

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

NO. 33245

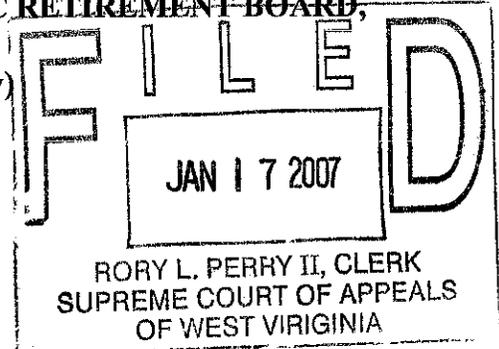
STATE OF WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD,

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

PETITIONER'S BRIEF IN SUPPORT OF
THE DECISION OF THE HONORABLE PAUL ZAKAIB

Submitted on behalf of Appellee by:
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CASES

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I.
STATEMENT OF THE CASE

This case is before this Court based upon Respondent's Appeal to the Decision of the Circuit Court of Kanawha County, Civil Action No: 03-AA-89, wherein it reversed the Respondent's Decision denying Ms. Hudkins retirement service credit earned by her in the nature of sick leave.

II.
STATEMENT OF THE FACTS

Ms. Hudkins was a member of the Public Employees Retirement System while working for the Department of Health and Human Resources System. She had worked under the Retirement System for 27 years and eight months. This Retirement System is administered by the West Virginia Public Employees Retirement System ("Retirement Board") herein. In March of 2000, she explored the possibility of terminating her employment and convert her unused sick leave to service credit to extend her service time which in turn would increase her retirement income when she reached age 55 on April 1, 2004. Prior to this determination, if she was to submit her resignation on March 28, 2000, she was given a letter from John Naymulski, Community Service Manager, which stated in part "her 1752.2 hours sick leave was frozen to use for extended service credit upon applying for retirement." (Exhibit 1).

In addition, to the above inducement, JoAnn Edwards, an employee of the Retirement Board, assured Ms. Hudkins that she could freeze her sick leave and use it in 2004 as additional service credit when she filed for retirement. (Page 5 & 6 of Transcript of the Retirement Board Hearing) While discussing her retirement plans in September 2002, Ms. Hudkins was told for the first time, that she would not be able to convert her sick leave to service credit. Ms. Hudkins confirmed this

position by letter to the Retirement Board (Exhibit 2). Ms. Hudkins was told by the Retirement Board that only those who actually retire from the state job can convert their unused sick leave and that this rule did not apply to employees who quit before their retirement age. (Exhibit 3).

Ms. Hudkins Appealed this Decision not to allow the conversion of her sick leave. (Exhibit 4). Upon Hearing before Hearing Officer on April 16, 2003, he rejected Ms. Hudkins' request to convert her sick leave to additional service credit and recommended to the Retirement Board that Ms. Hudkins' Claim be denied. (Exhibit 5). The Retirement Board denied her Appeal. (Exhibit 6)

Ms. Hudkins' Appealed to the Circuit Court of Kanawha County. The Honorable Paul Zakaib, Jr. found as follows:

Ms. Hudkins, a member of the Public Employees Retirement system, was employed by the Department of Health and Human Resources for twenty-seven years and eight months. She resigned on March 31, 2002, with 1752.2 hours in unused sick time. Upon her resignation she was assured by her supervisor that she could convert her 1752.2 hours of unused sick time into additional service credit upon her retirement at age 55. Ms. Hudkins asserts that she would not have terminated her employment early had it not been for this assurance.

Thereafter, and prior to reaching age 55, Ms. Hudkins sought the conversion of the 1752.2 hours of unused sick time into additional service credit. She was denied this conversion by the Division of Personnel, and was told that under the West Virginia Division of Personnel's Administrative Rule, all accumulated sick leave is canceled as of the date of separation from employment. Ms. Hudkins appealed this denial.

A hearing was held before Hearing Commissioner Jack Debolt on April 16, 2003. At the hearing, Ms. Hudkins testified that Joanne Edwards, an employee of the Retirement Board, told her at the time of her resignation that she could freeze her unused sick leave and use it for extended service credit when she retired. Ms. Hudkins further testified that this assurance of extended service credit was confirmed by letter by Jason Nimolski, Community Service Manager of the Department of Health and Human Resources.

Ms. Hudkins testified at the hearing that another employee, Sam Beverage, had three years and three months unused sick leave credited to his service after he quit. Terasa Robertson, Acting Executive Director of the Consolidated Public Retirement Board, testified at the hearing that, "...Sam Beverage was eligible on his last day of employment for an early retirement option which would result in a reduced annuity. He had more than 30 years of service and was under the age of 55; therefore, that is one of the qualifications that would qualify him for a reduced annuity at that time." This is in contrast to Ms. Hudkins who was not eligible for retirement when she quit. (Tr. p.13-14) In fact, Sam Beverage, like Ms. Hudkins, resigned his job. He did not retire at that point. (Tr. p. 15)

The Assistant Director of Employee Relations, James Hells, testified at the hearing that Ms. Hudkins was covered by the Department of Personnel rules and that Section 15.04E of the rules provide that all sick leave is canceled for anyone who separates for any reason other than retirement. (Tr. p. 18-19) These rules were in evidence at the hearing as Board Exhibit No. 1.

The Hearing Officer found that Ms. Hudkins was undeniably told she could convert her accrued sick leave before she separated her employment. He further noted that the principle of estoppel would ordinarily apply in such situations. However, since this case involves the State of West Virginia, he found estoppel would not apply.

Ms. Hudkins timely moved to amend the recommended decision to award her the conversion of 1752.2 hours sick leave to additional service credit as promised prior to her leaving her employment. This motion to amend was denied.

The Retirement Board affirmed the Hearing Officer's Recommended Decision, and Ms. Hudkins appealed to this Court.

The Retirement Board argues the Administrative Law Judge's decision should be upheld unless it is found to be arbitrary or capricious and not supported by the evidence. The Board further argues that the state is not subject to equitable estoppel as a result of its promise to Ms. Hudkins to allow her to convert her sick leave into service credit hours for retirement.

Ms. Hudkins argues the decision of the Administrative Law Judge is arbitrary and capricious, and it is not supported by the evidence. Ms. Hudkins argues she was assured by Jason Nimolski, Community Service Manager of the Department of Health and Human Resources, that she would be able to convert her unused sick leave into extended service credit. Ms. Hudkins maintains she relied to her detriment upon these assurances and would not have retired absent such assurances.

Although 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. To deny estoppel in this case would permit manifest injustice.

III. ARGUMENT

There is no dispute that The Board assured Ms. Hudkins that she could use her sick leave to extend her service credit for additional retirement pay. There is also no dispute that Ms. Hudkins would not have resigned when she did absent such assurance.

The Board simply claims that it made a mistake and that its supervision should not have assured Ms. Hudkins that she would be entitled to this benefit. The Board would normally be prevented from making such a claim successfully were it not for its claim that equitable estoppel does not apply to a government agency. While this may well be true, the concept of procedural due process certainly applies to The Board's treatment of Ms. Hudkins. The U.S. Supreme Court in *Perry vs. Sindermann* 408 U.S. 593, noted that property interest in due process cases are not limited to technical forms but "denotes a broad range of interest that are secured by existing rules or understandings." In *Cleveland Board of Education vs. Loudermill* 570 U.S. 532, the U.S. Supreme Court noted "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Here, Ms. Hudkins was told she could convert her sick leave to service time and this prompted her to resign. She would not have resigned absent this promise. (Exhibit 1) Prior to her resignation, clearly she had a property interest in her sick leave. She had earned it over the years. Unlike many public employees, she did not abuse her sick leave and take it whether or not she was sick. She reported to work, almost forty-four (44) weeks, and earned the hours claimed (1752.2). Prior to her

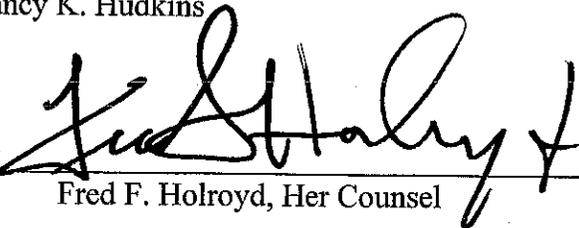
resignation, Ms. Hudkins was told by The Board that this property interest could be transferred. When it became too late for her to do anything about it, The Board told her it could not be transferred. She was entitled to be told this before she resigned, as the Judge found. Had The Board told Ms. Hudkins that she could not convert her sick time to service time before she resigned, she could have requested a due process hearing on her property right to the sick time and if denied, remained employed until age 55 then like other employees who actually reached retirement age she could retire and tack this unused sick leave onto her credited service. (See Hearing Officer's Recommendation Decision Exhibit 5). What the state is trying to do here is not due process, but is as Judge Zakaib found, "...would manifest injustice."

IV.
CONCLUSION AND PRAYER FOR RELIEF

It is therefore respectfully submitted that Petitioner's Brief In Support of the Decision of the Honorable Paul Zakaib be Granted and the Decision of the Circuit Court of Kanawha County, be AFFIRMED and further that the Retirement Board be ordered to credit Ms. Hudkins' 1752.2 unused sick time to service credit upon her retirement at age 55.

Respectfully Submitted
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By


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CERTIFICATE OF SERVICE

I, Fred F. Holroyd, hereby certify that I have served the foregoing **PETITIONER'S BRIEF**
IN SUPPORT OF THE DECISION OF THE HONORABLE PAUL ZAKAIB upon the
following by US Mail:

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Dated this 16th day of January, 2007.


FRED F. HOLROYD, ESQ.