IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1995 Term

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No. 22574

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STATE OF WEST VIRGINIA EX REL.
GLEN B. GAINER III,
AUDITOR OF THE STATE OF WEST VIRGINIA,
Petitioner Below, Appellant,

v.

THE WEST VIRGINIA BOARD OF INVESTMENTS,
Respondent Below, Appellee

_____

Appeal from the Circuit Court of Kanawha County
Honorable Robert K. Smith, Special Judge
Civil Action No. 94-C-840

REVERSED

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Submitted: January 18, 1995
Filed: May 31, 1995

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JUSTICE WORKMAN delivered the Opinion of the Court.
JUSTICE BROTHERTON did not participate.
JUDGE FOX sitting by temporary assignment.
JUSTICE CLECKLEY concurs and reserves the right to file a Concurring Opinion.

RETIRED JUSTICE NEELY dissents and reserves the right to file a Dissenting Opinion.

SYLLABUS BY THE COURT

1. "Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. Pt. 3, State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965).

2. "Moneys earned by public employees and contributed to a public employees' retirement plan, including the employers' contribution which has been earned by the public employees, become part of the corpus of the trust and are not thereafter state funds for expropriation or use for any purpose other than that for which the moneys were entrusted." Syl. Pt. 21, Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1989).

3. Until funds are withdrawn and paid out to individual members of the Public Employees Retirement System, the state has a beneficial ownership interest in such funds arising from the statutory trust relationship created by the enactment of the West Virginia Public Employees Retirement Act, West Virginia Code §§ 5-10-1 to -54 (1994 & Supp. 94).

4. "The amounts expropriated from the retirement trust funds for purposes other than those for which the funds were collected constitute a public debt owed by the state to the trust funds, and such expropriation must be remedied by recompense through appropriation." Syl. Pt. 23, Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1989).

5. "The Board of Investments has a fiduciary relation with the PERS trust and participants and must invest employee earned pension system assets consistently with the highest standards of fiduciary duty. It must utilize competent, educated, and trained financial managers to seek and manage high quality investments and to avoid speculative commercial and industrial ventures and schemes." Syl. Pt. 25, Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1989).

6. West Virginia Code § 12-6-9(j) (1991) is invalid and unenforceable as it violates the all-encompassing proscription found in Article X, Section 6 of the West Virginia Constitution against the state becoming a stockholder in any company or association.

Workman, Justice:

Glen B. Gainer, III, as Auditor of the State of West Virginia, appeals from the June 14, 1994, order of the Circuit Court of Kanawha County denying his request for injunctive and declaratory relief to prohibit the Appellee West Virginia Board of Investments ("Board") from investing certain monies from the consolidated pension fund in corporate stocks. After reviewing this matter in full, we conclude that the lower court erred in determining that West Virginia Code § 12-6-9(j) (1991) is not violative of Article X, Section 6 of the West Virginia Constitution. Accordingly, we reverse the decision below.

The underlying declaratory judgment action was initiated following the issuance of an attorney general's opinion addressing the following question: "[i]s it lawful for the West Virginia Board of Investments to invest the trust funds in the 'consolidated pension fund,' which represents monies of the Public Employees Retirement

[1]Mr. Gainer is a member of the Board pursuant to statute. See W. Va. Code § 12-6-3(a) (1991).

[2]West Virginia Code § 12-6-9(j) grants the Board authority to invest pension funds in: "[a]ny corporate stock of any private corporation or association organized and operating in the United States and which is also listed on the Standard and Poor's List of 500."

System ["PERS"], in corporate stock of any private corporation or association?" The advisory opinion issued by the attorney general on July 13, 1993, stated that the Board's investment of consolidated pension funds in corporate stocks violated article X, section 6 of the state constitution as well as the fiduciary principles enunciated in Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1989).

On May 12, 1994, the Appellant filed a petition in circuit court seeking a temporary injunction and declaratory judgment consistent with the opinion issued by the attorney general. Following a hearing on these issues on May 12, 1994, the circuit court issued an order on June 14, 1994, concluding that "West Virginia Code § 12-6-9(j) [1990] is not violative of article X, section 6 of the Constitution of West Virginia." This ruling was expressly predicated on the maxim that a legislative enactment is presumptively constitutional combined with the court's finding that article X, section 6 "was enacted to prevent the State from engaging in the operation of business or enterprise rather than to prevent the State from seeking dividend income from an investment." See Syl. Pt. 2, in part, State ex rel. State Bldg. Comm'n v. Moore, 155 W. Va. 212, 184 S.E.2d 94

[3]The attorney general's opinion was issued in response to a specific request posed by Larrie Bailey, State Treasurer, on May 12, 1993. Mr. Bailey is a Board member pursuant to West Virginia Code § 12-6-3(a).

(1971) (recognizing that "'negation of legislative power must be manifest beyond reasonable doubt'"). This appeal challenges the circuit court's reasoning and conclusions.

I.

In 1990, the legislature amended West Virginia Code § 12-6-9 to include subsection j, thereby permitting the Board to invest up to twenty percent of the PERS consolidated pension fund in corporate stock. The Appellant argues that West Virginia Code § 12-6-9(j) is unconstitutional on its face based on the following underscored constitutional language:

> The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever.

W. Va. Const. art. X, § 6 (emphasis supplied).

Conversely, the Appellee maintains that the constitutional proscription found in section six of article ten does not stand as a bar to investing a legislated portion of the consolidated fund

in corporate stocks. To support its position, the Appellee references the legislative intent behind the enactment of the subject constitutional language. In State ex rel. Dyer v. Sims, 134 W. Va. 278, 58 S.E.2d 766 (1950), rev'd on other grounds, 341 U.S. 22 (1951), this Court explained:

> The purpose of Section 6 of Article X was to guard against the granting of the credit of the State in aid of any county, city, township, corporation or person, or the assumption of their debts or liabilities; and against the State becoming a joint owner or stockholder in any company or association. . . . The purposes of the section are well known, being to guard against the mistakes of the mother Commonwealth of Virginia in granting aid to counties, and particularly in granting aid to organizations for the purposes of so-called public improvements, and in becoming stockholders of such organizations.

134 W. Va. at 289, 58 S.E.2d at 773 (emphasis supplied).

The Appellee chooses to view the historical basis of prohibiting credit from being extended for the development and private operation of public improvements such as canals, turnpikes, and railroads as the sole intent underlying the enactment of article X, section six. See Almond v. Day, 197 Va. 782, 787-88, 91 S.E.2d 660, 664-665 (1956). As the Day decision readily acknowledges, Virginia and at least thirty-eight other states have constitutional provisions concerning the prohibition of stock subscriptions or credit by the

state. See id. at 788-89, 91 S.E.2d at 665 (quoting 152 A.L.R. 495). Article X, Section Six of the West Virginia Constitution and similar other state constitutional provisions dealing with stock or credit proscriptions were clearly drafted in response to the historical occurrence of numerous unwise credit extensions having been made by the states during the early nineteenth century. See Day, 197 Va. at 787-88, 91 S.E.2d at 664-65; see generally Stewart E. Sterk and Elizabeth S. Goldman, Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations, 1991 Wis. L. Rev. 1301, 1306-12. The constitutional language at issue, however, is not limited or restricted in scope to prohibiting the state from analogous stock for credit arrangements.

Although the language at issue is grouped with language which bars the state from granting credit to any entity, the specific language at issue is stated unambiguously: "nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever." W. Va. Const. art. X, § 6. In resolving this issue of constitutional interpretation, we are bound by the well-established precept that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable

mind, it should be applied and not construed." Syl. Pt. 3, State ex rel Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965).

We do not accept the Appellee's argument that the purpose of article X, section six was limited to the avoidance of stock for credit transactions similar to those engaged in during the early nineteenth century. In examining the legislative intent underlying an analogous Arizona constitutional provision, the court in State v. Northwestern Mutual Insurance Co., 86 Ariz. 50, 340 P.2d 200 (1959), summarized, "[t]hus . . ., the evil to be avoided was the depletion of the public treasury or inflation of public debt by engagement in non-public enterprises." Id. at 53, 340 P.2d at 201; accord Engelking v. Investment Bd., 93 Idaho 217, 222, 458 P.2d 213, 218 (1969); Day, 197 Va. at 791, 91 S.E.2d at 667. Without exception, this concern that public debt be curtailed permeates the adoption of every constitutional provision which imposes restrictions on the lending of credit by the state or prohibits the state from being a stockholder. See Sterk et al., supra, at 1306-15. We conclude that the constitutional language at issue cannot be read as proscribing only those type of historical credit for stock transactions which served as the impetus for the enactment of article X, section six. Instead, the clearly-stated proscription against the state becoming an owner of corporate stock

must be read in accordance with its clear and plainly-stated terms. See Gore, 150 W. Va. at 72, 143 S.E.2d at 792, syl. pt. 3.

II.

As its primary argument, however, the Appellee asserts that the funds represented by the consolidated pension fund do not belong to the state but rather to the individual PERS beneficiaries. Based on this characterization, the Appellee contends that the proscriptive language found in article X, section six does not apply. As support for this position, the Appellee cites this Court's decision in Dadisman, in which we held, inter alia, that the legislature acted unconstitutionally in transferring funds from the PERS to pay insurance premiums to the public employees' insurance agency. 181 W. Va. at 793, 384 S.E.2d at 830.

The Appellee focuses specifically on the language of syllabus point twenty-one of Dadisman, which states that:

> [m]oneys earned by public employees and contributed to a public employees' retirement plan, including the employers' contribution which has been earned by the public employees, become part of the corpus of the trust and are not thereafter state funds for expropriation or use for any purpose other than that for which the moneys were entrusted.

Id. at 782-83, 384 S.E.2d at 819-20. According to the Appellee, the underscored language decrees that PERS funds are not state funds. This argument is patently flawed. The language identifying PERS funds as no longer constituting state funds is expressly connected with the concept of expropriating such funds for "any purpose other than that for which the moneys were entrusted." Id. Upon considering that the factual precipitation for Dadisman was the unlawful transfer of PERS funds to pay insurance premiums, it becomes exceedingly apparent that the designation of PERS funds as not being state moneys is causally dependent on the related concept of expropriation. Even a cursory reading of Dadisman results in the conclusion that the objective of syllabus point twenty-one was to set forth in no uncertain terms that PERS funds, once deposited, could be used for no other purpose than remittance to PERS beneficiaries. See id. at 793, 384 S.E.2d at 830 and syl. pt. 21. Thus, Appellee's attempt to cite syllabus point twenty-one as dispositive on the issue of whether PERS funds are owned by the state is tenuous, at best.

The Appellee cites only one case for the proposition that the PERS funds are not state moneys prior to distribution. In Louisiana State Employees' Retirement System v. State ex rel. Department of Justice, 423 So.2d 73 (La. App. 1982), aff'd, 427 So.2d 1206 (La.

1983), the court determined that because the funds of a public employees' retirement system belonged to the members of the retirement systems, the funds were not subject to the constitutional provision prohibiting the state from purchasing corporate stock. See 423 So.2d at 74-75. We are not persuaded by that decision, notwithstanding its factual and legal apposition, as the reasoning of that decision is Spartan, at best. Louisiana State Employees' Retirement System, in its limited analysis, fails to consider the full nature of the ownership of funds placed in a public employees' retirement system and the related concept of whose responsibility it is to replace any losses incurred by such a system.

These issues of ownership and loss responsibility as they relate to public employees' retirement funds were discussed in ICMA Retirement Corp. v. Executive Department, 92 Or. App. 188, 757 P.2d 868, review denied, 306 Or. 661, 763 P.2d 152 (1988). That case examined whether a constitutional prohibition against the state's purchase of corporate stock barred the investment of public employees' deferred compensation in a trust plan. 92 Or. App. at

[4]The Louisiana decision began in similar fashion to the case before us after an attorney general's opinion was issued declaring the unconstitutionality of investing public employee's retirement funds in accordance with a specific legislative enactment. See 423 So.2d at 74.

___, 757 P.2d at 869. Arguments similar to those advanced by the Appellee in this case were raised, including:

> the state should not be regarded as the 'owner' of deferred compensation money, because it owns the money only to the extent necessary to satisfy federal tax law. It [ICMA] contends that the employe[e]s are the beneficial owners, because deferred compensation is credited to employe[e]s for the purpose of computing retirement, pension and social security benefits.

Id. at ___, 757 P.2d at 870 (footnote omitted). Rejecting those contentions as well as the argument that no risk of loss was involved, the court reasoned first that "[t]he threshold test is not risk of loss, but ownership." Id. The ICMA court concluded that "the state would have a 'proprietary' or 'ownership' interest in the deferred compensation money that would be invested" and that, therefore, "[t]he purchase of corporate stock with deferred compensation money, . . . is barred by the 'general prohibition' of Article XI, section 6, against the state's purchase of corporate stock." Id.; cf. Sprague v. Straub, 252 Or. 507, 451 P.2d 49 (1969) (holding that investment of public employee retirement funds in corporate stocks did not violate constitutional stock proscription language under theory that state is merely custodian of funds and therefore holds no proprietary interest in same).

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[5]Oregon, however, has a statute which expressly declares that "'the State of Oregon and other public employers' have no proprietary

The Indiana Supreme Court considered issues analogous to those under consideration in Board of Trustees of the Public Employees' Retirement Fund v. Pearson, 459 N.E.2d 715 (Ind. 1984), prior to determining that the constitutional prohibition against the state becoming a stockholder precluded investment of the public employees' retirement fund in corporate stock. Id. at 718. Initially, the court examined the intent of the constitutional language at issue and concluded that:

> There can be little doubt that the general purpose of the last clause of the section was to bar the State of Indiana from placing state money at risk in corporate stocks. The delegates saw an intolerable risk of loss attendant to the ownership of some stocks, and therefore to be sure that the State of Indiana

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interest in the Public Employe[e]s' Retirement Fund . . . ." Sprague, 252 Or. at 522, 451 P.2d at 57 n.9 (emphasis omitted). The Oregon court further relied on the lack of specific legislative intent demonstrating that "it was the intention of the people in adopting Article XI, § 6 not only to avoid the loss of the state's assets but also to pronounce, in effect, the state's duty as trustee in dealing with the property of others." Id. at 522-23, 451 P.2d at 57. Sprague is easily distinguished given this state's lack of comparable legislation declaring the state's lack of a proprietary interest in the PERS combined with our prior enunciation in Dadisman of the fiduciary obligations imposed on the state in connection with investment of PERS funds. See 181 W. Va. at 794-95, 384 at 831-32 and syl. pt. 25.

[6]The Indiana Constitution states that "nor shall the State hereafter become a stockholder in any corporation or association." Ind. Const. art. XI, § 12, in part.

> would never again run that risk, enjoined the ownership of all stocks.

Id. at 717 (emphasis supplied). The Pearson court then examined whether the Board of Trustees ("Board") was acting in a private or a public capacity with regard to overseeing the investments as well as the ownership of the funds placed in the public employees' retirement system.

> The Board of PERF is a state agency, created by statute, and when it makes the selection of an investment for the Fund it is carrying out a statutorily prescribed duty. This is the State in its sovereign capacity. The Board's origination, its capacity, and its duties are the product of legislative and not private action. . . .
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> . . . .
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> The statutory declaration that the members own the contributions and interest in PERF means that they own these monies subject to the terms of the trust. Members cannot determine the types of investments which the Board may make. Members do not bear the risk of loss of their money in the pension fund, in the event financial losses are sustained. . . . If the value of stocks purchased for PERF fell in value, then the State could suffer a loss. This appears to be one of the types of adverse results or risks within the sweep of the clear language of the Constitution and the concerns expressed by delegates to the constitutional convention.

Id. at 718 (citation omitted).

In the Day decision reached by our sister state in 1956, the Virginia Supreme Court examined the constitutionality of a statute permitting the Board of Trustees of the Virginia Supplemental

Retirement System to invest funds in securities. Similar to the Appellee in this case, the petitioner in Day asserted that the funds were not state funds and thereby not subject to applicable constitutional prohibitions. 197 Va. at 785, 91 S.E.2d at 663. The Virginia court quickly dispensed with this contention, explaining that "[t]he Virginia Supplemental Retirement System is an agency of the State to which the State contributes, as well as the employees; the trust fund thus created is exempted from taxation, and the System is subject to abolition at the will of the General Assembly." Id. The court further noted that the "State holds and enjoys a proprietary interest in the fund . . . ." Id.

In considering whether the statute authorizing investment of public retirement funds violated the "stock or obligations clause," the court explained the effect of certain qualifying language that was added to the original clause.

> We now consider the 'stock or obligation clause' which forbids the State to 'subscribe to or become interested in the stock or obligations of any company, association, or corporation, for the purpose of aiding in the construction or maintenance of its works. . . .

[7]The statutory language authorizing such investment provided that the Board could invest funds "'in bonds of public utilities and private corporations with a recognized bond guide rating of at least A and which meet requirement for investment of reserves of domestic life insurance companies.'" Day, 197 Va. at 784, 91 S.E.2d at 663.

> When this clause was first inserted in the Constitution of 1869, the underlined [italicized] terminal phrase was not included. The framers of the Constitution of 1902 added this qualifying phrase. Before its addition and incorporation into § 185, the clear and certain prohibition forbade the State to subscribe to or become interested in the stock or obligation of any company, and the purchase by the State of bonds or stock of a private company was undoubtedly forbidden. If the clause were still in effect without the qualifying phrase added in 1902, § 51-111.24(a) would be invalidated insofar as it, . . . authorizes the purchase of stock or obligations of private corporations with State funds. However, the addition of the terminal phrase was for a definite purpose, and it has a certain meaning. Clearly its effect is to modify the preceding unqualified prohibition. Now the prohibition is not absolute but definitely qualified. It operates on the State only to prevent it from subscribing to or becoming interested in the stock or obligations of a private company when the transaction in question is for the purpose of aiding in the construction or maintenance of the works of such company.

197 Va. at 791-92, 91 S.E.2d at 667. While the result reached in Day was that the statute at issue did not violate the stock clause of the Virginia constitution, such finding was expressly conditioned on the inclusion of qualifying language which banned state involvement in stocks only "for the purpose of aiding any company in constructing or maintaining its work of public improvement." Id. at 792, 91 S.E.2d at 668. Under the reasoning expressed in Day, that court, if faced with our current question of constitutional

infringement, would conclude that West Virginia Code § 12-6-9(j) violates article X, section six of our constitution. See 197 Va. at 791-92, 91 S.E.2d at 667.

Borrowing the reasoning employed in Day, Pearson, and ICMA, we determine that until funds are withdrawn and paid out to individual members of the PERS, the state has a beneficial ownership interest in such funds arising from the statutory trust relationship created by the enactment of the West Virginia Public Employees Retirement Act, West Virginia Code §§ 5-10-1 to - 54 (1994 & Supp. 1994). See Dadisman, 181 W. Va. at 784, 384 S.E.2d at 821. Based on this same ownership/trust interest, this Court held in syllabus point twenty-three of Dadisman that "[t]he amounts expropriated from the retirement trust funds for purposes other than those for which the funds were collected constitute a public debt owed by the state to the trust funds, and such expropriation must be remedied by recompense through appropriation." Id. at 783, 384 S.E.2d at 820. We expounded further on the obligations imposed by this trust relationship in Dadisman, holding that:

> The Board of Investments has a fiduciary relation with the PERS trust and participants and must invest employee earned pension system assets consistently with the highest standards of fiduciary duty. It must utilize competent, educated, and trained financial managers to seek and manage high quality investments and

> to avoid speculative commercial and industrial ventures and schemes.

Id. at 783, 384 S.E.2d at 820, syl. pt. 25.

The clear language of article X, section six itself stands as a bar to state ownership of corporate stocks. This result is compelled by virtue of the fact that article X, section six is written as an unconditional proscription of the State's investment in stock of any company or association. Given this Court's obligation to enforce the state constitution as written, we have no choice but to conclude that West Virginia Code § 12-6-9(j) (1991) is invalid and unenforceable as it violates the all-encompassing proscription found in Article X, Section 6 of the West Virginia Constitution against the state becoming a stockholder in any company or association.

III.

We do not dispute the Appellee's contention that the framers of this state's constitution did not contemplate the investments authorized by West Virginia Code § 12-6-9(j). In fact, we recognize that the statute authorizing these investments may reflect sound investment strategy, provided such investments are intelligently selected and monitored. Nonetheless, our obligation to enforce the language of the constitution when it is plain and unambiguous requires that we refrain from interpreting such language as it clearly proscribes, without restriction, all instances of state involvement in the stock market. See Engelking, 93 Idaho at 222, 458 P.2d at 218 (recognizing that constitutional clause "prohibits the State from directly or indirectly becoming a stockholder in any association or corporation[]"); see also Michigan Sav. & Loan League v. Municipal Fin. Comm'n, 347 Mich. 311, 79 N.W.2d 590 (1956) (declaring unconstitutional statute authorizing school district investment in savings and loan associations in view of prohibition against state investment in corporate stock). Absent a constitutional amendment, the investment of PERS funds in corporate

[8]At least one state has amended their state constitutional prohibition against state involvement in corporate stock to create an express exception for retirement or pension benefits of public employees. In 1978, Michigan revised article 9, section 19 of its 1963 constitution which had read: "The state shall not subscribe to, nor be interested in the stock of any company, association or corporation." The applicable language inserted provides, in addition to the foregoing, "except that funds accumulated to provide

stock within the contemplation of West Virginia Code § 12-6-9(j) is clearly unconstitutional.

We do not dispute that investments in the stock market would likely produce a greater return over the long term for the consolidated fund, if prudently invested, than is currently being realized. As the Pearson court recognized, "according to today's investment wisdom, a prudent and balanced investment policy . . . would include dealing to some extent in the stock market." 459 N.E.2d at 716. However, our task here is not to choose or approve of investment strategies, but to determine whether West Virginia Code § 12-6-9(j) comports with the clear language of Article X, Section 6 of the West Virginia Constitution.

Based on the foregoing reasoning, the decision of the Circuit Court of Kanawha County is hereby reversed.

Reversed.

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retirement or pension benefits for public officials and employees may be invested as provided by law[.]" Mich. Const. art. 9, § 19.

[9]Attached as Exhibit A to the Appellee's brief was documentation submitted for the proposition that had the Board been involved in equity investments as of May 1993, the market value of the consolidated investment fund portfolio would have been

$19,517,920.92 greater by the end of 1994.