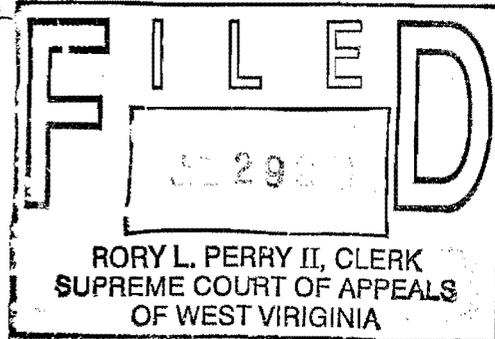


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court No. 3494A5



KATHERINE L. HOOPENGARNER

Petitioner/Appellant,

v.

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

STATE OF WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT BOARD,

Respondent/Appellee.

**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 Appellant, a member of the Teachers Retirement System (TRS), who executed a loan agreement with TRS and then, shortly thereafter, filed for bankruptcy. The executed loan agreement with TRS explicitly stated that interest would continue to accrue on any unpaid balance “until your retirement, withdrawal or death”.

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

The issue in this matter is whether or not the Appellant is obligated to pay the “loan” balance from her account with the Teachers Retirement System or, in the absence of such payment, have her eventual annuity benefit 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.¹ 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 Appellant is statutorily and contractually obligated to pay the entire “loan” balance including interest from her account with the Teachers Retirement System or, in the absence of such payment, have her eventual annuity benefit reduced.

Although collateral estoppel is not applicable in this case primarily because the Appellant is a different individual, 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).

¹In 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 Appellant's colleagues to replace the deficit created in Appellant's account by her failure to repay the accruing interest on the loan she took against their own account.

Appellant Hoopengartner is a member of the Teachers Retirement System with more than 30 years of credited service. She is employed as an executive secretary by the Mineral County Board of Education. In 1988, Appellant Hoopengartner secured a "loan" agreement from the Teachers Retirement System from her retirement account in the principal amount of \$5,173.02, 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 Hoopengartner made monthly payments through payroll deduction until July 1989. Appellant Hoopengartner filed a petition for Chapter 7 bankruptcy on June 28, 1989 and listed the Teachers Retirement System "loan" on her schedules. Upon receipt of the notice of bankruptcy, the Board notified Appellant Hoopengartner'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 \$7,519.39. On September 28, 1989, Appellant Hoopengartner received a general bankruptcy discharge for existing "debts".

Appellant Hoopengartner inquired about a new "loan" in February or March of 1990. In response to her inquiry, Appellant Hoopengartner was sent and received a memo from Attorney General James A. Swart which informed her that the repayment obligation of her 1988 "loan" continued but that payroll deductions had to be suspended.

In May 2003, Appellant Hoopengartner received a letter from the Board that her loan balance was \$7,519 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 her outstanding balance as of the end of her original repayment schedule and not reportable to the IRS at that time. Appellant Hoopengartner did not pay the \$5,251.03 to the Board by December 31, 2003.

In January 2004, Appellant Hoopengartner 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 her balance was \$20,607.11. This new figure represented interest that had accrued since the time of her original "loan" term. In August 2004, Appellant Hoopengartner was notified that her "loan" balance as of June 30, 2004, was \$21,224.54.

Appellant Hoopengartner, 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 Hoopengartner's appeal, adopting the recommendations of Hearing Officer DeBolt.

On September 1, 2005, Appellant Hoopengartner, along with two other members, James G. Clay and Michael Corbett, 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 Appellant is obligated to pay the entire "loan" balance including interest from her account with the Teachers Retirement System or, in the absence of such payment, have her eventual annuity benefit reduced.

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 APPELLANT 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 Appellant clearly informed her that she was 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 Appellant was not borrowing money from the TRS fund. The money came from her employee contributions, not the general fund or employer contributions, which resulted in a reduction of her individual account. She 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 Appellant's loan was not retroactive, as claimed in Appellant's brief, rather it was an explicit provision of the loan agreements as executed by the Appellant. How the interest was accrued and how the repayment was calculated by the Board may not have been clearly communicated to Appellant but the record demonstrates that the Appellant was sent a memorandum from then Assistant Attorney General James Swart notifying her 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 she retired or withdrew her contributions.

Appellant asserts that “the first issue to be addressed is can the bankruptcy lawyer be blamed for all of this? Was the bankruptcy attorney negligent?” Appellant contends that the answer to these questions is no because the bankruptcy code offered no guidance at the time, and further that Appellee Board is to blame for not filing an objection to the discharge in federal court.²

However, Appellant took no steps to clarify whether the loan had been discharged after she received the Swarts memorandum in 1990. Appellant has not sought clarification or an Order compelling Appellee to comply by discharging the “debt” in federal court. The Appellant’s bankruptcy Order was merely a general discharge of existing debts. Her pension “loan” is 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. Additionally, the Board is aware of one case in which the bankruptcy attorney paid the member’s loan balance because he had misinformed the member that her loan had been discharged with her bankruptcy.

Appellant has chosen this forum because of her 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. Therefore, the Board has no duty to file an objection to the discharge.

Each month that Appellant works, a percentage of her salary is withheld and placed in her

²See page 3-4 of Appellant’s *Appeal Brief*.

retirement account. Her employer also submits a certain percentage towards her retirement. The amount (“loan”) Appellant withdrew came from the money she had contributed from her salary, not from the employer portion or the general fund. It was her money. She had no obligation to pay it back. Appellee Board is not a lending institution, and is therefore not a creditor. Ms. Hoopengartner withdrew her own money from her own account, failed to replace it, and as a result her account and eventually her annuity will be reduced unless she fails to pay the balance including interest or this Court orders otherwise. This situation is analogous to attempting to have the money you spent from your bank savings account discharged in bankruptcy. Because the money she withdrew came from her own salary, Appellant occupies the position of both creditor and debtor with respect to her pension “loan”. She cannot reasonably expect to be able to discharge money she took from her own account and that this would not cause her annuity to be reduced. Her bankruptcy attorney should have known this or at least questioned it. Perhaps, they expected her colleagues or the general fund to replace the money she took.

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 APPELLANT’S COLLEAGUES TO COVER THE DEFICIT CAUSED BY THE APPELLANT 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 Appellant's colleagues to replace the deficit created in Appellant's account by her failure to repay the accruing interest on the "loan" she took against her account.

The Appellant argues that the Board breached its fiduciary duty by failing to warn the Appellant of the financial disaster to which she was oblivious; however, most of the cases cited by the Appellant were brought under ERISA. Additionally, the Appellant argues 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 Appellant's Board of Education to make timely employer contributions. This matter concerns an individual who executed a loan agreement, filed a petition for bankruptcy with the assistance of counsel, and had her "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 Appellant that she was "about to plunge into a ruinous course of dealing." Appellant was represented by counsel, and had a competent bankruptcy judge presiding over her 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 her 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 Appellant claims that the Board’s retroactive imposition of interest is a breach of the general standard of care. The Appellant argue that she should only be required to pay interest that would have accrued during the “favorable, 5-year payment schedule” because, she claims, 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 Appellant claims. 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 “loan” continued to accrue, and the obligation to pay such interest, as evidence by statute and the “loan” agreement signed by Appellant, 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 she created in her 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 Appellant 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 Appellant is 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 her 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 Appellant to repay the “loan” balance from her account within the Teachers Retirement System, or, in the absence of such payment, having her eventual annuity benefit reduced. Consequently, and under the prevailing law of this state, the doctrine of equitable estoppel cannot properly be applied here.

The Appellant’s 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.

Appellant also cites *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 Appellant has never had a legal right to be relieved of paying the balance of her “loan”, to the contrary, she had both a statutory and contractual obligation to pay the balance or have her annuity reduced to correspond with the deficit the Appellant created in her account.

Additionally, the Appellant has failed to demonstrate how she has substantially relied upon the Board’s inaction regarding the non-dischargeability of her “loan” to her detriment. As stated by the Hearing Officer:

“The applicant here has suffered nothing more than disappointment. She 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 Appellant has never had a statutory right to be relieved of her debt by having her colleagues or the fund pay for her advancement of contributions (“loan”).

D. 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 Appellant mistakenly informed the Court that there were only one or two other cases similar to this one. Counsel states in his brief as follows:

“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.”³

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.⁴ 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 Appellant also informed the Court that Appellant is willing to pay the balance owed at the time she thought her “loan” had been discharged in bankruptcy, but not the interest which has accumulated since that day, in part, because the Board had provided her with incorrect information regarding the calculation and amount of interest owed. The May 2003 letter which

³See page 6 of Appellant's brief.

⁴See 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.

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.⁵ 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 Appellant also told the Court and argued in her brief as though the lower Court’s affirmation of the Board’s decision would result in financial disaster for Appellant. Although Appellant’s failure to replace the money she withdrew from her account will result in a reduction in her annuity, unless she pays the balance or this Court orders otherwise, she will still receive a pension annuity. If Appellant Hoopengartner had retired on July 1 of this year (which she was eligible to do), her retirement annuity would have been \$1,965.28 reduced from \$2,204.76 per month. This annuity is calculated based upon the amount Appellant contributed to the system minus what she withdrew, the amount her employer contributed to the system on her behalf, and the interest which has accumulated on those combined contributions during her years of service, and her total 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 Appellant’s colleagues to replace the money the Appellant withdrew from her account.

V. CONCLUSION

⁵See attached Exhibit B.

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 Appellant invokes principles of equity and fiduciary responsibility; yet, if this honorable Court were to grant the relief requested, then the Appellant would be unjustly enriched by having her advancement of contributions (“loan”) paid for by her 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 Appellant is statutorily and contractually obligated to repay her “loan” with interest or face a reduction reflecting such offset with her retirement annuity.

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

Even though the doctrine of collateral estoppel does not apply in this case because the Appellant was 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 Appellant's request to be relieved of the statutory and contractual duty to repay her "loan" with interest.

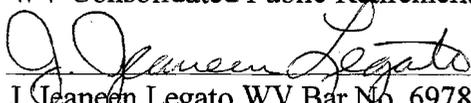
Respectfully Submitted
WV Consolidated Public Retirement Board,
By Counsel: 
J. Jeaneen Legato WV Bar No. 6978
4101 MacCorkle Ave. S.E.
Charleston, WV 25304
(304) 558-3570 ext. 52409 Fax: (304) 558-6337
Direct Dial No.: (304) 957-3522
Email: Jeaneen.J.Legato@wv.gov

Exhibit A

Loans Post Bankruptcy Filing

	<u>Original</u> <u>Amount</u>	<u>Recalculated</u> <u>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

	<u>Original</u> <u>Amount</u>	<u>Recalculated</u> <u>Amount</u>
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. 34944

KATHERINE L. HOOPENGARNER,
Petitioners,

v.

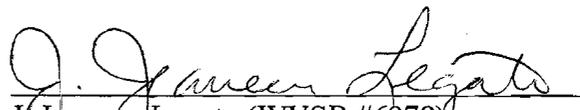
Civil Action No. 05-MISC-371
Circuit Court of Kanawha County
(Honorable James Stucky)

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 Petitioner, by service upon her attorney, Timothy M. Sirk, this 29th day of July 2009, by regular mail, postage prepaid, addressed as follows::

Timothy M. Sirk, Esquire
Post Office Box 356
Keyser, West Virginia 26726


J. Jeaneen Legato (WVSB #6978)
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