STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Joseph A. Compton Sr.,
Plaintiff Below, Petitioner

vs) No. 11-1110 (Kanawha County 07-MISC-512)

City of South Charleston Policemen's
Pension and Relief Fund,
Defendant Below, Respondent

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Joseph A. Compton, by counsel Roger D. Forman and Daniel T. Lattanzi, appeals the Circuit Court of Kanawha County's order dated June 23, 2011, granting summary judgment in favor of respondent, City of South Charleston Policemen's Pension and Relief Fund. Respondent, by counsel John F. Dascoli, has filed its response. Petitioner has filed a reply.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was a South Charleston police officer from November 18, 1988, until December 5, 2006, at which time he became disabled due to job-related injuries. Petitioner applied for a disability pension and was initially awarded $2,300.68 per month, which was calculated based upon his average monthly salary for the last twelve months of his employment. However, petitioner believed that his pension would be based only upon his last full month's salary, including overtime, and argued that it should have been $3,451.78 per month.

During the years that petitioner was employed by the City of South Charleston, at least four different methods for calculating pensions were used. In 2004, the respondent adopted regulations clarifying the method of calculating disability benefits, which stated that benefits would be calculated by taking the officer's preceding twelve months of salary and dividing that salary to find

the average monthly salary of the officer. The officer would then be granted sixty percent of this salary.[1] These regulations were adopted by the City of South Charleston on February 17, 2005.

Petitioner wrote to the pension board seeking a correction on his pension calculation and argued that the calculation should be based only on his last month's salary and not on an average of the prior twelve months. Petitioner also filed a Freedom of Information Act ("FOIA") request seeking information as to how disability pension benefits have been calculated in the past. The request sought "all documents including minutes that refer to how fellow officers of the South Charleston Police Department pension were calculated, on the last month salary or a yearly average," and then named seven specific retired police officers. This FOIA request was denied by the pension board, based on privacy concerns regarding the individuals named in the FOIA.

The circuit court granted respondent's motion for summary judgment on June 23, 2011, finding that at least four different methods of calculation were used to calculate pension benefits during petitioner's employment and, therefore, he could not have relied on any one method to his detriment. Moreover, the circuit court found that respondent correctly refused to respond to the FOIA request based on the personal information sought in the request.

Petitioner appeals the circuit court's grant of summary judgment in favor of respondent. This Court reviews a circuit court's entry of summary judgment under a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005). Further,

> Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). "'[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor.' *Anderson [v. Liberty Lobby, Inc.]*, 477 U.S. [242] at 252, 106 S.Ct. [2505] at 2512, 91 L.E.2d [202] at 214 [1986]." *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337.

Petitioner first argues that his pension was wrongfully calculated because it was calculated upon his last year's average salary as opposed to his last full month salary. Petitioner argues that there was no uniform or published system of calculation for pensions until Februrary 15, 2007, at which time a uniform system was adopted and applied to petitioner. Petitioner argues that he detrimentally relied on his own understanding that his pension calculation would be based on his last

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[1]There is also a provision allowing for a percentage increase for prior military service that is not at issue in this matter.

month's salary, including overtime, although he admits that the evidence shows that several different types of calculations had been used during petitioner's employment. Petitioner points out that pursuant to West Virginia Code § 8-22-24(a), he is to receive sixty percent of his monthly salary at the time he becomes disabled, but the calculation of this amount is left up to the municipality. Petitioner argues that the fact that four different calculation methods had been used creates a genuine issue of material fact that made summary judgment improper. Further, he argues that the lack of a standard calculation procedure makes his expectation more critical and that at least two officers had their pensions calculated in the manner espoused by petitioner. Petitioner argues that the calculation of his pension was arbitrary and capricious and that the grant of summary judgment was contrary to law.

Respondent responds that the award of summary judgment in its favor was proper. Respondent asserts that petitioner did not detrimentally rely on his calculation method, as it was only used one time since he was employed by respondent. This one time was in favor of petitioner's brother. Petitioner's brother served on the pension board for ten years, during which time three different methods were used to calculate disability pensions, including the same method used to calculate petitioner's pension. Respondent notes that the pension board adopted regulations clarifying the method of calculation of benefits in 2004, and these regulations were adopted by the City of South Charleston in 2005. Respondent argues that petitioner's brother stated in his affidavit that the last month's pay should be the basis for the calculation, yet petitioner offers no evidence that any individual other than petitioner's brother had his pension calculated in such manner. Respondent also argues that even under *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1995), there is no right to a system of pension benefits until a person has served in a system for at least ten years. In this case, respondent points out that there was no uniform system in place and thus the ten year time frame under *Booth* was not met.

The Court agrees with the circuit court's finding that petitioner has not shown that there is an issue of material fact concerning how his pension should have been calculated. This Court found in *Booth* that after ten years of service, a government pension may not be reduced and an employee has legitimate expectations that cannot be reduced. *Id.* However, in this matter, there have been at least four different methods of calculation. Therefore, this Court finds no error in the circuit court's finding that petitioner could not show that there was a system of pension calculation during his employment that he relied upon to his detriment.

Petitioner argues that respondent's failure to respond properly to the FOIA caused him to file suit, and the circuit court erred in granting summary judgment on this issue. He argues that he was forced to bring the instant litigation to get the information sought, and that he should not have had to agree to a protective order to get this information. He argues that the information he was eventually given, which included names, disability dates, and the method used to determine each officer's pension did not give any private information and did not infringe upon those individuals' rights. Petitioner also argues that there was a public interest requiring disclosure of this information, which means that the FOIA exemption cited by the pension board should not have applied. Petitioner argues he should have been provided the information requested or at least a redacted version of the

information pursuant to *Rosen v. Vaughn*, 415 U.S. 977 (1974), as adopted by this Court in Syllabus Point 6 of *Farley v. Worley*, 215 W.Va. 412, 599 S.E.2d 835 (2004).

Respondent argues that it could not provide the requested information, which included names, protected health information and other private information without some type of protective order. Respondent notes that the circuit court entered a protective order and the information was provided to petitioner showing how other disabled retirees' benefits were calculated. Respondent argues that pursuant to West Virginia Code § 29B-1-4(a)(2), the FOIA request was properly denied because the information sought was "[i]nformation of a personal nature such as that kept in a personal, medical or similar file . . . ." Further, respondent argues that this Court has recognized that an employee has privacy rights in matters pertaining to his or her medical condition that a fiduciary cannot breach. *See Morris v. Consolidation Coal Co.,* 191 W.Va. 426, 446 S.E.2d 648 (1994). Moreover, respondent argues that petitioner's FOIA request sought to obtain information protected by the Health Insurance Portability and Accountability Act. Respondent argues that until the instant case was placed under seal, the information sought could not be released to petitioner.Respondent points out that petitioner never asked for the information on a redacted basis and did not dispute the privacy interest asserted by respondent. Respondent argues that the circuit court was correct in finding that respondent properly withheld the FOIA information.

FOIA provides a list of exceptions to the requirement of disclosure of information pursuant to a proper request. Respondent relied on the following provision to deny petitioner's FOIA request:

> (a) The following categories of information are specifically exempt from disclosure under the provisions of this article: . . .
>
> > (2) Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance . . . .

W. Va. Code § 29B-1-4. Petitioner argues that the information could have been given in a redacted manner, but provides no evidence that he asked for a redacted list or that he disputed the privacy interests asserted by the respondent. This Court finds no error in the circuit court's grant of summary judgment in favor of respondent.

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh