more than twenty-three (23) years experience as a practicing attorney. His reputation in the community as an attorney is excellent, his services are in high demand and he currently bills at the rate of Two Hundred Fifty Dollars (\$250.00) for legal services, similar to those which are provided to the Raleigh County Emergency Services Board. (See appendix pages 125 – 126, 176). The record in this matter further reflects that the going rate for legal services in the community of Raleigh County for this type of legal assistance is at least Two Hundred Fifty Dollars (\$250.00) per hour.

Upon accepting the position of staff attorney for the Raleigh County Emergency Services Authority, Mr. Jones appeared at a board meeting (as all employees are required to do) and took an oath to serve as the Raleigh County Emergency Services Authority's staff attorney. In accepting the position Mr. Jones testified and the record clearly reflects that he relied upon the representation that he would receive the benefits

of a full time employee, including participation in the Public Employees Retirement System. (See appendix pages 127, 132, 184). Mr. Jones was paid a salary of approximately One Thousand Two Hundred Dollars (\$1,200.00) a month and was entitled to additional compensation if he provided more than eight (8) hours of legal services during any particular month (for which he billed at the rate of One Hundred Twenty-Five Dollars (\$125.00) per hour, subsequently increased to One Hundred Fifty Dollars (\$150.00) per hour). This amount is approximately fifty percent (50%) of the amount Mr. Jones ordinarily charged and the prevailing rate for attorneys in Raleigh County. (See appendix page 176).

The record further reflects that Mr. Jones was precluded from accepting other employment due to his position as staff attorney for the Raleigh County Emergency Services Authority. This was due both to potential conflicts and also because Mr. Jones simply did not have enough time to provide the Raleigh County Emergency Services Authority with access to legal services twenty-four (24) hours a day, seven (7) days a week, and take on additional work with an already substantial workload. (See appendix page 177). The record in this matter further indicates that Mr. Jones made contributions from his own personal funds of Two Thousand Seven Hundred Fifty Dollars and Sixteen Cents(\$2,750.16); wage reduction contributions of Seven Thousand Nine Hundred Forty-Seven Dollars and Twenty-Seven Cents (\$7,947.27); and interest thereon of One Thousand Eight Hundred Thirty-Nine Dollars and Forty-Nine Cents (\$1,839.49) while employed by the Raleigh County Emergency Services Authority, for a total of Twelve Thousand Five Hundred Thirty-Six Dollars and Ninety-Two Cents (\$12,536.92) as of December 31, 2009. (See appendix page 246). Furthermore, pursuant to their

contractual agreement and representation, the Raleigh County Emergency Services Authority also contributed the sum of Twenty Thousand Eight Hundred Twenty-Seven Dollars (\$20,827.00) to the Public Employees Retirement System for the benefit of Mr. Jones in accordance with their representations both verbal and written. (See appendix page 129).

Obviously during the ten (10) years and five (5) months of service that Mr. Jones contributed to the Public Employees Retirement System, the Public Employees Retirement Board received the benefit of those contributions. It invested those contributions, and based upon the unfunded liability of the Public Employees Retirement System, used those funds to satisfy retirement obligations to other public employees. All of these contributions were for the benefit of Mr. Jones and in accordance with his contractual agreement with the Raleigh County Emergency Services Authority. It was all tax deferred and treated as such on Mr. Jones' tax returns for those periods of time.

The record further substantiates that the Raleigh County Emergency Services Authority sent clerks and/or other personnel to seminars conducted by the Public Employees Retirement Board for training concerning the guidelines for participation in the Public Employees Retirement Plan. (See appendix page 159, 217). Teresa Miller, the director, testified that those clerks were responsible for completing forms and obtaining information submitted to the Public Employee Retirement Board in calculating the deductions and determining eligibility. (See appendix pages 217 – 220, 224 – 226). Furthermore at no time did Mr. Jones have any direct knowledge or undertake any action to circumvent the regulations of the Public Employees Retirement Board nor does the record reflect that he had any actual or constructive knowledge as to the

guidelines for participation. The acting director of the Consolidated Public Retirement Board, Teresa Miller, offered testimony in the record that Mr. Jones' eligibility was brought into question due to certain "spikes" in the amount of his compensation from month to month. Ms. Miller further testified that such "spikes" from month to month were common throughout the ten (10) years that Mr. Jones participated in the program and that the events which she related drew the attention of the Public Retirement Board were not unusual nor had they just recently occurred concerning Mr. Jones. (See appendix page 221 - 222).

On or about April 12, 2011, an evidentiary hearing was conducted before a hearing examiner on Mr. Jones' appeal of the Public Retirement Board's action to disqualify him from participation. The hearing examiner made a finding of fact that Mr. Jones had participated in the Public Employees Retirement System since January 1, 2002 and was not notified of his alleged ineligibility to participate in the Public Employees Retirement System until he received a letter dated November 1, 2010. The hearing examiner additionally made the following findings of fact: (See appendix pages 97 – 98).

Mr. Jones' employer classified him as a full time employee expected to be available twenty-four (24) hours a day, seven (7) days a week;

Mr. Jones relied upon participation in the Public Employees Retirement System when accepting that employment position;

Mr. Jones charges other clients far more than he charged the Raleigh County Emergency Services authority;

The job description for Mr. Jones position states that he is classified as full time with benefits except for holiday and leave accrual; and

It also requires him to be available twenty-four (24) hours a day, seven (7) days per week.

The hearing examiners conclusions of law were limited only to the definition of "full time" employment as set forth in §162-5-2.3 of the Code of State Rules which provides as follows:

"Full time employment" - employment of an employee by participating public employer in a position which normally requires twelve months per year service and requires at least 1,040 hours per year service in that position.

The hearing examiner erroneously concluded that that section of the Code of State Rules in and of itself precluded Mr. Jones from participation in the Public Employees Retirement System. The hearing examiner made no analysis of the doctrine of equitable estoppel and the application of the facts of record to that doctrine. The decision of the hearing examiner dated June 3, 2011 was adopted in its entirety by the Public Retirement Board on or about July 6, 2011.

Mr. Jones perfected his appeal of the Final Order of the Consolidated Public Retirement Board to the Circuit Court of Raleigh County. The issues were briefed for the Honorable John Cummings sitting by special assignment as Judge of the Circuit Court of Raleigh County, West Virginia and oral argument was conducted. By Order entered July 22, 2013, the Circuit Court of Raleigh County reversed the Order of the West Virginia Consolidated Public Retirement Board with the following pertinent findings of fact:

1. The Raleigh County Emergency Services Authority sought the services of a full time attorney to handle various legal matters in which the authority was and would in the future be involved.
2. The position was full-time, salaried and provided full benefits except for holiday and leave accrual. The base pay was Six Hundred Thirteen Dollars and Forty-Six Cents (\$613.46) per two (2) weeks for up to eight (8) hours of service per month. For each additional hour billed the attorney

would receive One Hundred Twenty-Five Dollars (\$125.00) which was later increased to One Hundred Fifty Dollars (\$150.00).

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

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

5. ...He performed work for the Authority at the reduced hourly rate of One Hundred Twenty-Five Dollars (\$125.00) due to the Authority's representations that he would receive retirement benefits. Work performed for clients other than the Authority was billed at Two Hundred Fifty Dollars (\$250.00) per hour.

6. ...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 (1) year and eight (8) months.

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

8. ...Jones provided additional work over the eight (8) hour monthly base as follows... (total 2002 through 2010 – 563.75).

The additional hours did not include the fact that (Jones) was on call twenty-four (24) hours a day, seven (7) days a week, nor did it account for non-legal work, meetings and travel which he did not bill but was required to attend. (appendix pages 3 – 5).

Judge Cummings' Order further gave careful consideration of the holdings of this Honorable Court in Hudkins v. Consolidated Retirement Board 220 W.Va. 275, 647 S.E.2d 711 (2007), The Circuit Court's Order goes into great detail analyzing the Hudkins opinion. After a thorough analysis of the prerequisites for application of doctrine of equitable estoppel and the facts of record, the Circuit Court of Raleigh

County concluded that the elements of equitable estoppel were met in the instant action (see paragraph 25 of the Circuit Court's Order entered July 22, 2013, appendix page 9).

STANDARD OF REVIEW

It should be noted that the standard of review recited in the Appellant's/ Petitioner's brief is erroneous. In Hudkins v. State of West Virginia Consolidated Public Retirement Board 220 W.Va. 275, 647 S.E.2d 711 (2007), at syllabus point 2, this Honorable Court articulated the standard of review to be applied in decisions where the Circuit Court has amended the result before the administrative agency. Syllabus point 2 of Hudkins is a restatement of syllabus point 2 in Muscatell v. Cline 196 W.Va. 588, 474 S.E.2d 518 (1996). The standard of review articulated by this Court is as follows:

"In cases where the Circuit Court has amended the result before the administrative agency, appellate Court reviews the final Order of the Circuit Court and the ultimate disposition by it of an administrative law case under abuse of discretion standard and reviews questions of law de novo.

Therefore the factual determinations of the Circuit Court of Raleigh County in the case at bar are reviewable under the abuse of discretion standard and questions of law are reviewed de novo.

SUMMARY OF ARGUMENT

The Circuit Court of Raleigh County acted well within its discretion in making the factual determination that misrepresentations of fact were made to Mr. Jones concerning his participation in the Public Employees Retirement System. In fact the factual conclusions reached by the Circuit Court of Raleigh County were largely uncontradicted. The record in the matter clearly reflects that it was represented to Mr. Jones verbally and in writing that in making himself available to the Raleigh County

Emergency Services Authority twenty-four (24) hours a day, seven (7) days a week he would be provided a monthly salary and full benefits including participation in the Public Employees Retirement System. The Circuit Court's finding that Mr. Jones relied upon this representation to his detriment and that as a result of this reliance Mr. Jones would sustain significant injury and damage if his Public Employee Retirement Benefits are withheld is likewise uncontradicted.

The Appellant's position that some discernible harm will occur to the pension fund if Mr. Jones is allowed to participate in the Public Employees Retirement System is without any factual basis in the record and is unsupported by simple logic. In substance the Circuit Court of Raleigh County found no resulting harm to the State or impairment of the Public Policy of this State if Mr. Jones is allowed to participate in the Public Employees Retirement System. The Circuit Court clearly applied the appropriate legal precedent and gave a thorough and detailed analysis of the pertinent case law, statutory provisions and administrative regulations and their application to the factual record in concluding that the doctrine of equitable estoppel should be applied in this proceeding. There is no factual basis to even assert that Mr. Jones was responsible for the error or had knowledge or the means of knowing that he was not considered a full time employee. The Circuit Court's finding that there is no injury at all to the public interest or adverse affect on any governmental function are correct and well within its discretion.

ARGUMENT

The West Virginia Consolidated Public Retirement Board unlawfully denied Mr. Jones participation in the Public Employees Retirement System after he became fully

vested, having contributed for nearly ten and a half (10½) years and attained an age in excess of sixty (60) years. Both the hearing examiner who considered this matter and the Public Employees Retirement Board reached their erroneous conclusion based upon the assertion that Mr. Jones did not work a thousand and forty (1,040) hours per year for the Raleigh County Emergency Services Authority.

The Circuit Court concluded that this was erroneous on at least two (2) grounds. First, as the record in this matter clearly reflects, Mr. Jones was on call twenty-four (24) hours a day, seven (7) days a week, for the Raleigh County Emergency Services Authority. The record in this matter clearly reflects that this is an extraordinary obligation undertaken by an attorney. Needless to say there is probably not another attorney in the State of West Virginia who has such an agreement with a client. However, it is understandable how an agreement of this nature would be necessary for the Raleigh County Emergency Services Authority. The Authority has to deal with emergency situations at all hours; that they have over thirty (30) employees, and a multi-million dollar facility to operate. While the billable hours that Mr. Jones submitted to the Raleigh County Emergency Services Authority may not in any one particular year add up to one thousand forty hours (1,040) he was obviously committed to them for well in excess of "the normal" time period. W.Va. Code of State Rules §162-5-2.3 defines "full time employee" as "a position which normally requires 12 months per year service and requires at least 1040 hours per year service in that position" (emphasis added). This regulation clearly recognizes that there may be situations which are not "normal." This Respondent suggests that being on call and available 24/7 suggest a "non-normal" relationship.

Secondly, the hearing examiner and the Board completely ignored the doctrine of equitable estoppel and the facts relating thereto. The transcript of the proceedings clearly indicates that the major argument presented to the hearing examiner concerned the applicability of the doctrine of equitable estoppel, particularly the case of Hudkins v. State of West Virginia Consolidated Public Retirement Board, 220 W.Va. 275, 647 S.E.2d 711, (2007). As this Court is no doubt aware, the Hudkins case specifically held that the doctrine equitable estoppel is applicable to the State of West Virginia and in particular, the Public Employees Retirement Board. Neither the hearing examiner nor the Board which ratified his decision considered the pertinent facts or gave any consideration to this legal precedent.

The appellant initially argues that the doctrine of equitable estoppel cannot be applied against a state agency. This is clearly wrong. It is the well established law in this State that the doctrine of equitable estoppel can be applied to the State. See e.g. Samsell v. State Line Development Co., 154 W.Va. 48, 174 S.E.2d 318 (1970). In fact the doctrine of equitable estoppel was applied directly against the Appellant in Hudkins v. State of West Virginia Consolidated Public Retirement Board, 220 W.Va. 275, 647 S.E.2d 711 (2007). Under the identical procedural history (denial by hearing examiner, affirmation of examiners decision by the Board, reversal by the Circuit Court).

The appellant also challenges the Circuit Court's determination that the elements of equitable estoppel were met by Mr. Jones. Again this Court need look no further than Hudkins, 220 W.Va. 275 to identify the necessary elements:

1. A false representation or a concealment of material facts.
2. Made with actual or constructive knowledge of the facts.

3. The party to who the representation was made is without knowledge or the means of knowledge of the real facts.

4. The representation or concealment must be made with the intent that it be acted on.

5. The party to whom made must rely upon the representation to their prejudice.

The record and the factual determinations of the Circuit Court clearly reflect that the criteria for establishing equitable estoppel were satisfied by Mr. Jones. There can be no credible argument presented to this Court that false statements of material facts were not made to Mr. Jones. At the eleventh hour the Appellant now contends that these misrepresentations were not "factual" but were "legal." Like much of this appeal, this is without support from the record and without legal precedent. Apparently it is now the Appellant's position is that it is a "legal misrepresentation" because they say so. Clearly the record says otherwise and so did the Circuit Court.

The Raleigh County Emergency Services Authority clearly and unequivocally represented the position in question as "full time" with benefits including participation the Public Employees Retirement System. They paid over Twenty Thousand Dollars (\$20,000.00) into the fund based on that representation. The hearing examiner made this finding (appendix pages 97 - 98) the Retirement Board adopted that finding and the Circuit Court found likewise. The Appellant has now reclassified this as a "legal" misrepresentation. Not a factual misrepresentation. Obviously that dog won't hunt. It was represented to Mr. Jones in the job description and in his conversations with Jack Bowden, the director, that he would participate in the Public Employees Retirement System. (Which his employer would contribute to on his behalf). The job description

provided to Mr. Jones confirms that "factual representation." (See appendix page 240 for job description).

The Raleigh County Emergency Services Authority had actual or constructive knowledge of the facts. The employer had the access to the information as to whether Mr. Jones would be an eligible participant. Seminars were made available to clerical and payroll employees of the Raleigh County Emergency Services Authority concerning the guidelines for participation in the Public Employees Retirement System. (See appendix pages 159, 217). Mr. Jones' employer therefore had the necessary eligibility information; not Mr. Jones. The record in this matter further reflects that Mr. Jones did not have knowledge of his inability to participate in the Public Employees Retirement System. As any reasonable employee would Mr. Jones acted upon the representations of his employer.

In Hudkins v. State of West Virginia Consolidated Public Retirement Board, 220 W.Va. 275,647 S.E.29 711, both the employer and the Retirement Board made misrepresentations of fact to the retiree concerning conversation of accumulated sick leave toward retirement. In Hudkins the Court gave careful consideration to the employer's representation; "It is also uncontroverted that Ms. Hudkins would not have separated from her employment with the Department but for the representations made by the Board Employee and the representations made by Mr. Nejmulski; the community service manager for the Department in which Ms. Hudkins was employed..." Hudkins 220 W.Va. at 281. Clearly the Court found the employers misrepresentation as an element in applying estoppel against the Retirement Board. In fact the employer's letter is contained in its entirety at foot note 3 of the Court's opinion.

The Public Employees Retirement Board trains the payroll employees of public employers on the proper procedures to be used in calculating deductions and eligibility for the retirement plan. The Board utilizes that information in administering the retirement plan and those benefits. (See Director Miller testimony appendix pages 217 – 220, 224 – 226). The Retirement Board invests those employers with that duty but now wants to disavow any responsibility for their actions and their results.

Clearly the Raleigh County Emergency Services Authority made the representation of availability of full benefits for the position of staff attorney with the intention that providing such benefits would attract a qualified candidate like Mr. Jones to fill that position and provide them with needed legal assistance at a reduced rate, on a permanent twenty-four (24) a day, seven (7) day a week basis.

The Circuit Court's findings of fact and the record in this matter exemplifies that Mr. Jones relied upon the representation of participation in the Public Employees Retirement System to his prejudice. Not only did he contribute a significant portion of his salary to the pension fund, he also contributed his own personal assets to buy back several months of prior service as a public employee. It is undisputed that Mr. Jones worked for the Raleigh County Emergency Services Authority at a greatly reduced rate (approximately 50% of his normal charge), made himself available twenty-four (24) hours a day, seven (7) days a week, declined or was prohibited from accepting other employment due to his busy schedule, his commitment to the Raleigh County Emergency Services Authority and potential conflicts of interest. (See appendix pages 173 – 177, 184). As the record and the Circuit Court's Order reflect the disqualification of Mr. Jones' participation in the Public Employees Retirement System may inflict a

substantial negative tax consequence upon him. He may now have to recapture ten (10) years of earned taxable benefits. (See appendix page 12, (Circuit Court Order) and page 186 – 187, 202, 204, (Jones testimony)).

It is further abundantly clear that the hearing examiner and the Public Employees Retirement Board failed to appreciate the fact that the Raleigh County Emergency Services Authority has contributed a substantial sum of money for the benefit of Mr. Jones in accordance with their contractual agreement with him. The hearing examiner and the Consolidated Public Retirement Board even questioned whether Mr. Jones is entitled to those funds. The examiner and the board were somehow convinced that the Raleigh County Emergency Services Authority could keep those funds or apply them for other employee's retirement benefits. (See appendix pages 196 – 205). This is totally ridiculous and confirms the absurdity of the Appellant's position.

The final volley from the Appellant's "shotgun" appeal suggests that Mr. Jones could not be without knowledge of the falsity of the representations made to him concerning participation in the Public Employees Retirement System because he is an attorney and as such knows all the law. That is certainly a stretch of the "without knowledge" element of equitable estoppel. The Appellant takes the position 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" citing an unidentified case reported at 467 US at 60. Obviously there is no equity at Public Employees Retirement Board. The record establishes and the Circuit concluded that Mr. Jones had no knowledge of the falsity of the representation, and that his employer was privy to the facts not him. This is the proper test and Mr. Jones passed.

Your Respondent acknowledges that before equitable estoppel can be applied against the State there is an additional hurdle that must be crossed. That hurdle is consideration of the degree of prejudice the State would suffer if estoppel is applied. Being an equitable remedy it is clear that its application is limited to situations where equity clearly requires its invocation.

Again Hudkins provides the Court with the road map to be used to balance the States interest against the injury Mr. Jones would suffer. Hudkins, 220 W.Va. at 280, 282-283. In Hudkins, this Court found that a financial impact of \$51.00 per month was a significant injury to a woman in her mid 50s who is likely to be on a fixed income for the duration of her lifetime. Such an injustice outweighed the public interest in that case.

In the Case at bar the Retirement Board claims that Mr. Jones' injury is far less than \$51.00 per month. Clearly a false assertion without support in the record. The record reflects that Mr. Jones completed 563.75 hours of work (in excess of his monthly full time salary) that was billed at approximately ½ of his normal rate. For this he was compensated approximately Seventy Thousand Five Hundred Dollars (\$70,500.00) over 9 years. (See appendix page 57). Therefore over that 9 year period he gave away Seventy Thousand Five Hundred Dollars (\$70,500.00) of his time and income. Additionally he and his employer have contributed more than of Thirty Thousand Dollars (\$30,000.00) to the retirement fund. Which may be lost and/or its tax deferred status placed in peril if the State is not estopped.

Does the Retirement Board really believe that Mr. Jones suffered no detriment in relying on the misrepresentation of the public retirement benefits? Do they really believe

that his injury is minor or minimal? Obviously the Circuit Court did not think so nor does the record support such a position.

The Appellant has spent many pages in their brief arguing what statutes say and what they want them to mean. Particularly West Virginia Code §5-10-17, §5-10-2 and West Virginia Code of State Rules §162-5-2.3.

Obviously these statutes and rules are not pertinent to the doctrine of equitable estoppel. However a review of these provisions leaves the objective reader with the distinct impression that they are designed to include persons into the retirement system not exclude them.

West Virginia Code §5-10-17(a) provides as follows:

“All employees, as defined in section two ... who are in the employ of a political subdivision...shall become members of the Retirement System.” (emphasis added)

Clearly a political subdivision and/or the employee cannot refuse to participate. The definition of employee in West Virginia Code §5-10-2(11) is extremely broad and includes “full time” salary employees and persons who are compensated daily, monthly or on completion of an assignment.

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

“Employment of an employee by a participating public employer in a position which normally requires 12 months per year service and requires at least 1040 hours per year service.” (emphasis added)

Why is the term normally used? Does that not indicate there are abnormal situations also that are not necessarily excluded? This point becomes even more apparent upon consideration of §162-7-7.2 of the West Virginia Code of State Regulations and West Virginia Code §5-10-2(12). West Virginia Code §5-10-2(12)

recognizes that employers make errors and misrepresentations and that those should be corrected. West Virginia Code §162-7-7.2 provides that when “errors occur the member is entitled to receive retirement service credit...contingent upon the Board’s receipt of employee and employer contributions...”

Simply stated if you pay into the system you should get the benefits from the system. These statutes and regulations like the doctrine of equitable estoppel were enacted to prevent an injustice. The Circuit Court recognized this in its Order and correctly applied those statutes to the facts.

CONCLUSION

In considering the record in this matter in its totality and the West Virginia Supreme Court of Appeals decision of Hudkins it is readily apparent that this Appeal should be denied and the findings of fact and legal conclusions of the Circuit Court upheld. The application of equitable estoppel with the reinstatement of Mr. Jones participation in the Public Employees Retirement System (including the ten (10) years and five (5) months of service) is the only just result which can be reached. In arriving at this conclusion the Circuit Court clearly found that any injury to the public interest is substantially outweighed by the injustice and damage which Mr. Jones would suffer if estoppel was not applied. In fact, there is no factual record of any prejudice to the retirement board or the fund. Mr. Jones is not asking for anything other than what he and his employer bargained and paid for. In fact, Mr. Jones’ contribution to the fund likely exceeds that which other public employees contribute. Utilizing the hours and the lowest rate of pay (\$125.00 per hour) which the Circuit Court found as fact a mathematical computation reveals that Mr. Jones received an average annual salary of

approximately Twenty-Two Thousand Three Hundred Seventy-Two Dollars (\$22,372.00) for the period of 2002-2010 (See appendix page 57). There is no evidence in the record to suggest that the actuarial soundness of the Public Employees Retirement Fund would be impaired by Mr. Jones' participation. The facts actually demonstrate that Mr. Jones contributions make the fund more sound. The Circuit Court posed an illuminating question during the hearing on Mr. Jones' appeal. In substance the Court asked: "Why require 1040 hours per year?" (See appendix page 31). The Circuit Court recognized the real issue is not how many hours someone works but how much someone contributes. The amount of contribution is what makes the plan sound. Obviously if someone only works 200 hours a year at \$10.00 per hour there may be a problem. However Mr. Jones' wages average over Twenty-Two Thousand Dollars (\$22,000.00) per year during the pertinent time frame (the equivalent amount as someone who makes \$21.50 per hour for 1040 hours or about \$11.00 an hour for a 40 hour a week employee). Clearly the more participants with meaningful contributions the more "sound" the fund becomes. Again the Appellant contends there is prejudice and injury because they allege it. No proof in the record or precedent required. Where is the prejudice to the State? Where is the impairment of any government function?

Equity demands that the Public Employees Retirement System be estopped and prohibited from denying benefits to a person who has contributed without objection for a period in excess of ten (10) years and who has attained an age which would allow them to presently receive those benefits. Obviously the West Virginia Consolidated Public Retirement Board received the benefits of the substantial contributions by and on behalf of Mr. Jones' for a lengthy period of time, only upon Mr. Jones being fully vested and

eligible to receive those benefits did the West Virginia Consolidated Public Retirement Board decide to declare Mr. Jones ineligible. Accordingly the Respondent asks that that the Order of the Circuit Court be affirmed and that all his retirement benefits be fully restored, including the right to continue participation under his agreement with the Raleigh County Emergency Services Authority.

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Respondent.

CERTIFICATE OF SERVICE

I, E. Kent Hellems, counsel for the Respondent, do hereby certify that service of the **SUMMARY RESPONSE OF RESPONDENT BENNY JONES** has been made upon the following person(s) by mailing a true and exact copy thereof in a properly stamped and addressed envelope this the 8th day of January, 2014.

J. Jeaneen Legato
State of West Virginia
Consolidated Public Retirement Board
4101 MacCorkle Avenue SE
Charleston, WV 25304-1636



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