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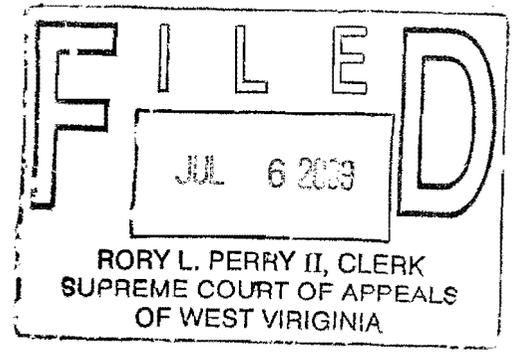
*In the Supreme Court of Appeals
of the State of West Virginia*

Docket No: 34945

KATHERINE L. HOOPENGARNER,
Petitioner,

v.

STATE OF WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Respondent.



APPEAL BRIEF

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STATEMENT OF FACTS

On October 18, 1988, the Petitioner, Katherine L. Hoopengartner, obtained a loan of \$6,503.00 from the Teachers Retirement System ("TRS"). The loan was made pursuant to W.Va. Code §18A-7-34 and was for a term of 60 months. The amount borrowed was to be repaid at the rate of 11.25% per annum and the payments were taken by way of payroll deduction by her local school board, working in conjunction with the TRS. The payroll deduction was carried out bilaterally between the employer school system and the TRS and the Petitioner was not involved in the process. The monthly payroll deductions stopped upon notification to the TRS of the bankruptcy and were never resumed.

On June 28, 1989, the Petitioner filed Chapter 7 bankruptcy proceeding in the United States District Court for the Northern District of West Virginia listing the West Virginia CPRB, as an unsecured creditor, for the then outstanding balance of \$4,585.62. Based on the discharge order entered by the Bankruptcy Court for the Northern District of West Virginia in 1989, she thought her loan and accrued interest from TRS had been discharged. She did not understand that the debt was not dischargeable in bankruptcy and, thus, continued to accrue interest. Other than stopping the monthly deductions from the beneficiary's pay to repay the loan the TRS took no action with regard to the bankruptcy case.

Fourteen years later, she was shocked to learn by letter dated May 15, 2003, that the loan had not been discharged and that she owed \$7,519.39. The May 22, 2003 letter explained the "loan" was in the nature of an advance from her retirement account. If that amount was not paid by the end of the year, the principal amount and interest would be reported as a premature distribution to the IRS, exposing her to additional taxation and penalties.

Nine months later, on January 24, 2004, the Petitioner received another letter from CPRB stating “[d]ue to an incorrect interpretation of state law, the amount indicated as your balance did not reflect all interest accrued on your loan.” The amount still owing, \$20,607.11, was three times the amount she had been told she owed in May, 2003.

The Petitioner attempted to recover the money informally but was unsuccessful. She then filed an internal administrative proceeding within the TRS. After a hearing before a hearing officer, the PERB denied all relief. The Circuit Court affirmed the decision of the PERB.

I. TRS HAD FIDUCIARY OBLIGATION TO ADVISE AND PROTECT APPELLANT

A. The first issue to be addressed is can the bankruptcy lawyer be blamed for all of this? Was the bankruptcy attorney negligent?

At the time of filing Appellant’s bankruptcy petition there was very little guidance for such bankruptcy attorneys. No rule or statute existed regarding the dischargeability of such debts. There was no clear and controlling law in effect dealing with the issue. The best an attorney could do was to tell the Debtor it was unclear whether the debt would be discharged and the TRS would object to the discharge if it was not dischargeable. That is exactly to advice Appellant received from her attorney, which was me.

TRS relies on the Villarie 648F.2d 810(2dCir. 1986) case to establish the non-dischargeability of the debt. In that case the Third Circuit held the loan was not a “debt” within the meaning of the applicable bankruptcy law. However, the decision is not binding precedent and other circuits came to a different conclusion. The bankruptcy code was silent and provided no guidance on the issue.

Therefore, bankruptcy counsel acted and appropriately advised Appellant. The law on the subject was unclear and in a state of flux. Under the circumstances the advice of counsel was reasonable and correct. The problem is the TRS did not offer any objection to the discharge and did not communicate to Appellant the TRS position on the issue.

So, it is clear the attorney filing the bankruptcy appropriately advised Appellant according to the existing state of the law at the time of the bankruptcy filing.

B. Who didn't do what they were supposed to? The answer is TRS. While the hearing examiner and Court below refused to recognize the fiduciary status of the TRS, it exists and this Court has so recognized.

The first case to be examined is Flanigan v. WVPERs, 176 W.Va. 330, 342 S.E.2d 414 (1986). In that case this Court held that W.Va. Code 5-1-3a required giving substantial weight to the remedial aspect of the PERS Act and to construe its provisions liberally in favor of the intended beneficiary and that the PERS has a "stringent duty" to avoid giving bad advice, or misleading the members or beneficiaries".

Further, in Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988) this Court actually identified the TRS as a fiduciary for the intended beneficiaries and found the TRS has the "highest fiduciary duty" to protect the fund and the participant's therein.

The tribunals below chose to ignore these cases, which are good and binding law. In that the hearing examiner was clearly wrong and this is plain legal error.

In accord with Globe Woolen Company v. Utica Gas & Electric Co., 224 N.Y. 483, 121 N.E.378 (1918) is Eddy v. Colonial Life Insurance Co., 919 F.2d 447(D.C. Cir. 1990) which also holds the government has a duty to disclose and inform and acknowledges the application of

fiduciary and equitable principles. In light of this and the other cases cited herein the government cannot deny the application of equitable principles is appropriate.

As such fiduciary relationship has been established, the question then becomes the extent to which the fiduciary responsibility exists. The answer is the responsibility extends to the failure to disclose information that should be disclosed Globe Woolen Company v. Utica Gas & Electric Co., 224 N.Y. 483, 121 N.E.378 (1918) In that decision the opinion, authored by Justice Cardozo, stated "...a beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as the spoken word."

In our case, this is exactly what happened. TRS betrayed Appellant by their silence. TRS knew the debt was not discharged and they knew the payroll deductions had been terminated. Therefore a reasonable person would have known, or at least suspected, the Appellant believed the debt was not dischargeable would have avoided this situation. However, TRS chose to do nothing and allow the interest to accumulate for fifteen years. Appellant plunged into a course of ruinous conduct which would have been avoided had TRS not remained silent.

Also, the TRS did not object to the debt being dischargeable. Within the bankruptcy proceeding there was an opportunity for TRS to challenge the dischargeability of the debt, but TRS chose to remain silent while Appellant's retirement account was drained. The role of fiduciary carries with it more responsibility than sitting quietly by watching a member's retirement be wasted.

II. EQUITY APPLIES

This Court has previously applied equitable principles to similar case involving government entities. In Board of Trustees of the Police Officers Pension and Relief Fund of the City of Wheeling v. James Carenbauer 567 S.E.2d 612,211 W.Va. 602 (2002), the Court applied equitable estoppel based on detrimental reliance. In that case the policeman had detrimentally relied on mistaken information provided to them by the government. Although a different factual scenario, the point is the Court applied equitable principles to resolve a dispute involving a governmental agency.

The Flannigan v. WVPERS, 176 W.Va. 330, 342 S.E.2d 414 (1986) case is more similar and in fact deals with PERS. The Court used the construction provision of W.Va. Code 5-10-3a to correct the situation and allow the employee to participate in PERS. This was an act of equity correcting a situation when the government gave bad advice or failed to advise the employee regarding substantial rights.

Then, in 2007, this Court decided Hudkins v. State Consolidated Retirement Board, 200 W.Va. 275, 647 S.E.2d 711 (2007). This case clearly and equivocally is controlling. The Court held equitable estoppel can be applied to government agencies if one or more of the requirements there set forth are satisfied. Let me examine these requirements and apply them to the facts of our case.

1. Estoppel will result in no injury to the public interest. The only thing the state will lose is the excess interest which should never have accumulated to start with and in fact was not even on the state's books until the IRS so required it.

2. Neither the citizens of the state nor anywhere else will suffer substantial injustice if Appellant is afforded the relief prayed for.

3. No public policy will be violated and in fact public policy demands fair and equitable treatment of employees.
4. Government functions will not be impaired.
5. In this case it would be highly inequitable not to estop the government.
6. The Appellants have been seriously injured financially and again the public intent will not be harmed. Also, if the Court fears opening a “Pandora’s Box”, the fear is without basis. No other similar cases have been filed and there are very few, if any, other persons similarly situated.

CONCLUSION

Ultimately this case is about the manner in which a government treats its citizens and employees. One would hope the government aspires to deal with its employees “fairly” or “equitably”. To remove the notion of equity from the relationship diminishes the quality and sustainability of the government.

These employees seek not to avoid their indebtedness but only to avoid the excess interest accumulated as a result of the government’s failure to properly advise and protect the employees and their retirement fund.

Respectfully submitted

KATHERINE L. HOOPENGARNER
PETITIONER, BY COUNSEL



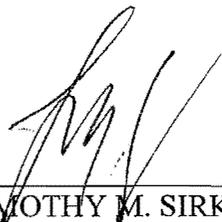
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CERTIFICATE OF SERVICE

I, Timothy M. Sirk, a practicing attorney, do hereby certify that I served a true copy of the foregoing *Petition for Appeal* upon the Respondent by mailing a true copy thereof by United States First Class mail, postage prepaid, on this the 30th day of June, 2009, addressed as follows:

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