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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Supreme Court Docket No. ~~3944#~~  
34944

JAMES G. CLAY and  
MICHAEL R. CORBETT,

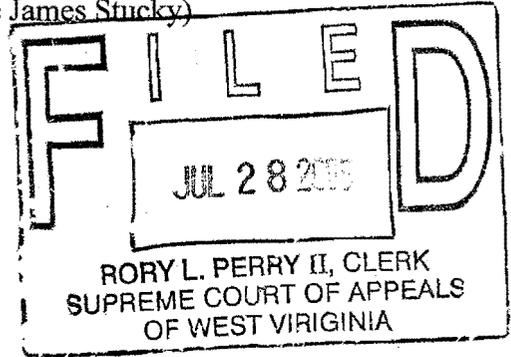
Petitioners/Appellants

v.

Civil Action No. 05-MISC-371  
Circuit Court of Kanawha County  
(Honorable James Stucky)

STATE OF WEST VIRGINIA  
CONSOLIDATED PUBLIC RETIREMENT BOARD,

Respondent/Appellees.



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**WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD'S  
BRIEF IN OPPOSITION TO PETITION FOR APPEAL**

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## **I. KIND OF PROCEEDING AND RULING IN LOWER TRIBUNAL**

### **A. INTRODUCTION**

This is an administrative appeal by Appellants, members of the Teachers Retirement System (TRS), who executed loan agreements with TRS and then, shortly thereafter, filed for bankruptcy. The executed loan agreements with TRS explicitly stated that interest would continue to accrue on any unpaid balance “until your retirement, withdrawal or death”.

Appellants do not contend that this “loan” was or should have been discharged by bankruptcy; rather, Appellants are requesting that they only be required to pay the outstanding loan balance at the time they thought the “loan” had been discharged by bankruptcy.

The issue in this matter is whether or not the Appellants are obligated to pay the “loan” balances from their accounts with the Teachers Retirement System or, in the absence of such payment, have their eventual annuity benefits reduced. The term “loan” is somewhat of a misnomer because pursuant to West Virginia Code §18-7A-34 the money actually comes from the member’s own employee contributions and thereby lacks any enforcement rights of ordinary debts making it a debt not subject to discharge in bankruptcy.<sup>1</sup> Pursuant to this statute, the only collection method authorized, if payroll deductions cease (such as the case in bankruptcy, termination of employment, death or retirement), is by offset to benefits at the time of distribution of benefits.

On October 17, 2008, the Circuit Court affirmed the Appellee Board’s August 2, 2005 *Final Order* determining that Appellants are statutorily and contractually obligated to pay the entire “loan” balance including interest from their respective accounts with the Teachers Retirement System or, in the absence of such payment, have their eventual annuity benefits reduced, as is the case of Appellant Corbett, or continue to provide reduced annuity benefits, as is the case of Appellant Clay.

Although collateral estoppel is not applicable in this case primarily because the Appellants are different individuals, this honorable Court has previously declined to hear the appeal of a case involving similar facts and the same legal issues in *Wolfe v. CPRB*, Sup. Ct. Case No. 052666 (Oct. 2006).

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<sup>1</sup>In Re Villarie, 648 F.2d 810.

**B. PROCEDURAL HISTORY AND STATEMENT OF FACTS**

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 Teachers Retirement System (hereinafter "TRS") established in article seven-a [ §§ 18-7A-1 et seq. ] chapter eighteen of the West Virginia Code. The members of the Board include the highest officials of the executive branch and a representative from each of the various plans. The Board and its members have the "highest fiduciary duty to maintain the terms of the [..TRS] 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, to ensure that the TRS 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. Such a duty encompasses the duty to maintain the integrity and credibility of the plan which duty prohibits the Board from taking money from the fund or Appellants' colleagues to replace the deficit created in Appellants' accounts by their failure to repay the accruing interest on the loans they took against their own accounts.

**1. IN RE: JAMES G. CLAY**

Appellant Clay is a member of the Teachers Retirement System with more than 30 years of credited service. He began a regular retirement annuity effective October 1, 2004. In 1984, Appellant Clay secured a "loan" agreement from the Teachers Retirement System from his retirement account in the principal amount of \$3,830.00 with a repayment period of 36 months. The "loan" agreement contained the following language:

If at the end of your loan agreement any balance not paid, including accrued interest, shall be subject to interest charges equal to but not in excess of the rate established by the retirement board for new loans being issued at that time. Such charges continue on the unpaid balance until your retirement, withdrawal or death or until such time that your total balance equals your total contributions, plus accrued interest, in the teachers accumulation fund. (Emphasis supplied)

Appellant Clay made monthly payments through payroll deduction until October 1986.

Appellant Clay filed a petition for Chapter 7 bankruptcy on October 24, 1986 and listed the Teachers Retirement system "loan" on his schedules. Upon receipt of the notice of bankruptcy, the Board notified Appellant Clay's employer to cease payroll deductions on the "loan." The balance at the time of the cessation of payroll deductions, including interest to the end of the "loan" agreement, was \$2,103.50. On April 23, 1987, Appellant Clay received a general bankruptcy discharge for existing "debts."

By memorandum, dated January 22, 1990, Appellant Clay was sent notice that although a bankruptcy filing caused payroll deductions to stop, it did not discharge the balance owed, and that any balance would be collected when he retired or withdrew his contributions.

In May 2003, Appellant Clay received a letter from the Board that his loan balance was \$2,103.50 and that if not paid by December 31, 2003, a 1099-R would be sent to the Internal Revenue Service reflecting that amount as a deemed distribution. This letter was subsequently determined to be inaccurate in that it reported his outstanding balance as of the end of his original repayment schedule and not reportable to the IRS at that time. Appellant Clay paid the \$2,103.50 to the Board in December 2003 and his check was negotiated by the Board.

In January 2004, Appellant Clay was informed by letter from the Board that because he had paid, a 1099-R would not be sent but that one may be sent at the time of retirement if a "loan"

balance remains. That letter also stated that in the May 2003 letter from the Board the accumulated interest had been miscalculated and that he owed an additional \$7,671.24. This new figure represents interest that had accrued since the time of his original "loan" term. In August 2004, Appellant Clay was notified that his "loan" balance as of June 30, 2004, was \$7,866.46.

Appellant Clay, by counsel, filed an administrative appeal and the matter was set for hearing and heard on December 14, 2004. Hearing Officer DeBolt issued his recommended decision on July 15, 2005, and on August 2, 2005, the Board denied Appellant Clay's appeal, adopting the recommendations of Hearing Officer DeBolt.

On September 1, 2005, Appellant Clay, along with two other members, Michael Corbett and Katherine Hoopengartner, filed a *Petition for Writ of Mandamus* and *Appeal of Final Order* in the Circuit Court of Kanawha County, West Virginia.

On April 11, 2008, the Circuit Court dismissed the *Petition for Writ of Mandamus*, and on October 17, 2008, the Circuit Court affirmed the Board's August 2, 2005 *Final Order* determining that Appellants are statutorily and contractually obligated to pay the entire "loan" balance including interest from their respective accounts with the Teachers Retirement System or, in the absence of such payment, have their eventual annuity benefits reduced.

## **2. IN RE: MICHAEL R. CORBETT**

Appellant Corbett is a member of the Teachers Retirement System with more than 30 years of credited service. He is employed by the Nicholas County Board of Education. In 1985, Appellant Corbett secured a "loan" agreement from the Teachers Retirement System from his retirement account in the principal amount of \$4,657.27, including an existing loan balance, with a repayment period of 60 months. The "loan" agreement contained the following language:

If at the end of your loan agreement any balance not paid, including accrued interest, shall be subject to interest charges equal to but not in excess of the rate established by the retirement board for new loans being issued at that time. Such charges continue on the unpaid balance until your retirement, withdrawal or death or until such time that your total balance equals your total contributions, plus accrued interest, in the teachers accumulation fund. (Emphasis supplied)

Appellant Corbett made monthly payments through payroll deduction until November 1986.

Appellant Corbett filed a petition for Chapter 7 bankruptcy on November 26, 1986 and listed the Teachers Retirement system "loan" on his schedules. Upon receipt of the notice of bankruptcy, the Board notified Appellant Corbett's employer to cease payroll deductions on the "loan." The balance at the time of the cessation of payroll deductions, including interest to the end of the "loan" agreement, was \$5,251.03. On April 24, 1987, Appellant Corbett received a general bankruptcy discharge for existing "debts."

By memorandum, dated January 22, 1990, Appellant Corbett was sent notice that although a bankruptcy filing caused payroll deductions to stop, it did not discharge the balance owed, and that any balance would be collected when he retired or withdrew his contributions.

In June 2003, Appellant Corbett received a letter from the Board that his loan balance was \$5,251.03 and that if not paid by December 31, 2003, a 1099-R would be sent to the Internal Revenue Service reflecting that amount as a deemed distribution. This letter was subsequently determined to be inaccurate in that it reported his outstanding balance as of the end of his original repayment schedule and not reportable to the IRS at that time. Appellant Corbett did not pay the \$5,251.03 to the Board by December 31, 2003.

In January 2004, Appellant Corbett was informed by letter from the Board that a 1099-R would not be sent but that one may be sent at the time of retirement if a "loan" balance remains.

That letter also stated that in the May 2003 letter from the Board the accumulated interest had been miscalculated and that his balance was \$20,001.92. This new figure represents interest that had accrued since the time of his original “loan” term. In August 2004, Appellant Corbett was notified that his “loan” balance as of June 30, 2004, was \$20,601.22.

Appellant Corbett, by counsel, filed an administrative appeal and the matter was set for hearing and heard on December 14, 2004. Hearing Officer DeBolt issued his recommended decision on July 15, 2005, and on August 2, 2005, the Board denied Appellant Corbett’s appeal, adopting the recommendations of Hearing Officer DeBolt.

On September 1, 2005, Appellant Corbett, along with two other members, James G. Clay and Katherine Hoopengartner, filed a *Petition for Writ of Mandamus* and *Appeal of Final Order* in the Circuit Court of Kanawha County, West Virginia.

On April 11, 2008, the Circuit Court dismissed the *Petition for Writ of Mandamus*, and on October 17, 2008, the Circuit Court affirmed the Board’s August 2, 2005 *Final Order* determining that Appellants are statutorily and contractually obligated to pay the entire “loan” balance including interest from their respective accounts with the Teachers Retirement System or, in the absence of such payment, have their eventual annuity benefits reduced.

## II. STANDARD OF REVIEW

The West Virginia Administrative Procedures Act, subsection (g) governs the review of contested administrative decisions that do *not* involve a disciplinary matter and issues by a circuit court, and specifically provides that

[t]he Court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the appellant or appellants have been prejudiced because the

administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

West Virginia Code § 29A-5-4

In the absence of an error of law, 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 Board of Medicine*, 506 S.E.2d 89 (W.Va. 1998). Under the arbitrary and capricious standard, a circuit court which is reviewing the factual findings of an administrative agency must “not substitute its own judgment for that of the hearing examiner.” *Mayhorn v. West Virginia Consolidated Public Retirement Board*, 631 S.E.2d 635, 640 (W.Va. 2006); *Woo v. Putnam County Board of Education*, 504 S.E.2d 644, 646 (W.Va. 1998).

Legal issues, such as statutory and regulatory interpretation, are legal matters which are subject to *de novo* review. *Woo*, 504 S.E.2d at 646.

As to judicial review of an administrative agency’s interpretations of the statutes and regulations which it administers, and notwithstanding the general rule of *de novo* review of issues of law, the 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

policymaking authority relating to the statute. *Sniffen v. Cline*, 456 S.E.2d 451, 455 (W.Va. 1995).

Interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight, and such an agency's construction of these statutes must be given substantial deference unless clearly erroneous. *Corliss v. Jefferson County Board of Zoning Appeals*, 591 S.E.2d 93 (W.Va. 2003); *WV Department of Health v. Blankenship*, 431 S.E.2d 681 (W.Va. 1993) *Dillon v. Board of Education of the County of Mingo*, 301 S.E.2d 588 (W.Va. 1983); *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.*, 277 S.E.2d 613 (W.Va. 1981).

### III. ISSUE ON APPEAL

The issue in this matter is whether the Circuit Court erred in ruling that Appellants are obligated to pay the entire "loan" balance including interest from their respective accounts with the Teachers Retirement System or, in the absence of such payment, have their eventual annuity benefits reduced, as is the case of Appellant Corbett, or continue to provide reduced annuity benefits, as is the case of Appellant Clay.

### IV. DISCUSSION OF LAW

**A. LOANS FROM THE TEACHERS' RETIREMENT SYSTEM (TRS) ARE CONTROLLED BY WEST VIRGINIA CODE §18-7A-34 AND ARE NOT SUBJECT TO DISCHARGE IN A BANKRUPTCY PROCEEDING. THE LOAN AGREEMENTS EXECUTED BY APPELLANTS EXPLICITLY STATED THAT INTEREST WOULD CONTINUE TO ACCRUE ON ANY UNPAID BALANCE "UNTIL RETIREMENT, WITHDRAWAL OR DEATH".**

Loans to members of the Teachers Retirement System (TRS) are primarily controlled by the provisions of West Virginia Code §18-7A-34, which makes clear that continually accruing interest is required for all unpaid loan balances. The loan agreement executed by Appellants clearly informed them that they were contractually agreeing to pay this interest. The "loan" agreement contained the following language:

If at the end of your loan agreement any balance not paid, including accrued interest, shall be subject to interest charges equal to but not in excess of the rate established by the retirement board for new loans being issued at that time. Such charges continue on the unpaid balance until your retirement, withdrawal or death or until such time that your total balance equals your total contributions, plus accrued interest, in the teachers accumulation fund. (Emphasis supplied)

The term "loan" is somewhat of a misnomer because pursuant to West Virginia Code §18-7A-34 the money actually comes from the member's own employee contributions and thereby lacks any enforcement rights of ordinary debts making it a debt not subject to discharge in bankruptcy. *In Re Villarie*, 648 F.2d 810 (2nd Cir. 1981). Pursuant to this statute, the only collection method authorized, if payroll deductions cease (such as the case in bankruptcy, termination of employment, death or retirement), is by offset to benefits at the time of distribution of benefits.

These "loans" are not debts. There is no obligation to pay it back. It is a withdrawal from one's own account which if not repaid results in a deduction in one's account and later annuity. The Appellants were not borrowing money from the TRS fund. The money came from their employee contributions, not the general fund or employer contributions, which resulted in a reduction of their individual accounts. They did not borrow the state's money.

Loans from TRS, being from a member's own contributions and affording no right to the Board to enforce collection, are not "debts" subject to discharge in bankruptcy. *In Re Villarie*, 648 F.2d 810 (2nd Cir. 1981). Therefore, the filing of a bankruptcy by a member does not discharge the balance of any unpaid "loan" and any balance is to be collected at the time of retirement or at the time of a withdrawal of contributions.

West Virginia Code of State Regulations (CSR) §162-4-8 provides, in part, that to comply with provisions of the Internal Revenue Code of 1986, upon retirement of a member, any unpaid loan

balance including accrued interest due, must be repaid in full by the member. If the member does not repay any or part of the amount due, the amount must be deducted in a lump sum from the refund of accumulated contributions or repaid in a lump sum through the reduction of the member's monthly retirement benefit. If the member's accumulated contributions or the actuarial reserve for the accrued benefit is not enough to repay the unpaid loan balance in full including the accrued interest, the member must pay the amount necessary to fully repay the amount due.

The imposition of interest on the unpaid balance of Appellants' loans was not retroactive, as claimed in Appellants' brief, rather it was an explicit provision of the loan agreements as executed by the Appellants. How the interest was accrued and how the repayment was calculated by the Board may not have been clearly communicated to Appellants but the record demonstrates that the Appellants were sent a memorandum from then Assistant Attorney General James Swart notifying them that although a bankruptcy filing caused payroll deductions to stop, it did not discharge the balance owed and that any balance would be collected when they retired or withdrew their contributions.

Appellants contend that their "loan" was discharged in bankruptcy and that the Board's reliance on *In Re Villarie* is not controlling because it was not until 2005 when the "Bankruptcy Abuse and Consumer Protection Act" was enacted that such pension plan "loans" became nondischargeable. Appellants further contend that the burden is upon the creditor to file a complaint to challenge the dischargeability of any debt.

If Appellants are correct in this analysis, then Appellee is in contempt of a federal court Order; yet, Appellants have not sought clarification or an Order compelling Appellee to comply by discharging the "debt". The Appellants' bankruptcy Order was merely a general discharge of

existing debts. Their pension “loans” are not a “debt”. There was no specific directive to Appellee to discharge it. Furthermore, the Board has conducted a review of Teachers Retirement System loans in which there has been a bankruptcy filed and could not find a single case in which such a “loan” was discharged in bankruptcy.

Appellants have chosen this forum because of their inability to succeed in federal court. Bankruptcy rules do not apply in this situation primarily for two reasons - this “loan” is not a debt and the Board is not a creditor.

Each month that Appellants work, a percentage of their salary is withheld and placed in their retirement account. Their employers also submit a certain percentage for each member’s retirement. The amount (“loan”) Appellants withdrew came from the money they had contributed from their salaries, not from the employer portion or general fund. It was their money. They had no obligation to pay it back. Appellee Board is not a lending institution, and is therefore not a creditor. Mr. Clay and Mr. Corbett withdrew their own money from their own accounts, failed to replace it, and as a result their accounts and eventually their annuities have or will be reduced. This situation is analogous to attempting to have the money you spent from your bank savings account discharged in bankruptcy. Because the money they withdrew came from their own salaries, Appellants occupy the position of both creditor and debtor with respect to their pension “loans”. They cannot reasonably expect to be able to discharge money they took from their own accounts.

**B. THE BOARD HAS THE HIGHEST FIDUCIARY DUTY TO MAINTAIN THE TERMS OF THE TRS TRUST, AS SPELLED OUT BY STATUTE. TAKING MONEY FROM THE FUND OR THE APPELLANTS’ COLLEAGUES TO COVER THE DEFICIT CAUSED BY THE APPELLANTS WOULD BE A BREACH OF THE BOARD’S FIDUCIARY DUTY TO THE FUND AND OTHER MEMBERS.**

The Board and its members have the “highest fiduciary duty to maintain the terms of the

[..TRS] 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, to ensure that the TRS 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. Such a duty encompasses the duty to maintain the integrity and credibility of the plan which duty prohibits the Board from taking money from the fund or Appellants’ colleagues to replace the deficit created in Appellants’ accounts by their failure to repay the accruing interest on the loans they took against their own accounts.

The Appellants argue that the Board breached its fiduciary duty by failing to warn the Appellants of the financial disaster to which they were oblivious; however, most of the cases cited by the Appellants were brought under ERISA. Additionally, the Appellants argue that a fiduciary may have a duty to affirmatively provide information to a beneficiary which the fiduciary knows the beneficiary needs to know for his or her own protection, but does not know. Again, the cited cases involve ERISA-regulated plans and primarily involve employers who failed to make the timely payments to the plans.

This matter involves neither an ERISA-regulated plan nor the failure of the Appellants’ respective Boards of Education to make timely employer contributions. This matter concerns two educated individuals who executed loan agreements. Those individuals also filed petitions for bankruptcy with the assistance of counsel and had their respective “debts” discharged. The Board’s failure to not dispute the dischargeability of the “loan” does not effectuate the argument that the Board was under a duty to inform the Appellants that they were “about to plunge into a ruinous course of dealing.” Appellants were each represented by competent counsel, and each had a

competent bankruptcy judge presiding over their case. Either or both the attorney and judge should have realized that the TRS “loan” listed on the schedules were, in actuality, an advancement of each person’s contributions to the retirement plan, and, thus, not a dischargeable debt. As noted in the Hearing Officer’s Amended Recommended Decisions, “the asserted breach of fiduciary duty said to have been committed by the [Board] amounts to failure to give legal advice about the effect of taking bankruptcy. The [Board] is simply not in a position to give such advice if it could lawfully do so.” Amended Recommended Decisions, Page 12.

Additionally, the Appellants claim that the Board’s retroactive imposition of interest is a breach of the general standard of care. The Appellants argue that they should only be required to pay interest that would have accrued during the “favorable, 5-year payment schedule” because, they claim, that from 1987 until December 2003, interest was not accruing on debts more than five years old.

This is simply not the case. Interest did not cease being accrued after the payment schedule had ended, as the Appellants claim. Instead, the Board “did not calculate the accruing interest beyond the original term of the loan, the maximum of which is five years.”*Id.* (Emphasis supplied). Interest on the “loans” continued to accrue, and the obligation to pay such interest, as evidence by statute and the “loan” agreement signed by each of the Appellants, was still in place.

As a fiduciary to the eight retirement plans it is charged with administering, Appellee, Board, must make every effort to safeguard the funds of every plan which, in this case, means securing the repayment of any and all advancements of contributions (“loans”) or otherwise reducing the individual’s retirement annuity consistent with the deficit he created in his account. West Virginia Code §18-7A-34 and the Code of State Rules §162-4-8 mandate that such “loans” be repaid in full

with interest. The Appellants each signed a “loan” agreement which stated that interest would “continue on the unpaid balance until [the applicant’s] retirement, withdrawal or death or until such time that [the applicant’s] total balance equals [the applicant’s] total contributions, plus accrued interest, in the teachers accumulation fund.” The Appellants are statutorily and contractually obligated to repay the “loan” with interest and the Board, as a fiduciary of the Teachers Retirement System, is not authorized to relieve them of this obligation.

**C. EQUITABLE ESTOPPEL IS NOT APPROPRIATE IN THIS CASE UNDER EXISTING LAW**

Equitable estoppel has consistently been limited in its applicability to state entities. *See, e.g., Bradley v. Williams*, 465 S.E.2d 180 (W. Va 1995); *McFillian v. Berkeley County Planning Commission*, 438 S.E.2d 801 (W. Va. 1993); *Samsell v. State Line Development Co.*, 174 S.E.2d 318 (W. Va. 1970); *Cawley v. Board of Trustees of Firemen’s Pension Fund of Beckley*, 76 S.E.2d 683 (W. Va. 1953). West Virginia’s Supreme Court of Appeals recognized that “an estoppel may **not** be invoked against a government unit when functioning in its governmental capacity.” *Samsell*, 174 S.E.2d at 325. Moreover, the Court held, “all persons must take note of the legal limitations upon [state officers’] power and authority,” and 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 authorized acts of its officers in the performance of government functions.” *Id.* at 325, 326.

In *Samsell*, the Court recognized that equitable estoppel may, in very limited circumstances, be applied to the state “when acting in a proprietary capacity, as distinguished from a governmental capacity.” *Id.* at 326. Assuming without deciding that the state officers in question in that case were acting in a proprietary rather than governmental capacity, the Court concluded that equitable estoppel

could **not** be properly applied under the facts of that case. In this case, Appellee, Board, was clearly acting in a governmental capacity, so estoppel cannot be applied.

In *McFillian*, the Supreme Court again noted the distinction which must be made when a government entity is acting in a government rather than proprietary capacity. *McFillian*, 438 S.E.2d at 808. When acting in a governmental capacity, a state entity “is **not** subject to the law of equitable estoppel.” *Id.* (Emphasis supplied). The Court noted that a governmental entity acts in a governmental capacity when “the act performed is for the common benefit of the public” rather than for the special benefit or profit of the entity. *Id.*

Here, it is clear that the Board has, in its capacity as administrator of the various state retirement systems, acted in a governmental rather than proprietary capacity in requiring the Appellants to repay “loan” balances from their respective accounts within the Teachers Retirement System, or, in the absence of such payment, having their eventual annuity benefits reduced, or continue to provided reduced annuity benefits. Consequently, and under the prevailing law of this state, the doctrine of equitable estoppel cannot properly be applied here.

The Appellants’ brief cites *The Board of Trustees of the Police Officers Pension and Relief Fund of the City of Wheeling v. Carenbauer*, 567 S.E.2d 612 (W. Va. 2002), as precedent for application of equitable estoppel against a state agency. The pension plan in *Carenbauer* is not a state pension plan. The issue in that case was detrimental reliance and the Court did not apply equitable estoppel.

Appellants also cite *Flanigan v. WVPERS*, 342 S.E.2d 414 (W. Va. 1986), as authority for a *de facto* application of equitable estoppel. *Flanigan* involved the Public Employees Retirement System, a retirement plan that does not have provisions for “loans” from members’ contributions and

the facts involved a magistrate who was denied a statutory right because he received incorrect information from an authorized source and acted on it to his detriment. This matter involves the Teachers Retirement System which does permit “loans,” and the facts demonstrate that Appellants have never had a legal right to be relieved of paying the balances of their “loans”, to the contrary, they had both a statutory and contractual obligation to pay the balances or have their annuities reduced to correspond with the deficit the Appellants created in their accounts.

Additionally, the Appellants have failed to demonstrate how they have substantially relied upon the Board’s inaction regarding the non-dischargeability of their respective “loans” to their detriment. As stated by the Hearing Officer:

“The applicant here has suffered nothing more than disappointment. He is only being required to do that which the law and his loan contract required all along. The fund of the Teachers Retirement System, on the other hand, absent collection of the interest in some manner, would suffer the real financial loss of earnings on the loan amount over the years the loan shall have been outstanding.”  
Amended Recommended Decisions, Page 11.

The equitable doctrines of detrimental reliance and promissory estoppel as outlined in such cases as *Booth* and *Flannigan* are simply not applicable to the case pending before this Court. In those cases, the Appellants were deprived of a statutory right due to misinformation or retroactive legislation. In this case, the Appellants have never had a statutory right to be relieved of their debt by having their colleagues or the fund pay for their advancement of contributions (“loans”).

**D. THE DOCTRINE OF LACHES IS NOT APPLICABLE IN THIS CASE**

Appellants assert that the doctrine of laches should apply because the Board did not contact the Appellants concerning their respective “loan” balances for an extended period of time. As articulated by the West Virginia Supreme Court of Appeals, laches “is not merely delay in the

assertion of a claim. It is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.” *Bank of Marlinton v. McLaughlin*, 17 S.E.2d 213, 218 (W. Va. 1941).

Unlike typical lending institutions, such as banks, credit unions, and other similar entities, the Board cannot assert a “known right” to compel repayment of a “loan,” as the funds are from the member’s own contributions to their retirement account and, thus, not a “debt”. Because it is not a debt, the Board has no authority to file a civil action to recover the money. Pursuant to West Virginia Code §18-7A-34, TRS members may choose to repay their “loans” or they may choose to take an actuarial reduction of their retirement annuities and not repay their “loans.” The election is solely up to the member’s discretion. The Board’s only means of reconciling the member’s account, if the member fails to pay, is by reducing the amount of the distribution given to the member upon withdrawal or retirement. Appellant Clay is currently receiving a reduced retirement annuity, as will Appellant Corbett unless otherwise ordered by this Court. If there were a time limit relevant to Board action such as a statute of limitations or doctrine of laches, the clock would not begin to run until there had been a distribution of benefits, such as when the member retires. When payroll deductions have ceased, West Virginia Code §18-7A-34 does not authorize the Board to act any earlier.

**E. ISSUES RAISED DURING ORAL PRESENTATION ON THE COURT’S MOTION DOCKET**

During oral presentation of this case on this honorable Court’s motion docket, counsel for Appellants mistakenly informed the Court that there were only one or two other cases similar to this one. Upon further review, Appellee Board has determined that there are approximately one hundred and eleven (111) TRS members who have taken out a “loan”, filed bankruptcy, later discovered that

their loans were not discharged, and received a letter in May 2003 from the Board with the wrong interest amount.<sup>2</sup> All of these members have now either repaid and/or are repaying their loans with the correct interest or have taken an offset with their annuities.

Counsel for Appellants also informed the Court that Appellants were willing to pay the balance owed at the time they thought their “loans” had been discharged in bankruptcy, but not the interest which has accumulated since that day, in part, because the Board had provided them with incorrect information regarding the calculation and amount of interest owed. The May 2003 letters which corrected a previous notice containing a miscalculation of interest was sent to all members who had “loans”, not just those who had filed for bankruptcy. Upon further review, Appellee Board has been able to identify ninety two (92) other such “loans” of members who received incorrect interest amounts and believes that there could possibly be twice as many.<sup>3</sup> All of these members have now either repaid and/or are repaying their loans with the correct interest or have taken an offset with their annuities.

Counsel for Appellants also told the Court and argued in their briefs as though the lower Court’s affirmation of the Board’s decision would result in financial disaster for Appellants. Although Appellants’ failure to replace the money they withdrew from their accounts will result in a reduction in their annuity, they will still receive a pension annuity. Appellant Clay is currently receiving a pension annuity, an annuity which has been reduced from \$2,134.60 per month to

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<sup>2</sup>See attached Exhibit A. Additionally, one member’s bankruptcy attorney repaid the “loan” for the member when the member realized the “loan” had not been discharged in the bankruptcy proceeding.

<sup>3</sup>See attached Exhibit B.

\$2,077.27 per month. If Appellant Corbett had retired on July 1 of this year (which he was eligible to do), his retirement annuity would have been \$2,408.56 reduced from \$2,673.52 per month. These annuities are calculated based upon the amount Appellants contributed to the system minus what they withdrew, the amount their employers contributed to the system on their behalf, and the interest which has accumulated on those combined contributions during their years of service. It would be patently unfair as well as a breach of the Board's fiduciary duty to take money from the general fund or Appellants' colleagues to replace the money the Appellants withdrew from their accounts.

## V. CONCLUSION

West Virginia Code and the legislative rule refer to these withdrawals as a "loan"; however, this is a misnomer because the money comes from the member's salary contribution into the retirement system. There is no obligation to repay it. It is the member's money. The member occupies the position of both a creditor and debtor. The Board is not a creditor. The Board did not loan the member money from the general fund or some other source. The Board is an administrator of several retirement plans, not a lending institution. Reference to these withdrawals as "loans" has created numerous problems for the Board and quite simply is not a good public policy decision to allow such withdrawals due to the potential impact on the member's pension. In 2005, West Virginia Code §18-7A-34(b) was amended to phase out these "loans".

Counsel for Appellants invokes principles of equity and fiduciary responsibility; yet, if this honorable Court were to grant the relief requested, then the Appellants would be unjustly enriched by having their advancement of contributions ("loans") paid for by their fellow colleagues and the Teachers Retirement fund which would result in a breach of the Board's fiduciary duty to the fund and other members. The Appellants are statutorily and contractually obligated to repay their "loans"

with interest or face a reduction reflecting such offset with their retirement annuities.

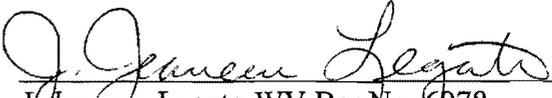
Although the Appellants may or may not have been able to position themselves better financially if each had inquired about the status of their "loan" at an earlier time, the Appellants have suffered no real loss. They received the benefit of having the money and now are simply being asked to do what the statute and loan agreement require - return the money with interest that they borrowed from their own account or take a reduction in their annuity. Additionally, Appellants have failed to demonstrate any affirmative duty on the part of the Board to apprise each Appellant of his "loan" status.

Even though the doctrine of collateral estoppel does not apply in this case because the Appellants were not a named party in the prior case, the facts, issues, and law are all the same as in the case before this honorable Court in *Pelma Rose Wolfe v. Consolidated Public Retirement Board*, Civil Action No. 05-AA-5, Sup. Ct. Case No. 052666 (Oct. 2006). As in *Wolfe*, the Board's August 2, 2005 decision in this case is not in violation of any constitutional or statutory procedure. The decision is not affected by other error of law or clearly wrong in view of the reliable, probative, and substantial evidence on the entire record. The decision is not arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ACCORDINGLY, and for all the foregoing reasons, the undersigned respectfully submits that the Board's Final Order of August 2, 2005, adopting Hearing Officer DeBolt's Recommended Decision in its entirety, is not affected by error of law, and that the Board's factual findings set forth therein are supported by the substantial, reliable and probative evidence of record. Consequently, this Court should affirm the Circuit Court's Order affirming the Board's administrative denial of Appellants' request to be relieved of the statutory and contractual duty to repay their "loans" with

interest.

Respectfully submitted,  
WV Consolidated Public Retirement Board,

By Counsel:   
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## Exhibit A

Loans Post Bankruptcy Filing

	<u>Original Amount</u>	<u>Recalculated Amount</u>
1	10,892.39	22,267.58
2	9,126.94	16,444.51
3	2,063.72	10,635.51
4	6,488.41	9,790.05
5	9,014.29	10,933.79
6	5,990.49	7,715.55
7	11,438.22	18,397.57
8	3,672.55	4,902.69
9	12,058.12	21,389.30
10	7,152.23	13,145.49
11	7,284.14	7,597.87
12	3,272.63	6,617.13
13	2,039.68	9,706.00
14	7,865.37	8,204.13
15	10,911.87	15,551.01
16	2,103.50	9,548.49
17	10,741.86	11,344.03
18	8,962.23	13,418.52
19	10,865.41	16,268.11
20	2,408.57	3,576.69
21	5,251.03	20,001.92
22	7,700.09	8,967.50
23	11,845.13	13,121.24
24	11,273.85	11,594.64
25	1,455.09	4,383.27
26	12,103.26	22,244.05
27	11,546.80	13,046.87
28	9,837.19	10,252.74
29	979.54	1,065.72
30	8,413.19	8,614.10
31	4,071.49	5,726.11
32	5,107.65	6,593.03
33	2,139.89	4,464.79
34	2,547.95	2,889.41
35	8,528.08	9,763.08
36	13,354.59	34,718.38
37	3,637.46	9,969.16
38	762.80	935.36
39	5,697.29	5,900.92
40	2,390.49	2,496.72
41	3,028.34	5,140.07

42	3,484.55	16,577.88
43	3,460.24	7,717.63
44	2,434.80	6,105.71
45	5,078.30	7,259.39
46	8,439.03	18,829.27
47	3,006.48	4,206.63
48	7,519.39	20,607.11
49	4,104.29	12,875.25
50	5,235.83	8,055.24
51	11,132.27	11,239.66
52	10,715.48	11,166.54
53	10,543.61	11,733.02
54	8,957.80	9,355.95
55	2,122.48	10,097.80
56	6,737.28	26,828.93
57	11,240.67	11,553.69
58	8,702.62	9,023.59
59	8,274.04	11,325.75
60	959.28	3,860.78
61	11,471.11	14,250.70
62	9,110.24	9,512.93
63	8,288.03	11,046.44
64	969.34	969.34
65	10,212.18	9,660.45
66	3,862.80	4,034.49
67	3,686.61	3,873.23
68	8,438.02	8,709.26
69	1,466.83	2,611.99
70	4,177.71	12,519.60
71	10,604.44	13,529.28
72	6,442.34	20,983.25
73	4,877.52	4,906.34
74	4,790.11	5,892.78
75	6,631.19	17,574.50
76	8,744.69	12,872.22
77	9,199.67	9,288.41
78	4,750.21	13,997.92
79	885.16	4,179.26
80	2,871.65	7,881.16
81	7,279.30	10,769.82
82	4,732.21	14,564.35
83	6,464.81	16,951.62
84	6,175.91	17,956.62
85	9,436.48	12,484.18
86	3,610.60	13,874.92
87	11,501.84	11,811.78
88	11,455.90	28,981.11



**Exhibit B**

**Recalculation of Interest on TRS Loans**

	<b><u>Original</u></b> <b><u>Amount</u></b>	<b><u>Recalculated</u></b> <b><u>Amount</u></b>
1	3,894.08	8,228.78
2	10,595.15	10,372.76
3	10,359.12	26,121.22
4	9,154.88	19,135.60
5	1,756.15	1,811.39
6	2,181.48	8,713.61
7	2,457.00	6,980.76
8	8,686.65	23,384.92
9	957.51	1,246.84
10	6,345.39	15,998.33
11	4,089.86	5,148.10
12	961.55	3,899.26
13	7,642.10	9,456.40
14	167.43	333.40
15	7,534.86	12,672.35
16	3,790.36	4,832.49
17	2,301.84	3,069.75
18	9,305.77	18,358.03
19	2,336.76	2,819.27
20	10,911.87	15,551.01
21	1,774.69	3,477.16
22	2,278.57	8,831.89
23	5,278.19	7,631.59
24	7,482.64	14,377.29
25	9,800.92	22,933.03
26	1,465.31	2,603.41
27	8,283.91	21,084.34
28	9,844.26	12,611.14
29	5,371.58	8,715.74
30	7,068.02	11,954.70
31	3,135.00	13,643.94
32	572.07	2,964.34
33	5,978.62	7,107.84
34	2,161.16	2,870.62
35	1,102.86	2,400.59
36	1,687.59	8,697.12
37	823.54	2,160.34
38	1,874.79	6,215.07
39	1,985.40	4,380.26

40	13,806.30	16,714.70
41	207.30	1,035.99
42	1,574.69	1,604.08
43	8,299.82	15,267.48
44	2,345.47	3,705.59
45	748.84	2,877.89
46	11,250.05	23,435.75
47	761.89	1,394.74
48	2,859.39	9,249.05
49	706.69	2,240.17
50	4,678.79	7,390.97
51	205.74	1,299.77
52	11,670.94	16,396.45
53	7,711.75	16,926.68
54	2,748.25	5,051.48
55	8,017.41	14,825.58
56	6,276.82	7,523.07
57	2,282.93	2,969.64
58	3,150.80	6,079.99
59	508.84	524.30
60	7,526.96	18,384.59
61	600.88	1,245.67
62	6,725.82	14,844.95
63	1,005.75	1,408.56
64	2,383.95	3,916.85
65	3,767.72	6,909.61
66	3,405.05	13,883.32
67	3,877.17	6,729.86
68	2,136.39	3,291.77
69	9,243.91	22,431.87
70	3,230.41	4,391.73
71	97.50	108.20
72	5,192.33	6,122.24
73	2,298.50	2,828.05
74	1,410.87	5,326.67
75	786.79	967.82
76	4,031.42	5,750.13
77	151.68	308.28
78	426.16	3,696.90
79	244.78	142.41
80	1,244.40	3,345.54
81	4,638.70	9,741.81
82	6,531.77	10,656.18
83	3,110.06	7,050.67
84	177.27	119.33
85	2,013.16	9,323.64
86	3,672.78	9,074.00

87	430.34	1,252.29
88	5,724.22	17,002.39
89	443.02	470.46
90	4,382.52	8,569.67
91	674.75	2,151.81
92	6,737.26	13,106.62

Total:           \$    371,535.93                   \$  733,861.94

Difference:       \$    **362,326.01**

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Supreme Court Docket No. 3944

JAMES G. CLAY and  
MICHAEL R. CORBETT,  
Petitioners,

v.

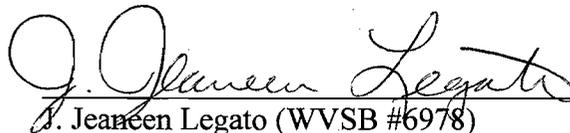
Civil Action No. 05-MISC-371  
Circuit Court of Kanawha County  
(Honorable James Stucky)

STATE OF WEST VIRGINIA  
CONSOLIDATED PUBLIC RETIREMENT BOARD,  
Respondent.

CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, Counsel for the Respondents, do hereby certify that a copy of the foregoing "WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD'S BRIEF IN OPPOSITION" was served upon the Petitioners, by service upon their attorney, Bradley J. Pyles, this 28<sup>th</sup> day of July 2009, by regular mail, postage prepaid, addressed as follows::

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Logan, West Virginia 25601



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