

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**RODNEY A. MYERS AND DIANE M.
MYERS,**

Petitioners Below, Appellees,

v.

No. 35470

**Appeal From the Circuit Court of
Lewis County, West Virginia,
Civil Action No. 08-C-126**

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

Respondent Below, Appellant.

**REPLY ON BEHALF OF APPELLANT, WEST VIRGINIA CONSOLIDATED PUBLIC
RETIREMENT BOARD TO RESPONSE TO APPELLEES RODNEY AND DIANE
MYERS AND RESPONSE TO CROSS ASSIGNMENT OF ERROR**

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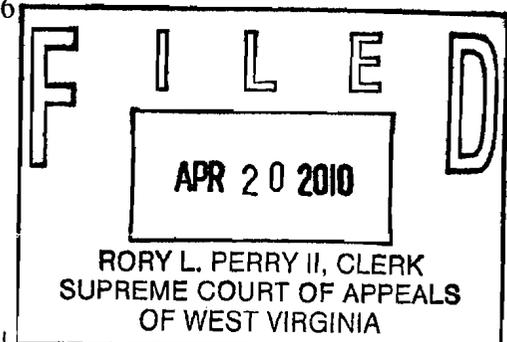


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I. REPLY TO RESPONSE OF APPELLEES

A. The Board's Denial of Appellee's Request to Include a Lump Sum Payment of Unused Leave in Calculating His Final Average Salary Did Not Violate Appellee's Contract Rights.

1. Appellee Cannot Be Presumed to Have Detrimentally Relied on a Statute Prior to its Existence.

Appellees' Response fails to explain why the Appellee should be concluded to have detrimentally relied on a statutory amendment before it was enacted. It is undisputed that from the time the Appellee was first employed by the State until 1988, the Appellee could not have included a lump sum payment for accrued unused annual leave in his final average salary. It was only in July 1988, when the Legislature's amendment of West Virginia Code section 5-5-3 became effective, that the Appellee could begin to rely. One year later, the Legislature rescinded the provision on which Appellee relies. Thus, Appellees' attempt to apply the presumption of detrimental reliance described in *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995), based on the ten years of service occurring prior to the 1988 amendment to West Virginia Code section 5-5-3 asks the Court conclude that the Appellee detrimentally relied on the amendment before it was ever made.

It is this illogical result that the Board challenges, and for which the Appellees have offered no justification or support. Simply put, a promise has to be made in order for detrimental reliance to occur. *Summers v. W. Va. Consol. Pub. Ret. Bd.*, 217 W. Va. 399, 628 S.E.2d 408 (2005). This Court implicitly recognized that this holds true in the context of the *Booth* presumption, agreeing that: "*Booth* principally stands for the proposition that government cannot take away contractual promise of pension benefits after an employee has relied thereon to his detriment, such detrimental reliance being presumed after ten years of service while the

promise shall have been made.” *Id.* at 405 (emphasis added). The Board respectfully requests that this Court affirm this principal.

2. The Evidence Clearly Establishes That Appellee Did Not Actually Detrimentally Rely on the Statute.

Even when the presumption of detrimental reliance does not apply, a retirement system member with more than ten years of service may still be said to have detrimentally relied on a statute. Appellees’ argument in this regard mistakenly rests on the notion that the Appellee has somehow been deprived of “just compensation.” Pension benefits in this State are governed by statute, however, and the statutes applicable to the Appellee’s retirement benefit clearly state, and have since the inception of the system, that the Appellee’s benefit would be based on a calculation involving his years of service and “final average salary.” W. VA. CODE § 5-10-22. As this Court has recognized, “salaries” do not include benefits such as payment for unused leave. *See W. Va. Consol. Pub. Ret. Bd. v. Carter*, 219 W. Va. 392, 396-397, 633 S.E.2d 521, 525-526 (2006) (holding that the term “final average salary,” as used in PERS, “plainly limits the calculation of retirement benefits to an annual salary paid to a member ... for personal services rendered by the member to the participating public employer,” and that payments for unused, accrued vacation leave were neither “salary” nor “annual,” and further observing that the statutory definition of “final average salary” has remained essentially the same since 1961); *Craig v. City of Huntington*, 179 W. Va. 668, 371 S.E.2d 596 (1988) (holding that a lump sum payment for accrued vacation and sick leave was not a part of an employee’s monthly salary or

compensation, and therefore was not properly considered in calculating disability pension benefits under the City's retirement plan).¹

Appellee notes that State receives a tangible benefit when employees decide to work rather than take vacation, and argues that by denying the Appellee's request, the Board has failed to provide "just compensation" for this benefit. The Appellee conveniently omits from this discussion the fact that he received a check for nearly twenty thousand dollars in exchange for this accumulated leave. Adm. Rec. Exh. 12, Benefit Estimate Requested dated November 16, 2007. He also fails to acknowledge that he has asked that this amount to be treated as salary for to increase his benefit, but without making a corresponding contribution to the retirement plan from that amount (this in contrast to the treatment of true salaries, from which deductions are required to be made).² In the alternative, the Appellee could have used the accrued leave to obtain additional service credit pursuant to West Virginia Code section 5-10-15a.

There is also no evidence that, like the employees at issue in *Booth* or *Adams v. Ireland*, 207 W. Va. 1, 528 S.E.2d 197 (1999), this Appellee could have or did make a decision to remain employed based on the statutory amendments in issue. He became employed by the State and turned down offers for other jobs before he ever believed he could include unused leave in calculating his final average salary, and remained so employed even after his ability to

¹ In both *Carter* and *Craig*, the Court observed that courts in other jurisdictions agree that the term "salary" does not include such payments. See e.g. *Stover v. Ret. Bd. of St. Clair Shores*, 38 Mich.App. 409, 260 N.W.2d 112 (Mich. Ct. App. 1977); *Kosey v. City of Washington Police Pension Bd.*, 73 Pa. Commw. 564, 459 A.2d 432 (Pa. Commw. Ct. 1983). As these and other courts have noted, allowing retirees to include these amounts in calculating their pension benefits results in "a large windfall simply because their [employer] chose to pay them a lump sum for unused vacation time in lieu of requiring them to take their vacation time prior to their official retirement date." *Kosey*, 459 A.2d at 434. This practice also results in a significant disadvantage to employees who have been sick or taken vacation, as it reduces the pension they will receive over the remainder of a lifetime. *City of Covington v. Bd. of Trustees*, 903 S.W.2d 517, 522-523 (Ky. 1995).

² This is in contrast to the treatment of salaries, from which deductions are required to be made. See W. VA. CODE § 5-10-29.

do this was rescinded. Moreover, from July 1988 to July 1989, the year during which this practice was permitted, the Appellee was not eligible to retire. July 2, 2009 Final Order of the Circuit Court of Lewis County, West Virginia (“Final Order”), p. 8. Finally, he did not request or receive any estimates which suggested to him that his accrued leave would be included in his final average salary. Adm. Rec. Exh. 12. Each of these undisputed facts establish that the Appellee did not actually detrimentally rely on the version of § 5-5-3 which permitted lump sum payments for unused leave to be included in the final average salary calculation. Accordingly, the Board requests that this Court reverse the decision of the Circuit Court and reinstate the Board’s Final Order.

B. The Amendments to West Virginia Code Section 5-5-3 and the Application of Booth’s Contract Clause Principles Do Not Result in Violations of Equal Protection Principles.

That the Appellee, who had ten years of service at the time of the 1988 amendment to West Virginia Code section 5-5-3 but who did not detrimentally rely on the amendment, is being treated differently than a member with the same years of service who did detrimentally rely, does not create a classification that violates the equal protection clause of the West Virginia Constitution. Rather, this is a recognition that the Legislature may amend and change the pension laws, and that such changes may apply to existing employees as long as those changes do not affect the contract rights of those employees.

This Court applies a three-part test when faced with equal protection arguments that relate to economic, as opposed to fundamental, rights:

“Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all

persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.’ Syllabus Point 7 [as modified], *Atchinson v. Erwin*, [172] W. Va. [8], 302 S.E.2d 78 (1983).”

Syl. pt. 3, *Summers*, 217 W. Va. 399 (citing Syllabus Point 4, *Gibson v. W. Va. Dept. of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991)). The Appellees concede that enacting and amending statutory provisions related to state employee retirement benefits is a proper governmental purpose. See Response and Cross Assignment of Error, at p. 13. Indeed, this Court has stated as much. *Summers*, 217 W. Va. at 404 (finding it “clear” that a legislative rule prohibiting the use of vacation leave to increase final salary serves the “legitimate governmental purpose of controlling the amounts paid in retirement benefits and to thereby ensure continued adequate funding” of the system).

At issue, then, is whether the alleged classification is rational, and whether all persons within the alleged class are treated equally. See Syl. pt. 3, *Summers*, 217 W. Va. 399. In *Summers*, the Court concluded that the classification at issue, which was very similar to the one created by the application of *Booth* in this case, was rational. *Id.* at pp. 403-404. Because the law permits the application of statutory amendments to employees with ten or more years of service only with respect to employees who have not detrimentally relied, factors such as whether an employee was eligible to retire, received a benefit estimate, or turned down other offers for employment, relate directly and rationally to the question of whether an employee detrimentally relied. In fact, in this State, these classifications are mandated by law. See *Booth*, 193 W. Va. 323. This part of the Court’s equal protection test is clearly satisfied.

Moreover, members of the class to which the Appellee belongs are, in fact, treated equally. While not all members of the class with which the Appellee identifies himself (members who had ten or more years of service at the time of the amendments to West Virginia Code section 5-5-3) are eligible under *Booth* and *Adams* to take advantage of the prior version of West Virginia Code section 5-5-3, all are certainly permitted the opportunity to establish detrimental reliance. Moreover, as this Court has previously held, equal protection principles are not violated simply because some members of a retirement system are prohibited from doing something that others were permitted to do so prior to enactment of rule. *See Summers*, 217 W. Va. at 403-404. Thus, the final part of the Court's equal protection test is also clearly satisfied. That the alleged classification may result in some financial impact for the Appellee does not make it unconstitutional. *See Courtney v. State Dept. of Health of W. Va.*, 182 W. Va. 465, 388 S.E.2d 491 (1989).

Finally, if the Appellees' argument is taken to its logical conclusion, absolutely no changes to the retirement system could ever be applied to existing employees. Any employee can resign at any time; if members are permitted to claim entitlement to the application of previous versions of statutes merely because they could have terminated employment while the previous version was in effect, the Legislature would be unable to make any changes to the pension statutes with respect to anyone other than new hires. That some employees might be able to take advantage of more beneficial statutes by quitting before the statute is amended, while those who remain employed become subject to the change, does not violate equal protection.

II. RESPONSE TO APPELLEES' CROSS ASSIGNMENT OF ERROR

A. Statement of Facts.

The Appellee was born January 21, 1954 and is a retired member of the West Virginia State Public Employees Retirement System ("PERS"), which is administered by the West Virginia Consolidated Public Retirement Board (the "Board"). Administrative Record, Exh. 1, Recommended Decision at p. 1. Mr. Myers retired from the West Virginia Department of Transportation, Division of Highways, effective January 1, 2008. *Id.* at p. 2. Petitioner Diane M. Myers ("Mrs. Myers") is Mr. Myers' wife and beneficiary. Pet. for Appeal, p. 1.

Following graduation from high school, Mr. Myers became employed by the Division of Highways through a cooperative education ("co-op") program. The Division of Highways operated the co-op program for students pursuing a college degree in engineering. Through this program, students were eligible to work for the Division of Highways during the summers, provided that they enroll and continue in an undergraduate engineering program and maintain requisite grades and adequate scholastic performance. Students participating in the program could then become eligible for an offer of employment in a full-time, permanent position with the Division of Highways upon graduating with an engineering degree. Mr. Myers recalls that he was required to major in civil engineering, submit his grades before each period of employment, and that the Division of Highways communicated with his school to ensure he remained in good standing. Adm. Rec. Exh. 1, pp. 2-3; Tr. of March 20, 2008 Adm. Hr'g, pp. 59-61; Adm. Rec. Exh. 2, March 31, 2000 Recommended Decision, pp. 2-4.

During the first summer he participated in the co-op program, Mr. Myers worked from June 5, 1972, through August 15, 1972, but was paid through August 21, 1972 as a result of accumulated annual leave. Although employed through the co-op program, Mr. Myers was

erroneously designated as a permanent employee on Division of Highways records, and retirement system contributions to PERS were mistakenly made on his behalf by his employer and withheld from his pay. As a result, Mr. Myers was credited with two months of service credit. At the conclusion of the summer, Mr. Myers commenced undergraduate studies in engineering at West Virginia University. Adm. Rec. Exh. 5, Tr., pp. 50-51; Adm. Rec. Exh. 12, March 31, 2000 Recommended Decision, p. 2. Mr. Myers continued in the co-op program and again worked for the Division of Highways in the summers of 1973, 1974 and 1975. No retirement system contributions were made on his behalf or withheld from his pay during these summers, and he accrued no service credit for these periods. Tr., p. 51; Adm. Rec. Exh. 12, March 31, 2000 Recommended Decision, pp. 2-3.

Mr. Myers became employed with the Division of Highways in a full-time, permanent position from June 1, 1976, upon graduating from West Virginia University with a civil engineering degree, and he remained in that employment until retirement. During this time, Mr. Myers accumulated more than thirty years of contributing service credit in PERS. Adm. Rec. Exh. 1, p. 2; Tr. p. 29; Adm. Rec. Exh. 12, March 31, 2000 Recommended Decision, p. 3. In 1999, Mr. Myers requested that the Board credit him with service credit for his 1973, 1974, and 1975 summer employment, as well as an additional month of service credit for his 1972 summer employment.

West Virginia Code sections 5-10-2 and § 5-10-17(a), which establish conditions for membership in PERS, provide that the membership of PERS consists of “all persons who become employees of a participating public employer,” an “employee” being defined as “any person who serves regularly as an officer or employee, full time, on a salary basis, whose tenure is not restricted as to temporary or provisional appointment...” “Full time employment” is

defined as “employment of an employee by a participating public employer in a position which normally requires twelve (12) months per year service and requires at least one thousand forty (1,040) hours per year service in that position.” W. VA. CODE R. § 162-5-2.3. Because Mr. Myers’ employment in the co-op program was temporary and provisional, Board staff denied Mr. Myers’ request. Mr. Myers appealed to the Board’s Hearing Officer. Adm. Rec. Exh. 12, Letter Dated May 25, 1999, Letter Dated January 4, 2000, Recommended Decision dated March 31, 2000, pp. 4-5.

The Hearing Officer’s Recommended Decision concluded that Mr. Myers’ request to purchase retroactive service credit for these periods should be denied. In the Recommended Decision, the Hearing Officer observed that Mr. Myers had been erroneously credited with two (2) months of service credit for his 1972 summer employment as a result of the mistakenly-withheld contributions, but also made a suggestion with respect to Mr. Myers:

Although it is clear that Mr. Myers’ participation in the system in 1972 was in error, equity suggests that he be permitted to retain this two-months service credit. The error, however, should not, now that the actual circumstances of his employment are known, be compounded by awarding an additional one-month’s service credit, for which he would be entitled under Rule § 162-5-5.1.2 had he been legally eligible for membership. However, should Mr. Myers not wish to receive only two months’ service credit for the contributions made, he should be permitted to withdraw these contributions, with interest.

Adm. Rec. Exh. 12, March 31, 2000 Recommended Decision, pp. 5-6. The Hearing Officer’s actual recommendation to the Board, however, addressed only the request that was actually made by Mr. Myers: “It is recommended that the request of Rodney A. Myers for additional service credit for 1972 and to acquire service credit for employment in 1973, 1974 and 1975 be denied.”

Adm. Rec. Exh. 12, March 31, 2000 Recommended Decision, pp. 5-6.

The Board of Trustees of the West Virginia Consolidated Public Retirement Board (“Board of Trustees”) considered the March 31, 2000 Recommended Decision during its May 10, 2000 meeting. The Hearing Officer summarized the facts in issue and then recommended that Mr. Myers’ request for additional service credit be denied, and made a “sub-recommendation” that he be permitted to retain the two months of service credit erroneously awarded to him. The Chairman of the Board of Trustees and the Board’s Executive Director questioned the Hearing Officer regarding this “sub-recommendation,” and in the course of the discussion, the Hearing Officer stated that his Recommended Decision did not actually make a recommendation on the erroneously awarded two (2) months of credit – in fact, Board staff had never taken any action regarding those two (2) months, having not been aware that they were accrued erroneously until Mr. Myers’ made his request to obtain the other months of service credit. The Board of Trustees then voted to adopt the Recommended Decision of the Hearing Officer. Adm. Rec. Exh. 7. Mr. Myers did not appeal the Board’s adverse decision, and the Board took no further action in the matter. *Id.*

Upon applying for retirement in 2007, Board staff, pursuant to standard practice, conducted an audit of Mr. Myers’ account, and after learning that Mr. Myers remained credited with the two months of erroneously awarded service credit, issued a check to the Division of Highways for the mistaken employee and employer contributions and notified that agency that it should refund Mr. Myers’ mistaken contributions to him. The Division of Highways did so, issuing a check to Mr. Myers in the amount of \$39.72, which constituted the erroneous contributions made by Mr. Myers in 1972, without interest.³ Mr. Myers was informed of this

³ W. VA. CODE § 5-10-44 requires the Board to correct any employer error which results in any person receiving from the system more or less than he or she would have been entitled to receive had the records been correct. The Board is not authorized by this statute to pay interest resulting from an employer error.

action and the reason for it by letter dated February 6, 2008. Adm. Rec. Exh. 1, p. 3; Adm. Rec. Exh. 12. Mr. Myers appealed the Board's decision to remove the two (2) months of service credit from his account. Adm. Rec. Exh. 1, Final Order; Adm. Rec. Exh. 5, Recommended Decision; Adm. Rec. Exh. 12, Letter dated February 13, 2008.

Mr. Myers appealed the decision, along with the Board's denial of his request to include a lump sum payment for accrued unused annual leave in calculating his final average salary, and the Board's Hearing Officer issued a Recommended Decision on May 20, 2008 that his requests be denied. At its September 3, 2008 meeting, the Board of Trustees adopted the Recommended Decision and issued the September 3, 2008 Final Order. Adm. Rec. Exh. 1; Adm. Rec. Exh. 5. The Board's denial of Mr. Myers' request to retain the two (2) months of service credit he mistakenly accrued was affirmed on appeal to the Circuit Court of Lewis County by order dated July 2, 2009.

B. Discussion of Law.

1. The Board's Denial of the Appellees' Request To Retain Service Credit for His 1972 Co-Op Employment Was Not In Error Because the Appellee Did Not Meet the Statutory Eligibility Requirements for Membership in PERS During That Period.

To be entitled to service credit for a period of employment, an individual must show that, during the period, he or she met the statutory requirements for membership in PERS.

Membership in PERS is governed by W. VA. CODE § 5-10-17, which provides that:

The membership of the retirement system consists of the following persons:

(a) All **employees**, as defined in section two [§ 5-10-2] of this article, who are in the employ of a political subdivision the day preceding the date it becomes a participating public employer and who continue in the employ of the participating public employer

on and after the date shall become members of the retirement system ...

(emphasis added). “Employees” are defined in Section 5-10-2 as “any person who serves regularly as an officer or employee, full time, on a salary basis, whose tenure is not restricted as to temporary or provisional appointment ...” W. VA. CODE § 5-10-2(11).⁴ Accordingly, to be eligible for the service credit Petitioner seeks, he must: (1) establish that he was a full time employee; **and**, (2) establish that he was not a temporary or provisional employee. The Board correctly found that the Appellee failed to establish both of these requirements.

a. The Appellee’s Employment Was Not Full-Time.

To constitute full-time employment, the Board’s regulations requires the

employment of an employee by a participating public employer in a position which normally requires twelve (12) months per year service and/or requires at least 1,040 hours per year service in that position is considered full-time employment.

W. VA. CODE R. § 162-5-2.3. The Appellee’s employment with the Division of Highways was only for summer periods of approximately three months in length. Final Order pp. 9-10. The Board’s finding that the Appellee’s employment in 1972 was not full-time is clearly supported by evidence in the record, and was alone a sufficient basis upon which to deny the Appellee’s request.

b. The Appellee’s Employment Was Provisional and Temporary.

The Appellee’s request to receive service credit for a period of co-op employment was also properly denied because the employment was provisional and temporary,

⁴ The relevant language of the statutory definition of “employee” has remained virtually the same throughout the years; however, the numbering of the specific subsections within W. VA. CODE § 5-10-2 in which it appears has changed over the years. Thus, the language the Hearing Officer references in W. VA. CODE § 5-10-2(6) can now be found at W. VA. CODE § 5-10-2(11).

and therefore expressly excluded from the definition of employment set forth in W. VA. CODE § 5-10-2(11). Final Order pp. 9-10. Although not defined in PERS statutes, “provisional” is generally defined as “[t]emporary; preliminary; tentative.” Black’s Law Dictionary (6th Ed. abr.) p. 852. This accurately describes the nature of the Appellee’s co-op employment. The Appellee only worked as a co-op employee in the summer, while not taking classes, thus the employment was temporary in nature; the co-op employment was offered before the Appellee was qualified for full-time, permanent work as an engineer, thus it was preliminary in nature; and finally, the opportunity for co-op employment was contingent on a number of factors, including remaining in college, majoring in civil engineering and maintaining grades, and thus was tentative. In every sense, this employment was provisional; therefore, the Circuit Court correctly concluded that the Appellee is not entitled to service credit for this period.

2. The Doctrine of Res Judicata Does Not Entitle the Appellee to Any Relief Because His Request To Retain the Service Credit Was Not Made and Therefore Was Not and Could Not Have Been Adjudicated In the Course of the 2000 Appeal.

The Appellee argues that he should be afforded the service credit in issue because he believed it was awarded to him in the course of the 2000 administrative appeal. Thus, the Hearing Officer and Circuit Court considered whether the doctrine of *res judicata* entitled the Appellee to the service credit, and both concluded that this doctrine could not apply because the issue was not properly raised or rule upon in the 2000 appeal. Adm. Rec. Exh. 1, Recommended Decision p. 5 (citing Syl. Pt. 2, *Rowe v. Grapevine Corp.*, 206 W. Va. 703, 527 S.E.2d 814 (1999) (“For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency’s adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identity

of the issues litigated is a key component to application of administrative *res judicata* or collateral estoppel.”)

Relief based on *res judicata* requires the establishment of three elements:

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Syllabus point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997). The Hearing Officer’s finding that the Appellee’s entitlement to the two months of service credit was not actually litigated or determined by the 2000 administrative appeal is clearly supported in the record; therefore, there was no final adjudication on the merits in the prior action which would satisfy the first element.

The Appellee never asked the Board to determine whether he could retain the credit; the 2000 Recommended Decision does not address arguments made or evidence submitted that dealt with that issue; a transcript of the meeting shows that the Hearing Officer clearly told the Board that he did not make a recommendation in this regard, and that the Board therefore took no action; and most importantly, as the Board and Circuit Court found, no administrative action had been taken regarding the 1972 service prior to the appeal; therefore, the appeal could not have dealt with the issue, as there was simply no Board action for the Appellee to contest at that time. The Hearing Officer and Board of Trustees did not have the ability in the course of the 2000 administrative appeal to decide whether the Appellee was entitled to retain the two months of service credit in issue because no Board action to remove the credit had yet

occurred – in fact, there was not even a request by the Appellee to retain the credit. The Board’s Legislative Rules clearly require a written decision from Board staff before an appeal can be taken. W. VA. CODE R. § 162-2-7.1. Accordingly, *res judicata* does not offer the Appellee any relief.

While the PERS provisions are to be liberally construed, West Virginia’s Supreme Court of Appeals has noted that it “may not confer retirement benefits for employment where the legislature has not so authorized.” *In re Cain*, 197 W. Va. 514, 518 n.9, 476 S.E.2d 185, 189 n.9 (1996). Moreover, by law, the Board is required to correct errors when the result of an error would confer on a participant more or less than he or she would have been entitled to receive had the records been correct. W. VA. CODE § 5-10-44. The Board’s decision simply reflects that the work for which the Appellee seeks service credit is expressly excluded from the type of work eligible for such credit under the applicable statutes and regulations.⁵ Accordingly, the Board’s denial of the Appellee’s request should be affirmed.

3. Principles of Equity Do Not Justify The Result the Appellees Seek.

The Appellee argues that even if the doctrine of *res judicata* does not entitle him to relief, he should be permitted to retain the service credit as a matter of equity. This argument was squarely rejected by both the Hearing Officer and Circuit Court. The only basis for the Applicant’s argument in this regard is that he received yearly statements crediting him with the two months of service credit. This is essentially an argument that he the Appellant is now

⁵ In two similar cases, the Circuit Court of Kanawha County affirmed the Board’s decisions to deny PERS service credit for co-op employment. *See Dietz v. CPRB*, Civil Action No. 06-AA-108 (J. Bloom) and *Epperly v. CPRB*, Civil Action No. 06-AA-107 (J. Zakaib). The cases were consolidated for appeal to the West Virginia Supreme Court of Appeals, No. 070309, which denied the Petition for Appeal on March 15, 2007. *See also Cuervo v. CPRB*, Civil Action No. 07-AA-115 (J. King), which affirmed the Board’s decision to remove from an applicant’s account mistakenly credited service credit for co-op employment.

estopped from correcting the error; however, this argument must fail because this is not a proper case for the application of estoppel against the Board, and because the Appellee's reliance was not reasonable.

“[E]stoppel applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party's misrepresentation or concealment of a material fact...” *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998) (quoting *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989)). Having learned through the course of the 2000 appeal that co-op employment was not, in fact, employment for which he should be receiving PERS service credit, the Appellee cannot now claim to have reasonably relied on the statements which showed that he retained the two months of service credit mistakenly earned in 1972.

Moreover, this is not a proper case for the application of estoppel against the Board. As this Court has held, “[t]he doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state.” Syl. pt. 3, *Hudkins v. W. Va. Consol. Pub. Retirement Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) (quoting *Samsell v. State Line Development Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970)). In contrast to the retiree in *Hudkins*, this Appellee did not take any action that significant action such as retirement based on the belief that he would retain the two months of service credit. He was never told by Board staff that he could retain those months, and only raised that question in the course of his retirement. Finally, the Appellant notes that there was no prejudice to the Appellee simply because the two months service credit issue was decided in the course of this appeal, rather than the prior. The Appellee was given the opportunity to present evidence and testimony to support

his request in the instant appeal; had he made the request in the course of the 2000 appeal, he would have received the same opportunity. Accordingly, the Board submits that it should not be estopped from now correcting the error.

C. Relief Requested.

For the reasons set forth herein, Appellant, the West Virginia Consolidated Public Retirement Board, respectfully requests that this Court reverse the July 2, 2009 Final Order of the Circuit Court of Lewis County, West Virginia, and reinstate the September 3, 2008 Final Order of the West Virginia Consolidated Public Retirement Board denying the Appellee's request to include the lump sum payment he received for accrued unused annual leave in computing his final average salary for purposes of PERS benefits.

Respectfully submitted,

THE WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Appellant.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RODNEY A. MYERS AND DIANE M.
MYERS,

Petitioners Below, Appellees,

v.

No. 35470
Appeal From the Circuit Court of
Lewis County, West Virginia,
Civil Action No. 08-C-126

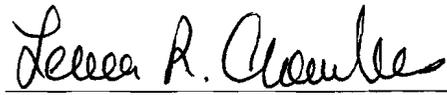
WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Respondent Below, Appellant.

CERTIFICATE OF SERVICE

I, Lenna R. Chambers, counsel for Petitioner West Virginia Consolidated Public Retirement Board hereby certify that I have served the foregoing *“Reply on Behalf of Appellant, West Virginia Consolidated Public Retirement Board to Response to Appellees Rodney and Diane Myers and Response to Cross Assignment of Error”* upon counsel for the Appellees by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 20th day of April, 2010, addressed as follows:

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