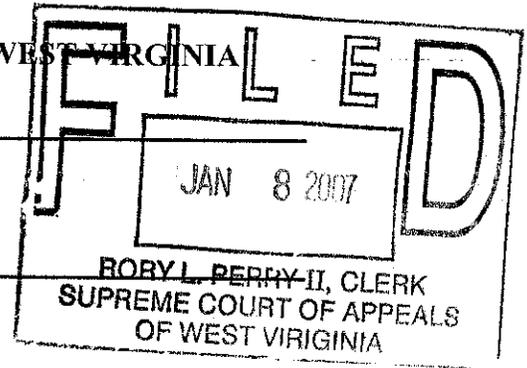


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

No. 33245



State of West Virginia Consolidated Public Retirement Board,

Appellant (Respondent below)

v.

Nancy K. Hudkins,

Appellee (Petitioner below).

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

Civil Action No. 03-AA-89

The Honorable Paul Zakaib, Jr., Judge

BRIEF ON BEHALF OF APPELLANT,

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD

Submitted on behalf of Appellant by:
Erica M. Mani (WVSB #8823)
Bowles Rice McDavid Graff & Love LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone (304) 347-1790
Facsimile (304) 347-1756

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I. NATURE OF PROCEEDING AND RULING OF COURT BELOW

The State of West Virginia Consolidated Public Retirement Board (hereinafter "Board") respectfully Petitions for Appeal from the Circuit Court of Kanawha County's Final Order, dated May 17, 2006, overturning the administrative decision of the State of West Virginia Consolidated Public Retirement Board denying Nancy K. Hudkin's request to convert previously accumulated, but forfeited, sick leave to additional retirement system service credit.

II. STATEMENT OF FACTS & PROCEDURAL HISTORY

The West Virginia Consolidated Public Retirement Board is a public body established pursuant to W. Va. Code §5-10D-1 to serve as the statutory administrator and fiduciary for the State's several pension plans, including the largest of those plans, the West Virginia Public Employees Retirement System ("PERS"). State ex rel. WV Deputy Sheriffs' Assn., Inc. v. Sims, 204 W. Va. 442, 513 S.E.2d 669 (1998). The members of the Board include the highest officials of the executive and legislative branches of our State's government, and the Board and its members have the "highest fiduciary duty to maintain the terms of the PERS trust, as spelled out in the statute." State ex rel. Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988). As a federally qualified pension plan, it is incumbent upon the Board, as part of its fiduciary duty,¹ to ensure that the PERS plan is administered according to its terms, for the exclusive benefit of all plan participants and beneficiaries, in order to protect and preserve the plan's qualified tax status. See IRC 401(a); W. Va. Code §5-10-3a. For these reasons, *inter alia*, the Board brings this Petition for Appeal before the Court.

¹ Such a duty encompasses the duty to maintain the integrity and credibility of the plan which requires the Board to file this appeal in order to prevent an increase of approximately \$1,591,000 to the PERS Unfunded Actuarial Accrued Liabilities. See Exh. 1.

Nancy K. Hudkins ("Hudkins"), a member of the Public Employees Retirement System, was born on April 1, 1949. She commenced participation in the PERS plan through her employment with the West Virginia Department of Health and Human Resources in 1972 and remained an active PERS participant until she voluntarily resigned her employment on March 31, 2000. See Adm. Rec. Exh. 6, p. 1. At the time of her resignation, Hudkins had acquired twenty-seven (27) years and eight (8) months of service credit in the PERS plan, but was not yet eligible for retirement. Id. See also Adm. Rec. Exh. 7, at p. 14.² At the time Hudkins separated from her employment, she had accumulated 1752.2 hours of unused sick leave. See Adm. Rec. Exh. 6, at p. 2; see also Adm. Rec. Exh. 15.

Before Hudkins separated from her job, she contacted the Board and asked that her leave time be frozen until her anticipated annuity commencement in 2004 when she would turn fifty-five years of age and become eligible to commence a retirement annuity. See Adm. Rec. Exh. 6, at p. 2. She was told by a member of the staff of the Board that she would be permitted to convert the accumulated sick leave to additional service credit at the time her annuity commenced. Id. Thereafter however, the Board became aware that its practice of permitting such a conversion of sick leave to those members who have separated their employment prior to their eligibility to commence an annuity, was in conflict with an administrative rule of the Division of Personnel pertaining to retention of sick and annual leave upon termination of employment. Id.

In September 2002, Hudkins learned that the Board had determined in the context of other similar administrative appeals that employees who are subject to the Division of

² Hudkins was not eligible to retire until she reached fifty-five (55) years of age. See W. Va. Code §5-10-21.

Personnel's legislative rules are, by operation of WVCSR §143-1-14.4(e) and §162-8-4.1, not entitled to utilize previously accumulated sick or annual leave for retirement system service credit when such employees have terminated their employment through resignation prior to attaining eligibility for retirement. See Adm. Rec. Exh. 14; Adm. Rec. Exh. 7, at p. 13-14.

Hudkins initiated administrative proceedings in January 2003 seeking to circumvent the cancellation of her accumulated leave and her ineligibility to convert such cancelled leave to retirement system service credit on the basis of estoppel. See Adm. Rec. Exh. 13. In February 2003, Board staff provided Hudkins with a determination that denied her request to convert her accrued unused sick leave to service credit due to the fact that she was not eligible to commence an annuity upon her resignation and that according to the Division of Personnel rules, accumulated sick leave is cancelled at the date of separation. See Adm. Rec. Exh. 9.

Hudkins appealed the Board staff decision at the administrative level. On April 16, 2003, this matter was brought on for hearing before the Board's administrative hearing officer, Jack W. DeBolt. See Adm. Rec. Exhibits 6 & 7. Hudkins was present and was afforded the right to participate in the hearing, to present evidence and argument in support of her appeal, and to cross-examine witnesses. Also present and testifying on the issues relevant to this appeal was Terasa L. Robertson, then Interim Executive Director of the Board, and James Wells, Assistant Director of Employee Relations for the West Virginia Division of Personnel. See Adm. Rec. Exh. 7.

During the hearing, Hudkins provided that she resigned her employment in March of 2000 in reliance upon the representations of the Board's staff that she would be eligible to utilize her previously accumulated sick leave for additional retirement system service credit

when ultimately entering retirement status. Hudkins testified in that regard that, prior to her voluntary resignation in March, 2000, she spoke to Joanne Edwards, a member of the Board's staff, regarding the sick leave she had accrued with her employer. Hudkins recalled that she was informed during her communications with Ms. Edwards that she could "freeze" her sick leave and then use such leave for extended retirement system service credit when she eventually attained retirement eligibility. See Adm. Rec. Exh. 7, at p. 6. Hudkins admitted, however, that she did not inquire of or verify with any representative of the Division of Personnel or her employer regarding the leave policies which were applicable to her, or confirm what effect her resignation would have upon her previously accumulated sick leave. See Adm. Rec. Exh. 7, at p. 8.³

One week after the hearing, on April 23, 2003, the Board's hearing officer issued a Recommended Decision which concluded that Hudkins' administrative appeal should be denied by the Board. In support of the recommended denial, the hearing officer noted that Hudkins had resigned her employment with the Department of Health and Human Resources in March of 2000 prior to attaining eligibility for retirement, and that under applicable law, her accumulated sick leave was thus cancelled and no longer eligible for conversion to retirement system service credit. See Recommended Decision of Hearing Officer, Adm. Rec. Exh. 6, at p. 6. The hearing officer further concluded that the doctrine of equitable estoppel does not properly apply to justify the relief sought by Hudkins here because this matter did not involve a misrepresentation of fact, but rather a mistake of law and further, estoppel does not apply against

³ Prior to the date of her resignation, Hudkins did, however, obtain a letter from Jason Nimolski, the Community Service Manager of the Department of Health and Human Resources, which stated that "her 1752.2 hours sick leave were frozen to use for extended service credit upon applying for retirement." See Adm. Rec. Exh. 15; Adm. Rec. 6, at p. 8. Hudkins has testified that she is unaware of the basis for Mr. Nimolski's asserted position relating to the "freezing" of sick leave.

a governmental entity when acting in a governmental capacity rather than a proprietary capacity. See Adm. Rec. Exh. 6, at p. 7.

At its meeting on May 28, 2003, the Board heard and considered the hearing officer's Recommended Decision, and adopted the recommendation in its entirety. A final administrative order was thereafter forwarded to Hudkins which communicated the Board's adoption of the hearing officer's Recommended Decision to deny her request. See Adm. Rec. Exh. 1.

In June 2003 Hudkins initiated the Circuit Court Appeal under the judicial review provisions of West Virginia's Administrative Procedures Act. Hudkins argued to overturn the Board's final order and that her request to convert her accumulated hours of unused sick leave should have been permitted because she received and relied on information from the Board staff providing that Hudkins would be permitted to convert her accumulated hours of unused sick leave to additional service credit. Id. Based on that, the Circuit Court overturned the Board's administrative decision finding that "[a]lthough generally estoppel does not apply against a governmental agency in carrying out its statutory duties, there are exceptions. In this particular case, this Court finds estoppel does apply." It further Ordered that the Board convert Hudkins' sick leave hours into extended service credit upon her retirement. The Board appeals to this Honorable Court from that decision.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE COURT BELOW

A. *The Circuit Court Erred by Failing to Afford Appropriate Deference to the Board's Reasonable and Permissible Construction of Applicable Statutes and Rules as the Administrative Body Charged with Enforcing Such Statutes and Rules.*

B. *The Circuit Court Erred by Failing to Apply the Laws that Clearly Provide that Accumulated Unused Sick Leave Could Not be Converted to Retirement Service Credit After it was Forfeited.*

C. *The Circuit Court Erred by Applying the Doctrine of Equitable Estoppel, which Does Not Afford Proper Basis for Relief Under the Circumstances of this Case.*

D. *There was No Deprivation of Hudkins' Procedural Due Process Rights Under the Circumstances of this Case.*

1. *Hudkins Did Not Hold a Constitutionally Protected Property Interest to Retirement System Service Credit for Accumulated Sick Leave at the Time of her Resignation.*

2. *Even Assuming the Existence of a Constitutionally Protected Property Interest Which was Denied by the Board, Hudkins was Afforded all the Procedural Process to Which She was Due.*

IV. DISCUSSION OF LAW

A. **The Circuit Court Erred by Failing to Afford Appropriate Deference to the Board's Reasonable and Permissible Construction of Applicable Statutes and Rules as the Administrative Body Charged with Enforcing Such Statutes and Rules.**

This matter came before the circuit court below pursuant to W.Va. Code § 29A-5-4, of the West Virginia Administrative Procedures Act ("Act"). Section 29A-5-4(g) of the Act governs the review of contested administrative decisions and issues by a circuit court, and specifically provides that:

(g) The Court may affirm the . . . decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the . . . decision of the agency if the substantial rights of the petitioner . . . have been prejudiced because the administrative . . . decisions are:

In violation of constitutional or statutory provisions; or

In excess of statutory authority or jurisdiction of the agency; or

Made upon unlawful procedure; or

Affected by other error of law; or

Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See W. Va. Code § 29A-5-4(g).

This Court has consistently held that factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or “arbitrary and capricious.” See, e.g., Healy v. West Virginia Bd. of Medicine, 506 S.E.2d 89, 92 (W.Va. 1998). Questions relating to the amount of service credit standing to a member’s credit, and whether a member has substantially detrimentally relied upon Board staff interpretations or communications, are factual questions which are subject to the deferential, “arbitrary and capricious” standard of factual review.

Statutory interpretive issues, on the other hand, constitute questions of law which are generally subject to *de novo* review. However, with respect to judicial review of an administrative agency’s interpretations of the statutes which it administers, and notwithstanding the general rule of *de novo* review of issues of law, this Court has held that “absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible

construction of [a] statute by [an administrative agency]" having policy making authority relating to the statute. See, e.g., Sniffen v. Cline, 193 W. Va. 370, 456 S.E.2d 451 (1995). In Sniffen v. Cline, this Court explained:

The circuit court's adjudicatory interpretation of [the controlling statute] is entitled to no special deference and is subject to our independent review. However, absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of the statute by [the administrative agency] because it has policymaking authority with regard to the statute. Consistently, this Court has held that interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight. [An agency's] construction of these statutes must be given substantial deference.

Sniffen, 456 S.E.2d at 455, citing Zapata Haynie Corp. v. Barnard, 933 F2d 256, 258 (4th Cir. 1991); WV Department of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); WV Non-Intoxicating Beer Commr' v. A & H Tavern, 181 W. Va. 364, 382 S.E.2d 558 (1989); Dillon v. Board of Educ., 171 W. Va. 631, 301 S.E.2d 588 (1983); Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975).

As set forth more fully in the discussion to follow, the Board's interpretation of the relevant retirement plan statutes at issue here was both reasonable and consistent with clearly expressed legislative intent. Consequently, the Circuit Court should not have substituted its judgment for that of the Board and its hearing officer, and should have instead afforded substantial deference to the Board's interpretation of the controlling statutes/rules.

B. The Circuit Court Erred by Failing to Apply the Laws that Clearly Provide that Accumulated Unused Sick Leave Could Not be Converted to Retirement Service Credit After it was Forfeited.

The privilege of members of PERS to convert accumulated leave to additional service credit is provided by § 5-10-15a of the West Virginia Code, which states as follows:

“Any member accruing annual leave or sick leave days may, after the effective date of this section [June 27, 1988], elect to use such days at the time of retirement to acquire additional credited service in this retirement system. Such days shall be applied on the basis of two work days credit granted for each one day of such accrued annual or sick leave days, with each month of retirement service credit to equal twenty work days and with any remainder of ten work days or more to constitute a full month of additional credit and any remainder of less than ten work days to be dropped and not used, notwithstanding any provisions of the code to the contrary, including section twelve, article sixteen of this chapter. Such credited service shall be allowed and not deemed to controvert the requirement of no more than twelve months credited service in any year’s period.” (emphasis supplied).

“Retirement” is defined in § 5-10-2 of the Code as follows:

“(24) ‘Retirement’ means a member’s withdrawal from the employ of a participating public employer and the commencement of an annuity by the retirement system.” (emphasis supplied).

Hudkins’ entitlement to and use of accrued sick and annual leave is also controlled in part by legislatively approved regulations promulgated by the West Virginia Division of Personnel. See Adm. Rec. Exh. 7, at p. 18. Since 1961, those rules have stated the following with respect to the effect of an employee’s resignation, retirement or other separation from employment upon accumulated *annual leave*:

(f) Separation from Employment. The appointing authority shall pay an employee who separates from employment for any reason for all accrued and unused annual leave. An employee does not accrue annual leave after his or her date of separation. The payment shall be made according to one of the following methods:

...

2. Any eligible employee . . . who is separated from employment by resignation . . . retirement, death or termination, may be paid in a lump sum at his or her option for accrued and unused annual leave. . . .

3. An employee who retires may elect not to receive payment for any or all accrued annual leave and may apply the balance toward extended insurance coverage under guidelines established by the

Public Employees Insurance Agency or to acquire additional credited service in the appropriate state retirement system.

See WVCSR §143-1-14.3(f)(emphasis supplied). See also, Adm. Rec. Exh. 7, pp. 16-20.⁴

Similarly, and with respect to the use of accumulated *sick leave*, the Department of Personnel rules have, since 1961, clearly stated that such leave is cancelled as of the date of separation, if the employee has separated from service for reasons other than retirement:

(e) Separation from Service—Sick leave does not accrue after the date of separation as defined in this rule.

Retirement—An employee eligible to retire at the time of separation from employment may use unused sick leave to purchase extended insurance coverage upon retirement under guidelines established by the Public Employees Insurance Agency or upon retirement to acquire additional credited service in the state retirement system under guidelines established by the Consolidated Public Retirement Board.

All Other Separations—All accumulated sick leave shall be cancelled as of the date of separation. If an employee returns to eligible employment . . . within twelve (12) calendar months, . . . all cancelled sick leave shall be restored. However, if the employee returns to work after more than twelve (12) calendar months from the effective date of separation of employment, no more than thirty (30) days of cancelled sick leave shall be restored. If an employee is recalled from a layoff and cancelled sick leave shall be restored.

See WVCSR §143-1-14.4.(e) (emphasis supplied).

In addition, the Board's legislatively approved rules set forth in Title 162 of the Code of State Rules specify the circumstances in which a PERS participant is eligible to receive additional retirement system service credit for accrued and unused sick and annual leave at the

⁴ At the time of her resignation in March, 2000, Hudkins was paid in a lump sum for her 358.5 hours of accumulated annual leave. See Adm. Rec. Exh. 15.

time of retirement. Those rules specify that the leave which is subject to conversion to service credit is limited to “the member’s accrued unused sick and annual leave days which stand to the member’s credit with the member’s last participating public employer at the time of retirement.”

WVCSR §162-8-4.1 (emphasis supplied). Consequently, in cases such as this where the participant has no leave standing to his or her credit at the time of retirement under the rules and policies of the participant’s last employer, there is no leave which is subject to conversion. See Testimony of Terasa L. Robertson, Adm. Rec. pp. 11-13; See also, Adm. Rec. Exh. 9.

It is clear under West Virginia Code of State Rules §162-8-4 that Hudkins was not eligible to convert the leave time since it was not standing to her credit with her employer at the time she became eligible to commence an annuity in 2004, which was the time of retirement as contemplated by §5-10-2 of the Code. Even without application of WVCSR §162-8-4, West Virginia Code §5-10-2, as quoted above, contemplates retirement to be when a member separates from employment “with an annuity payable.”

Because Hudkins’ sick leave was cancelled or forfeited as of the day she terminated her employment with the State pursuant to WVCSR §143-1-14.4.(e), she is simply not eligible to convert that forfeited time to retirement system service credit pursuant to West Virginia Code §5-10-15a. The administrative hearing officer and the Board reasonably interpreted the applicable retirement laws and applied them correctly in making its determination that Hudkins could not receive the benefit of her previously accrued unused, but forfeited, sick leave.

C. **The Circuit Court Erred by Applying the Doctrine of Equitable Estoppel, which Does Not Afford Proper Basis for Relief Under the Circumstances of this Case.**

In the proceedings below, the Circuit Court's basis for overturning the Board's denial of Hudkins' request to utilize previously accumulated sick leave for additional retirement service credit was predicated upon the doctrine of equitable estoppel. Hudkins provided that the Board's staff gave her incorrect information regarding her ability to "freeze" her previously accumulated sick leave for later conversion to retirement system service credit, and that she resigned her employment with the Department of Health and Human Resources on the basis of such information.

As the Board's hearing officer correctly ruled, however, estoppel applies only to correct mistakes of fact rather than mistakes of law. Where, as here, any misinformation which may have been provided to Hudkins by the Board's staff regarding her eligibility to utilize accrued but cancelled sick leave for retirement service credit constituted a mistake of law, equitable estoppel was not a legally appropriate remedy. See, e.g., Webb v. Webb, 171 W.Va. 614, 301 S.E.2d 570 (1983).

Moreover, West Virginia courts have consistently held that equitable estoppel may not be invoked against a governmental unit when functioning in a governmental capacity. See Samsell v. State Line Development Co., 174 S.E.2d 318, 325 (W. Va. 1970); McFillan v. Berkeley Co. Planning Comm'n, 438 S.E.2d 801, 808 (W. Va. 1993). In the Samsell case, the Supreme Court of Appeals specifically held that:

This Court has stated many times that the state and its political subdivisions are not bound, on the basis of estoppel, by the *ultra vires* or legally unauthorized acts of its officers in the performance of governmental functions.

174 S.E.2d at 325-36.

Only in those limited instances in which a governmental officer or entity has been found to have acted in a proprietary rather than governmental capacity may estoppel be applied against the State or its administrative agencies. A governmental entity acts in a governmental rather than proprietary capacity when "the act performed is for the common benefit of the public rather than for the special benefit or profit of the entity." McFillan, 438 S.E.2d at 808. To the extent that any member of the Board's staff provided incorrect information to Hudkins regarding her entitlement to convert accumulated sick leave to retirement system service credit, such actions were clearly undertaken in a governmental capacity and in no way for the "special benefit or profit" of the Board or its administrative staff.

Moreover, courts which have considered the applicability of equitable estoppel in pension plan cases have consistently held that the doctrine does not properly lie to compel a pension plan administrator to disregard plan provisions or to confer a benefit not otherwise available under the plan, despite representations or errors on the part of administrative staff. For example, in Thurber v. The Western Conference of Teamsters Pension Plan, et al., the Ninth Circuit Court of Appeals addressed the arguments of a plan participant who sought to estop the plan from denying his eligibility for a disability pension due to representations made to him by the plan's administrative staff upon which he had relied. The Ninth Circuit rejected the participant's estoppel argument, reasoning, *inter alia*, that

The fact that [the participant] relied on representations of an employee of the firm retained to administer the trust fund would not estop the Pension Fund and its trustees from denying [the participant's] eligibility for the pension. The rights of other pensioners must be considered, and the trust fund may not be deflated because of the misrepresentation or misconduct of the

administrator of the fund. We agree with the district court that the doctrine of estoppel may not be invoked to compel an illegal act.

542 F.2d. 1106, at 1109. See also, e.g., Freeman v. Central States, Southeast and Southwest and Southwest Areas Pension Fund, 1979 U.S. Dist. Lexis 11447 (E. D. Mich. 1979) (rejecting an estoppel argument that a pension plan administrator's acceptance of pension contributions over a number of years entitled participant to credit for those years).

D. There Was No Deprivation of Hudkins' Procedural Due Process Rights Under the Circumstances of this Case.

Recognizing that equitable estoppel does not properly apply against the Board in this matter, Hudkins' sole argument in the appeal below was that the Board denied her procedural due process rights by denying her request to convert previously accumulated sick leave to additional retirement system service credit.⁵ Such argument, however, is specious at best and confuses the jurisprudential parameters of procedural due process. Though the Final Order of the Circuit Court does not adopt Hudkins' due process argument, nor address this matter, it is nonetheless provided herein in an effort to address or dispense with any potential due process argument.

The Due Process Clause of the Fourteenth Amendment reduces unfair or mistaken deprivations of individual interests by commanding states to provide persons in jeopardy of loss with certain procedural safeguards. Mallette v. Arlington County Employees' Supplemental Retirement System, 91 F.3d 630 (4th Cir. 1996). A two-part analysis is utilized to determine whether a procedural due process violation has occurred. First, it must be determined whether

⁵ Hudkins predicated her due process argument below upon the assertion that she had a "property interest" in her sick leave prior to her resignation, that "she was told by Respondent [below] that this property interest could be transferred," and that she was entitled to be told that she could not convert this "property interest" to retirement service credit prior to her resignation.

the aggrieved party has lost something that fits into one of three protected categories: life, liberty or property. See Board of Regents v. Roth, 408 U.S. 564 (1972). If the first inquiry is satisfied, it must then be determined whether the aggrieved party has received the minimum measure of procedural protection warranted under the circumstances. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

As set forth more fully below, Hudkins did not have a constitutionally protected property interest to retirement system service credit for accumulated sick leave at the time of her resignation from employment from the Department of Health and Human Resources in March, 2000. To the contrary, at all times relevant both before and after Hudkins' resignation from employment, applicable state regulations pertaining to her status as a state employee have clearly provided that all accrued sick leave is cancelled in the event that an employee separates from service prior to retirement. Even if such a constitutional property interest is found to exist, however, Hudkins' procedural due process rights have been fully satisfied in this matter.

1. **Hudkins Did Not Hold a Constitutionally Protected Property Interest to Retirement System Service Credit for Accumulated Sick Leave at the Time of her Resignation.**

“Property interests” which are entitled to constitutional protection are fundamentally creatures of “independent positive law.” Mallette v. Arlington County Employees' Supplemental Retirement System II, 91 F.3d 630 (4th Cir. 1996). The United States Supreme Court has explained in this regard that property rights or interests which are entitled to Fourteenth Amendment protection are “created, and their dimension defined by existing rules or understandings that stem from an independent source such as state law” Id. As the Supreme Court has explained in the seminal case of Board of Regents v. Roth:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Legislative rules applicable to employees of the West Virginia Department of Health and Human Resources and which have been in place since 1961 clearly and unequivocally provide that an employee's resignation from employment prior to retirement cancels all accumulated sick leave. See WVCSR §143-1-14.4(e). Consistent with longstanding judicial principles, Hudkins is charged with the knowledge of all such laws which apply to her. See, e.g., United States to the Use of Hine v. Morse, 218 U.S. 493 (1910); Webb v. Webb, 171 W.Va. 614, 301 S.E.2d 570 (1983), citing Harner v. Price, 17 W. Va. 523, 544 (1880).

Moreover, the statutes and regulations relating specifically to the State's pension plans have never conferred upon a pension plan participant the right to additional retirement system service credit for sick or annual leave which has been cancelled and which does not stand to the participant's credit at the time of retirement. See Adm. Rec. Exh. 6, pp. 11-13; See also W. Va. Code §5-10-2; §5-10-15a; WVCSR §162-8-4.⁶ Consequently, and to the extent that Hudkins believed that she was entitled to "freeze" her previously accumulated but cancelled sick leave, such a belief was clearly inconsistent with applicable law and negates her assertion of a "legitimate claim of entitlement" such as is necessary to trigger Fourteenth Amendment protection.

⁶ WVCSR §162-8-4 was promulgated and passed by the Legislature in 2002, the rules stated therein are a codification of the longstanding policy of the Board to accept, for retirement credit conversion purposes, the leave standing to a member's credit with his or her last participating employer.

The best that can be said under the facts and circumstances of this case is that Hudkins had an “expectation” of a benefit, albeit an erroneous one, that she would ultimately be able to use her accumulated leave for retirement system service credit when she ultimately attained retirement eligibility. Even assuming that Hudkins’ expectation was fostered, in part, by communications with an employee of the Board, the absence of statutory law to support the conferral of such a benefit or “property interest” is fatal to her procedural due process claim. As the United States Supreme Court has explained:

The *Roth* decision teaches that a mere expectation of a benefit – even if that expectation is supported by consistent government practice – is not sufficient to create an interest protected by procedural due process. Instead, the statute at issue must create an entitlement to the benefit before procedural due process rights are triggered. . . . An individual simply has nothing more than a mere hope of receiving a benefit unless the decision to confer that benefit is in a real sense channeled by law.

Board of Pardons v. Allen, 482 U.S. 369, 382 (1987) (O’Connor, J., dissenting).

2. **Even Assuming the Existence of a Constitutionally Protected Property Interest Which was Denied by the Board, Hudkins was Afforded all the Procedural Process to Which She was Due.**

Even assuming that Hudkins had a constitutionally protected property interest to additional retirement system service credit for previously accumulated but cancelled sick leave, and assuming that such interest existed at the time of her resignation in March of 2000, Hudkins was afforded all the procedural due process to which she was entitled. See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972); Matthews v. Eldridge, 424 U.S. 319 (1976).

In the administrative proceedings, Hudkins was provided with written notice of the Board’s interpretation of the law which applied to her case, such notice having been

reasonably calculated to apprise Hudkins of the Board's position, and to afford her an opportunity to object. Memphis Light, Gas & Water Div. v. Craft, 436 U.S.1, 13 (1978). See also Adm. Rec. Exh. 9, 14. Hudkins was then afforded a full and fair opportunity to contest that interpretation through the Board's benefit determination and appeal rules. See WVCSR §162-2-1, et seq.. Through operation of such rules, Hudkins was afforded an administrative hearing before an independent hearing officer and was given the opportunity to testify, to present evidence, to submit written and oral argument, and to cross-examine witnesses.

Additionally, the opportunity to seek redress for any erroneous denial of benefits in state court, before and after the denial of benefits, is clearly sufficient to satisfy procedural due process. See, e.g., Matthews, 424 U.S. at 349.

V. CONCLUSION

As set forth above, Hudkins had, at all times relevant, been subject to legislatively approved rules which, since 1961, have clearly provided that a State employee's accumulated sick leave is cancelled in the event that the employee resigns from employment prior to attaining eligibility for retirement. In cases such as this where there is no leave standing to a PERS participant's credit at the time of retirement under the rules and policies of the participant's last participating employer, there is no leave for conversion to additional retirement system service credit. Hudkins failed to demonstrate the existence of the requisite "legitimate claim of entitlement" to the retirement system service credit sought.

Further, the doctrine of equitable estoppel was improperly applied by the Circuit Court in overturning the final administrative order of the Board. Estoppel is not applicable to this matter because the Board, a government entity, was acting in a governmental capacity rather

than in a proprietary capacity when it denied Hudkins' request to convert accumulated unused, but cancelled, sick leave to additional retirement system service credit. Further, the Board's final administrative decision was not arbitrary and capricious, but was supported by the evidence. In overturning the Board's final administrative order, the Circuit Court failed to afford appropriate deference to the Board's reasonable and permissible construction of applicable statutes and rules as the administrative body charged with enforcing such statutes and rules. For these reasons, the Circuit Court's Final Order of May 17, 2006 should be reversed.

VI. RELIEF PRAYED FOR

For the reasons set forth herein, Appellant respectfully prays that this Honorable Court overturn the May 17, 2006 Final Order of the Circuit Court of Kanawha County, West Virginia, and uphold the administrative decision of the State of West Virginia Consolidated Public Retirement Board lawfully denying Nancy K. Hudkin's request to convert previously accumulated, but forfeited, sick leave to additional retirement system service credit.

Respectfully submitted,
THE WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Appellant.



By: Erica M. Mahi (WVSB No. 8823)
Bowles Rice McDavid Graff & Love LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1790
Counsel for Appellant

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

No. 33245

State of West Virginia Consolidated Public Retirement Board,

Appellant (Respondent below)

v.

Nancy K. Hudkins,

Appellee (Petitioner below).

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

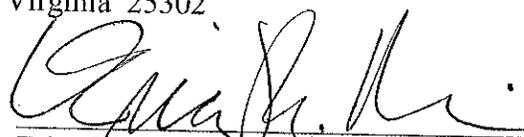
Civil Action No. 03-AA-89

The Honorable Paul Zakaib, Jr., Judge

CERTIFICATE OF SERVICE

I, Erica M. Mani, counsel for Appellant West Virginia Consolidated Public Retirement Board hereby certify that I have served the foregoing "*Brief on Behalf of Appellant, West Virginia Consolidated Public Retirement Board*" upon the appellee's counsel by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 8th day of January, 2007, addressed as follows:

Fred F. Holroyd
209 West Washington Street
Charleston, West Virginia 25302


Erica M. Mani (WVSB #8823)