

14-1250

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

MICHAEL WHALEN,

Plaintiff,

v.

CIVIL ACTION NO. 01-C-264-N
Judge David W. Nibert

THE WEST VIRGINIA PUBLIC
EMPLOYEES RETIREMENT SYSTEM,

Defendant.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT and DENYING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND MOTION TO DISMISS**

Now comes the Plaintiff, MICHAEL WHALEN, by counsel, William B. Summers and the WEST VIRGINIA PUBLIC EMPLOYMENT RETIREMENT SYSTEM (now the Consolidated Public Retirement Board) by counsel, Special Assistant Attorney General, Janeen Legato. The parties had previously filed Motions for Summary Judgment and Dismissal in this matter, which are of record, and the same have been maturely considered by the Court. This Court hereby GRANTS the Plaintiff's Motion for Summary Judgment and DENIES the Defendant's Motion to Dismiss and Motion for Summary Judgment for the reasons stated as follows.

FIRST, the Defendant's Motion to Dismiss is not well taken. While the Defendant is correct that the rules require that an appeal from the Retirement Board's decision must be filed within 30 days of the receipt of the order adopting the recommended decision, the Plaintiff did not receive a signed copy of the order. While the Plaintiff did receive a "recommended decision" from the Administrative Law Judge and "Order", said order was not signed by the Chairman of the Consolidated Public Retirement Board. Thus, in the same way an Order is not valid unless signed by

the Court or a law is not effective unless it is signed by the Governor, the receipt of an unsigned "Order" does not begin the running of the appeal deadline. Consequently, the Plaintiff's actions in filing a civil suit were timely given that filing suit in Mason County Circuit Court was, at the time, the Plaintiff's only remedy for the adverse decision. In fact, uncontested correspondence provided to the Court demonstrates that no such signed copy was provided prior to the filing of the Complaint. To the Court's knowledge, the Defendant has never produced proof that a signed copy of the Order was ever served either on Plaintiff's counsel at the time, James Casey, or the Plaintiff. Consequently, Mr. Casey was within the bounds of the rules by filing the complaint against the school board and the Defendant because no 30 day period had started to run.

FURTHERMORE, there is no material issue of fact in dispute in this case and are of record in this matter both in the transcript of the Administrative Hearing and the Hearing Examiner's decision. The Plaintiff's next to last year of his salary was increased by \$60,000 due to a contract buyout by the Mason County Board of Education. The Defendant received retirement contributions and the school board withheld taxes and social security as if the buyout amount was salary. The Plaintiff, prior to retirement, asked the Mason County Board of Education, who obtained the estimations for his retirement, what his retirement benefits would be. The Board provided retirement benefits that included the calculations that with the \$60,000 payment. The Plaintiff retired relying upon the calculations provided that these were his retirement benefits. After his retirement, the Board told the Plaintiff that his retirement would not include the \$60,000. He thereafter filed a grievance which led us to this litigation. The Defendant has never refunded the retirement contributions to the Plaintiff.

This Court believes that the Supreme Court's decision in of Summers v. W. Va. Consol. Pub. Ret. Bd., 217 W. Va. 399; 618 S.E.2d 408; 2005 W. Va. LEXIS 94 (2005), while a *per*

curium decision, can provide some guidance in this matter. In Summers, two retired administrators, George Summers and Ronald Fertile, sought review of a decision of the retirement board, which adopted a hearing officer's recommendation to deny the teachers' request to include lump sum payments for *accumulated vacation days* in the calculation of their retirement benefits. The Circuit Court of Kanawha County (West Virginia) affirmed the decision. The teachers appealed.

By including accumulated unpaid vacation benefits in their final year of active employment, the pension benefits of the teachers would have been increased (*in exactly the same way that Plaintiff's pension benefits would increase with his contractual buyout included in his computations*). However, W. Va. Code St. R. tit. 162, § 8-5.4 prevented this practice. While the Supreme Court of Appeals did not adopt several of the administrators' arguments, the Court reversed the Circuit Court's judgment on a **detrimental reliance** argument because the administrators' retirement process had progressed sufficiently by the time W. Va. Code St. R. tit. 162, § 8-5.4 became effective that the legislative rule should not have applied to the calculation of the teachers' retirement benefits. The Court looking at the facts, stated as follows:

As indicated above, the legislative rule at issue became effective on April 10, 2002. The record reveals that Mr. Fertile made a request for an estimate of retirement benefits in February 2002, and applied for retirement benefits that same month. Therefore, this Court believes that Mr. Fertile's retirement process had progressed sufficiently far by the time 162 C.S.R. § 8-5.4 became effective that the legislative rule should not apply to the calculation of his retirement benefits. We find the same to be true of Mr. Summers. Although Mr. Summers did not apply for retirement benefits until April 19, 2002, nine days after 162 C.S.R. § 8-5.4 became effective, the record indicates that Mr. Summers filed a "Benefit Estimate Request," in which he requested an estimate of his retirement benefits from the Teachers Retirement System, in December 2001, and indicated that his last day of employment would be June 30, 2002. Based on this, we find that the Retirement Board must include lump-sum payments for accumulated vacation pay in the calculation of Appellants' final average salary determination of benefits from the Teachers Retirement System in accord with *Kiser v. West Virginia Consolidated Public Retirement Board, supra*, which was the law in effect prior to 162 C.S.R. § 8-5.4. Accordingly, the circuit court's order to the contrary is reversed.

In this matter --- just like in Summers ---- the Plaintiff's next to last year of his salary was increased by \$60,000 due to a contract buyout. The Defendant received retirement contributions and the school board withheld taxes, retirement and social security as if the amount was a salary. Plaintiff, prior to retiring, asked the board, who obtained the estimations for his retirement, what his retirement benefits would be. (The Court note's that Mr. Summers filed a "benefit estimate request" just like Mr. Whalen). The Board provided retirement benefits in May of 1996 -- including the calculations that included the \$60,000 payment. The Plaintiff retired believing and detrimentally relying upon the calculations provided that these were his retirement benefits. Afterwards, the Plaintiff -- who retired in June of 1996 -- was told by the Board that his retirement *would not* include the \$60,000. This resulted in an approximate annual loss of annuity benefits of \$ 8,599.44 -- a tremendous sum of money for Mr. Whalen, who dedicated his life to teaching and administering in schools. This matter is clearly similar to the Summers decision, except that in Summers the Court dealt with unused but accrued vacation pay. In this matter, the Court is looking to whether Plaintiff's contract buyout is salary or not. The Defendant received contributions from said buyout. The Defendant cannot have its proverbial cake and eat it, too.

WHEREFORE it is accordingly ORDERED that the Defendant is ORDERED to recalculate the Plaintiff's retirement benefits using the additional \$60,000 of income in the next to the last year of employment -- contrary to the administrative law judge's recommendation -- and it is accordingly ORDERED that the PLAINTIFF is awarded DAMAGES equal to the difference between his actual retirement payments and the payments he should have received since 1996, with pre and post-judgment interest thereon. It is also ORDERED that said retirement calculations shall be submitted to the Court and the parties of record within thirty (30) days of the entry of this Order to enable the Court to have prepared a separate Order regarding the amount of the Judgment.

Entered on this the 13 day of November, 2014.


JUDGE DAVID W. NIBERT

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