

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICHARD H. BURTON,

Petitioner Below, Appellee,

v.

No. 35507

Appeal From the Circuit Court of
Kanawha County, West Virginia,
Civil Action No. 06-AA-169

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Respondent Below, Appellant.

BRIEF ON BEHALF OF THE APPELLANT,
WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD

Submitted on Behalf of Appellant by:
Lenna R. Chambers, Esq. (WVSB # 10337)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
lchambers@bowlesrice.com
Telephone (304) 347-1777
Facsimile (304) 347-2196

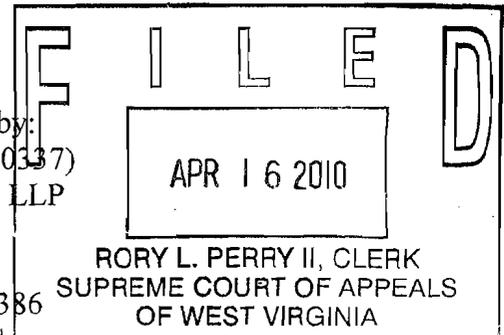


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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal is brought by the West Virginia Consolidated Public Retirement Board (the "Board" or the "Appellant"), which is charged by statute with the administration of various retirement plans for state, local and municipal employees, including the West Virginia Public Employees Retirement System ("PERS"). *See* W. VA. CODE § 5-10D-1(a). This appeal is taken from the August 6, 2009 Final Order of the Circuit Court of Kanawha County, West Virginia (the "Final Order"), which reversed the October 26, 2006 decision of the Board denying Appellee Richard H. Burton's ("Mr. Burton" or the "Appellee") request to include the amount of a lump sum payment for accrued unused annual leave in computing his final average salary. On appeal by the Appellee, the Circuit Court of Kanawha County reversed the Board's decision.

The issues presented in this appeal are (1) whether the Circuit Court erred by holding that *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995) and *Adams v. Ireland*, 207 W. Va. 1, 528 S.E.2d 197 (1999) create an irrefutable presumption that any employee with more than ten years of service is entitled to the benefit of a statutory amendment, no matter how short-lived, and regardless of all other factors; and (2) whether the Circuit Court erred in reversing the Board's well-supported factual finding that the Appellee did not rely to his detriment on a statutory amendment.

II. STATEMENT OF FACTS

Mr. Burton was born August 4, 1948 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"). Adm. Rec. Exh. 1, Recommended Decision at p. 2.¹ Mr. Burton ceased employment with the West Virginia Bureau of Employment Programs, Unemployment Compensation Division, on January 31, 2005 and retired effective February 1, 2005. *Id.*

Mr. Burton earned more than thirty years of contributing service credit in PERS, first with the Division of Highways, and then with the Unemployment Compensation Division. Adm. Rec. Exh. 1, Recommended Decision at p. 2. By the date of his retirement, Mr. Burton had accumulated a number of unused annual leave hours. *Id.* As is permitted by W. VA. CODE § 5-5-3, in the course of retiring, Mr. Burton requested and received from his employer a lump sum payment for those hours in the amount of \$12,050.29. *Id.* No retirement system contributions were withheld from this payment. *Id.*; see also Adm. Rec. Exh. 7. Ten months

¹ All citations to the Administrative Record are referred to as "Adm. Rec. Exh. ____". When possible, more specific references to the various documents that comprise each exhibit will follow. References to the transcript of the administrative hearing are referenced as "Tr. at p. ____".

after retiring, Mr. Burton wrote to the Board and requested that his retirement benefits be recalculated by including the lump sum payment for accrued unused annual leave in calculating his final average salary, and further requesting that the Board apply the recalculation retroactively, and pay him the additional amount he believed he should have received, with interest. Adm. Rec. Exh. 7, December 11, 2005 letter from Mr. Burton.

When Mr. Burton was first hired by the Division of Highways in 1972, no statutory provision was in effect which allowed a PERS member or retiree to receive a lump sum payment for accrued unused annual leave and include that amount in calculating his final average salary.² In 1986, the West Virginia Legislature enacted W. VA. CODE § 5-5-3 providing that eligible state employees, including PERS members, could elect to receive a lump sum payment for unused leave. This statute, which became effective on July 1, 1986, provided that:

Every eligible employee, as defined in section one of this article, at the conclusion of such employee's active employment by resignation, death, retirement or otherwise, may be paid in lump sum amount, at their option, for their accrued and unused annual leave at the employee's usual rate of pay at such time. Such lump sum payment shall be made by the time of what would have been the employee's next regular payday had his employment continued; and in determining the amount of such annual leave entitlement, weekends, holidays or other period of noncountable time shall be excluded.

W. VA. CODE § 5-5-3 (1986).

The following year, on March 14, 1987, the Legislature adopted an amendment to this statute, providing that no employee contribution be deducted from amounts paid for

² In *W. Va. Consol. Pub. Retirement Bd. v. Carter*, 219 W. Va. 392, 633 S.E.2d 521 (2006), this Court held that the term "final average salary," as used in W. VA. CODE § 5-10-2 "plainly limits the calculation of retirement benefits to an annual salary paid to a member . . . by a participating public employer for personal services rendered by the member to the participating public employer." In so holding, this Court noted that the statutory definitions of "final average salary" has remained essentially the same since 1961. *Carter*, 219 W. Va. at 397.

accrued and unused leave, and clarifying that no retirement service credit was awardable on the basis of such leave. That amendment, which became effective from passage, amended W. VA. CODE § 5-5-3 to read as follows:

Every eligible employee, as defined in section one of this article, at the time his or her active employment ends due to resignation, death, retirement or otherwise may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular payday had his employment continued. In determining the amount of annual leave entitlement, weekends, holidays or other periods of normal, noncountable time shall be excluded, and no deductions may be made for contributions toward retirement from lump sum payments for unused, accrued annual leave, since no period of service credit is granted in relation thereto, and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending unit.

W. VA. CODE § 5-5-3 (1987). This amendment clarified that lump sum payments for accrued, unused annual leave were not to be treated in the same manner as payments of salary for purposes of state retirement plans.

Then, in 1988, the Legislature again amended this provision to provide that, even though lump sum payments for accrued, unused annual leave could not serve as the basis for additional retirement system service credit, such payments could be considered for purposes of calculating a retiring member's final average salary:

Every eligible employee, as defined in section one of this article, at the time his or her active employment ends due to resignation, death, retirement or otherwise, may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular pay day had his employment continued.

In determining the amount of annual leave entitlement, weekends, holidays or other periods of normal, noncountable time shall be excluded, and no deductions may be made for contributions toward retirement from lump sum payments for unused, accrued annual leave, since no period of service credit is granted in relation thereto; however, such lump sum payment is to be a part of final average salary computation; and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending unit: *Provided*, That the superintendent of the department of public safety shall make deductions for retirement system contributions of members of the department, since retirement benefits are based on cumulative earnings rather than period of service.

W. VA. CODE § 5-5-3 (1988).

This amendment was passed on March 12, 1988 and became effective July 1, 1988; however, the following year, effective July 8, 1989, the West Virginia Legislature again amended W. VA. CODE § 5-5-3, removing the language permitting lump sum payments for accrued unused annual leave to be part of the final average salary computation, and providing as follows:

Every eligible employee, as defined in section one of this article, at the time his or her active employment ends due to resignation, death, retirement, or otherwise, may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular payday had his employment continued. In determining the amount of annual leave entitlement, weekends, holidays or other periods of normal, noncountable time shall be excluded, and no deductions may be made for contributions toward retirement from lump sum payments for unused, accrued annual leave, since no period of service credit is granted in relation thereto; however, such lump sum payment not be a part of final average salary computation; and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending

unit: *Provided*, That the superintendent of the department of public safety shall make deductions for retirement system contributions of members of the department, since retirement benefits are based on cumulative earnings rather than period of service.

W. VA. CODE § 5-5-3 (1989). This provision remains in force and materially unchanged today.

See W. VA. CODE § 5-5-3 (2009).

Mr. Burton made the decision to become employed by the State at a time when lump sum payments for accrued unused annual leave were not permitted to be used to increase final average salaries, and remained employed with the State for more than fifteen years under these terms. Moreover, he remained employed with the State and participated in PERS for more than fifteen years after the statute was amended to again prohibit this practice. Thus, for only one year of Mr. Burton's more than thirty year tenure with the State was a statute in effect which permitted Mr. Burton to use the lump sum payment for accrued unused annual leave to inflate his final average salary.

During the only year when the statute permitted this, Mr. Burton was not eligible to retire. Tr. at pp. 9, 10, 12. Mr. Burton testified at the hearing that he received and turned down offers for other employment, but did not specify whether those other offers occurred before, during or after the changes made to W. VA. CODE § 5-5-3, or whether his decision turned in any way on the particular benefit granted by the 1988 version of W. VA. CODE § 5-5-3. Tr. at pp. 9-10. Rather, he stated that he relied on his ability to participate in the system generally. *Id.* Nonetheless, Mr. Burton asserts that he is entitled to both a presumption of reliance and a finding of actual reliance on the language of W. VA. CODE § 5-5-3 as it existed from July 1, 1988 to July 8, 1989.

Board staff considered Mr. Burton's request to include the lump sum payment for unused annual leave in his final average salary but concluded that he was not entitled to the application of the rescinded version of W. VA. CODE § 5-5-3. Adm. Rec. Exh. 1, Recommended Decision at p. 2; *see also* Adm. Rec. Exh. 7. Mr. Burton appealed the decision and after holding a hearing on the matter, reviewing briefs submitted by both parties and considering the request, on September 29, 2006, the Board's Hearing Officer issued a Recommended Decision that his request be denied. Adm. Rec. Exhs. 2, 4, 5. At its October 26, 2006 meeting, the Board of Trustees of the West Virginia Consolidated Public Retirement Board adopted the Recommended Decision and issued the October 26, 2006 Final Order. Adm. Rec. Exh. 1.

Mr. Burton appealed the Board's decision to the Circuit Court of Kanawha County, West Virginia, filing a Petition for Appeal on November 21, 2006. After considering briefs submitted by both parties, the Circuit Court ruled in favor of Mr. Burton, and reversed the Board's denial of Mr. Burton's request to include the lump sum payment amount in calculating his final average salary. Final Order at pp. 1, 5. The Circuit Court ordered the Board to include the lump sum payment in the calculation of Mr. Burton's final average salary for purposes of the calculation of his retirement benefit, and to apply this calculation retroactively to his date of retirement. *Id.* pp. 5-6. The Circuit Court also ordered the Board to pay interest on the recalculated unpaid portion of the benefit. *Id.* at p. 6. Although Mr. Burton requested attorneys' fees and costs in his Petition for Appeal, the Circuit Court did not grant them. The Board now appeals the Circuit Court's Final Order.

III. ASSIGNMENTS OF ERROR

- A. **The Circuit Court Erred by Applying the Presumption of Detrimental Reliance Established in *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995), to the Appellee.**
1. **The Presumption Does Not Apply Where the Statute In Question Was Not In Effect Throughout the Period of Service Relied Upon To Establish the Presumption.**
 2. **The Circuit Court Erred by Failing to Recognize that the Appellee Acquiesced to the 1989 Amendment to W. VA. CODE § 5-5-3.**
- B. **The Circuit Court Erred by Reversing the Board's Finding of Fact that Respondent Did Not Detrimentally Rely on the 1988 Amendment to W. VA. CODE § 5-5-3 Because There Was Substantial Evidence in the Record to Support the Board's Finding.**

IV. POINTS AND AUTHORITIES RELIED UPON

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V. DISCUSSION OF LAW

This appeal is brought pursuant to the West Virginia Administrative Procedure Act, which governs the review of contested administrative decisions issued by a circuit court, and specifically provides that:

(g) The 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 petitioner or petitioners 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.

W. VA. CODE § 29A-5-4 (g).

A. The Circuit Court Erred by Applying the Presumption of Detrimental Reliance Established in *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995), to the Appellee.

At issue in this appeal is whether the 1989 amendment to W. VA. CODE § 5-5-3 unconstitutionally impaired an obligation of contract, in violation of Article III, Section 4 of the West Virginia Constitution, with respect to the Appellee. This Court has previously addressed the constitutionality of amendments to public pension statutes, and concluded that the “determinative factor” is whether the employee may be said to have detrimentally relied on the

statute. *Adams v. Ireland*, 207 W. Va. 1, 528 S.E.2d 197 (1999) (citing *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995)). The key question in this case, therefore, is whether the Appellee detrimentally relied on the 1988 version of W. VA. CODE § 5-5-3. The Circuit Court erred in making this determination by holding that the Appellee was entitled to a presumption of detrimental reliance on a statute based on years of participation in the system when the statute was not in effect.

This Court has, in two opinions, described how an employee can establish detrimental reliance such that an amendment to a public pension plan statute cannot apply to him. In *Booth*, this Court observed that “line drawing in this ... regard must be made on a case-by-case basis, but after ten years of state service detrimental reliance is presumed.” Syl. pt. 15, *Booth*, 193 W. Va. 323. In both *Booth* and *Adams*, the Court indicated that, in the alternative to showing substantial participation in a system, an employee could show actual detrimental reliance. *Adams*, 207 W. Va. at 8.

1. The Presumption Does Not Apply Where the Statute In Question Was Not In Effect Throughout the Period of Service Relied Upon To Establish the Presumption.

The Circuit Court reasoned that the 1989 amendment to W. VA. CODE § 5-5-3 could not be applied to the Appellee because he had substantially participated in the system at the time of the amendment. Final Order p. 4. When the Appellee was first hired by the State in 1972, no statutory provision was in effect which allowed a PERS member or retiree to receive a lump sum payment for accrued unused annual leave and include that amount in calculating his final average salary. In fact, this Court has already, in previous cases, held that benefits of this type are clearly not payments that should be considered salary for purposes of calculating pension benefits. 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).³ Thus, aside from the brief period during which W. Va. Code § 5-5-3 permitted this, the law had always been that lump sum payments of the kind received by the Appellee do not constitute salary.

In 1986, the West Virginia Legislature enacted W. VA. CODE § 5-5-3, which allowed eligible state employees, including PERS members, to elect to receive a lump sum payment for unused annual leave. The following year, the statute was amended to provide that no deductions for retirement system contributions be taken from such lump sum payments, because no retirement system service credit was to be granted in relation to such payments. These amendments required employers to refund any deductions which had been made from such amounts. W. VA. CODE § 5-5-3 (1987). The Legislature again amended this provision in 1988, this time providing that such lump sum payments were to be a part of the final average

³ In both *Carter* and *Craig*, the Court observed that courts in other jurisdictions agree. 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).

salary computation. W. VA. CODE § 5-5-3 (1988). In 1989, the Legislature removed the language permitting lump sum payments to be included in the final average salary computation. W. VA. CODE § 5-5-3 (1989). Thus, the Appellee had participated in the PERS for more than fifteen years at the time W. VA. CODE § 5-5-3 was amended to prohibit the inclusion of a lump sum payment in computing a member's final average salary; however, this practice was permitted for only one of those more than fifteen years.

Rather than considering the inherent contradiction with such a position, the Circuit Court applied the presumption set forth in *Booth* based on the number of years an employee participates in a system. The Circuit Court's application of the *Booth* presumption was in error because, as the Hearing Officer reasoned,

The only logical construction to be made [of the *Booth* presumption] is that the ten-years of service must have occurred while the benefit was being promised. There can be no legitimate expectation or reliance developed if there is no promised benefit. The whole sense of the presumption is the concept of an employee, in reliance upon a promised benefit, forgoing other employment options.

Adm. Rec. Exh. 1, p. 7. Admittedly, the *Booth* opinion does not expressly adopt this distinction; however, the opinion certainly implicitly recognized that a promise must have been made in order for reliance to be shown. In summarizing the test applied to these questions, this Court stated that:

[t]he determination of an employee's vested contract rights concerns whether the employee has sufficient years of service in the system that he or she can be considered to have relied substantially to his or her detriment on the existing pension benefits and contribution schedules.

Syl. pt. 3, *Booth*, 193 W. Va. 323; *see also* syl. pt. 5 (observing that the issue in many public employee pension cases is whether employees have a property right protected under the contract clauses because of substantial detrimental reliance on the existing pension system) (emphasis added); *see also* *Summers v. W. Va. Consol. Pub. Ret. Bd.*, 217 W. Va. 399, 405, 618 S.E.2d 408, 414 (2005) (recognizing that there can be no detrimental reliance under the *Booth* test where there is no statutory promise on which employees can rely).

The Circuit Court's reasoning, and the Appellees' argument, that the *Booth* presumption applies is based largely on the statement made in this Court's decision in *Adams*, that "[t]he length of time that a public employee pension statute was in effect is not the controlling factor in determining whether a subsequent statutory amendment has unconstitutionally impaired a public employee's contract." *Adams*, 207 W. Va. at 8. This statement was a response to the lower court's conclusion that the constitutional protection against impairment of contracts "has no relevance to an accrued annual leave statute that was in existence for only one year prior to its repeal[.]" *Id.* This statement merely recognized that *Booth's* detrimental reliance standard always applies to the question of whether an amendment to a public pension statute violates the West Virginia Constitution's prohibition against impairment of contracts. At no point in *Adams* did this Court hold that *Booth's* presumption of detrimental reliance based on years of service applied where a statute was not in effect during the years of service relied upon to obtain the presumption.

Moreover, if *Booth's* presumption applied to all employees with more than ten years of participation in the system, regardless of the length of time the statute in question was in effect, as suggested by the Appellee, this Court could have ruled in Mr. Adams' favor solely on the basis of its observation of the date of Mr. Adams' commencement in the PERS plan. *See id.*

at pp. 3-4. Instead, this Court remanded the case to the circuit court with orders to develop a record upon which to consider whether Mr. Adams could show detrimental reliance.⁴ The Hearing Officer's Recommended Decision took these facts into account, but the Circuit Court did not.

This Court implicitly recognized that detrimental reliance for purposes of these questions may be presumed or established when it concluded in *Adams*, that “[w]ithout a record, we are unable to evaluate whether the appellant substantially participated in the public employee’s retirement system, or whether the appellant relied on his detriment on the 1988 version of W. VA. CODE 5-5-3.” *Id.* (emphasis added). As the Hearing Officer reasoned in the Recommended Decision, this Court ruled in Mr. Adams’ favor and permitted Mr. Adams’ suit to proceed because he established the possibility of actual detrimental reliance. Adm. Rec. Exh. 1, at p. 6-7. In particular, Mr. Adams was eligible to retire during the time period when the 1988 version of W. VA. CODE § 5-5-3 was in effect, but allegedly chose not to so that he could continue working and accrue additional unused leave time that would be added into his final average salary. *Adams*, 207 W. Va. at 4. Similarly, the employees who brought the appeal in *Booth* were, at the time of the statutory amendments in issue, eligible to retire. 193 W. Va. at 332. The Appellee, on the other hand, was not eligible to retire in 1988 or 1989, while the statutory amendment at issue in this appeal was in effect.

Taken together, and recognizing the contexts in which they were issued, *Booth* and *Adams* establish two ways for employees to show detrimental reliance on a statute or promised benefit: (1) by presumption, if an employee participates in a system while the statute is

⁴ The case was settled out of court and no further opinions were issued.

in effect or the benefit is promised for more than ten years; or (2) by presenting evidence of and establishing actual detrimental reliance. Contrary to the Appellee's assertion and the Circuit Court's ruling, the fact that the Appellee had participated in PERS for more than ten years in 1989, when the amendment to W. VA. CODE § 5-5-3 removed the ability to include a lump sum payment in computing final average salary, does not alone entitle him to a presumption of detrimental reliance on a statutory provision first enacted in 1988.

Even if the *Booth* presumption were held to apply, the Board submits that the length of time a statute is in effect should be considered relevant as a rebuttal of that presumption. While this Court held that the length of time a statute is in effect is not the "controlling factor" in determining whether an employee has detrimentally relied on a statute such that an amendment thereto cannot be applied to an employee, it has not held that this factor cannot be considered. *Adams*, 207 W. Va. at 8. In fact, this Court directly tied the notion of detrimental reliance to the amount of time an employee participates in a system promising certain benefits. *See* syl. pts. 3 and 5, *Booth*. Thus, even if the *Booth* presumption of detrimental reliance applies, the length of time a statute is in effect should be considered, along with other factors such as whether prior to the enactment of a statute, a benefit was promised, as evidence rebutting the presumption.

2. The Circuit Court Erred by Failing to Recognize that the Appellee Acquiesced to the 1989 Amendment to W. VA. CODE § 5-5-3.

In both *Adams* and *Booth*, this Court observed that the Legislature can reduce a participating employee's pension property rights if the public employee acquiesces to such changes; however, neither decision actually considered whether the employees in those circumstances acquiesced to the amendments in issue. *See Adams*, 207 W. Va. at 7 (quoting

Booth, 193 W. Va. at 341-2). This issue was not specifically raised or addressed in either case. As previously noted, *Adams* reached this Court after the Circuit Court denied a motion to dismiss; therefore there was no evidence in the record on this point. The employees in *Booth*, however, sought to enjoin the implementation of the amendments before the effective date of the amendments. *Booth*, 193 W. Va. at 331.

The Appellee clearly acquiesced in the statutory amendment at issue in this case by remaining employed for more than fifteen years afterwards, without objecting or even contacting the Board during that time. The Circuit Court's Final Order, however, did not address this argument. The Board submits that even if the Appellee is considered to have detrimentally relied on the amendment granting the benefit of including a lump sum payment in computing his final average salary solely by virtue of his years of service, he acquiesced in the change by remaining employed for many years after the ability to do so was statutorily revoked. The Appellee in this case did not in any way object to the 1989 amendment to W. VA. CODE § 5-5-3 which removed the ability of employees to include lump sum payments for unused annual leave in computing final average salary. This alone should have been a sufficient basis upon which to affirm the Board's Final Order.

This Court's decisions in *Booth* and *Adams*, as interpreted by the Circuit Court, will have a significant fiscal impact on the operation of each and every retirement system administered by the Board and funded by the State. This is so in a direct sense because W. VA. CODE § 5-5-3 applies to almost all State employees,⁵ and lump sum payments received by state

⁵ W. VA. CODE § 5-5-3 applies to all "eligible employees," defined as "any regular full-time employee of the State or any spending unit for the State who is eligible for membership in any state retirement system of the State of West Virginia or other retirement plan authorized by the State." W. VA. CODE § 5-5-2(a)(1). Members of the Death, Disability and Retirement Fund for State Police are not subject to these rules since final average salary is not part of the computation for such members' annuities.

employees for accrued unused annual leave under W. VA. CODE § 5-5-3 are not reduced for retirement plan contributions, nor are corresponding employer contributions made. In a broader sense, the existence of a rule which prohibits detrimental changes for any state employee with ten or more years of service, regardless of any and all factors other than those years of service, strips the Legislature of the ability to correct mistakes and respond to changing conditions to protect the fiscal soundness of the State's retirement plans.

This interpretation also undermines this Court's acknowledgment that the Legislature is permitted to amend statutes with respect to employees in a system with a few years of service. *See e.g. Booth*, 193 W. Va. at 340 (observing that changes can be made with regard to new employees and employees with so few years of service that they cannot be said to have substantially relied to their detriment). If this Appellee can be said to have detrimentally relied on a statute in existence for only one year, employees who have participated in a system for only one year could argue that they too have detrimentally relied on statutes in existence for that year. The Board does not dispute that lines may be drawn to declare some to be absolutely protected from detrimental amendments to their state pensions, it simply disputes that the line is drawn in the manner the Appellee and Circuit Court would place it.

B. The Circuit Court Erred by Reversing the Board's Finding of Fact that Respondent Did Not Detrimentally Rely on the 1988 Amendment to W. VA. CODE § 5-5-3 Because There Was Substantial Evidence in the Record to Support the Board's Finding.

The Circuit Court held that the Appellee was entitled to the application of the 1988 version of W. VA. CODE § 5-5-3 because he detrimentally relied on this amendment by foregoing other employment opportunities. Final Order at pp. 4-5. However, the Circuit Court failed to give the Board's decision, which found otherwise, the deference it was owed as an

administrative decision which was fully supported by substantial, reliable and probative evidence in the record.

The Appellee can only be entitled to the relief he seeks if he can establish that he actually detrimentally relied on the Legislature's amendment to W. VA. CODE § 5-5-3. *See e.g. Adams*, 207 W. Va. 1; *Booth*, 193 W. Va. 323 (1995). The Circuit Court held that the Appellee established detrimental reliance on the 1988 amendment to W. VA. CODE § 5-5-3 because he chose to forego other employment opportunities and continue his employment with the state, and because he testified that he "relied on what [he] would get at retirement in benefits especially in medical and retirement to be about the best in the valley." Final Order at p. 4. On this basis, the Circuit Court reversed the Board's factual finding that the Appellee had not detrimentally relied on this statute. *Id.*

In reviewing the Board's decision, the Circuit Court was required to give deference to the Board's factual determinations and perform a *de novo* review to the Board's legal decisions. *See Mayhorn v. W. Va. Consol. Pub. Retirement Bd.*, 219 W. Va. 77, 79-80, 631 S.E.2d 635, 637-8 (2006). Findings of fact are to be accorded deference, "unless the reviewing court believes the findings to be clearly wrong." *Id.* (citing Syl. pt. 2, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)). This Court has repeatedly held that a circuit court reviewing the findings of an administrative agency must "not substitute its judgment for that of the hearing examiner." *See e.g. Woo v. Putnam Co. Bd. of Educ.*, 202 W. Va. 409, 504 S.E.2d 644 (1998).

While questions of law are to be reviewed *de novo*, this Court has held that:

[a court] must uphold any of the ALJ's factual findings that are supported by substantial evidence, and ... owe[s] substantial deference to inferences drawn from the facts. Further the ALJ's credibility determinations are binding unless patently without basis

in the record . . . [a] Court must determine whether the ALJ's findings were reasoned, i.e., whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record.

See Woo, 202 W. Va. at 411-412 (quoting *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995)). This Court has also described the "clearly wrong" standard of review, which was apparently applied in this case, as allowing a court to overturn an administrative decision only:

when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Sale ex rel. Sale v. Goldman, 208 W. Va. 186, 191, 539 S.E.2d 446, 451 (2000) (citing Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996) and *Woo*, 202 W. Va. at 412.

The Board's finding that the Appellee did not establish detrimental reliance was supported by substantial evidence in the record and therefore should not have been overturned. It is undisputed that the Appellee chose to work for the state at a time when lump sum payments could not be used to increase final average salaries, and that he remained so employed for more than ten years before such was permitted. The Circuit Court did not hold (because indeed, there was no evidence to support), that the Appellee received and turned down offers for other employment during the time period when the statute permitted what he seeks, or that the Appellee's decision to remain employed with the state had any relationship whatsoever to the provision in issue. He cannot, therefore, argue that his forbearance entitles him to a finding of

reliance on the statutory amendments in issue. In addition, it is undisputed that during the year in which the provision in question was in effect, the Appellee was not eligible to retire. *Id.* Thus, unlike Mr. Adams, or the Troopers in *Booth*, the Appellee did not—in fact could not—make a decision regarding his retirement date based on the statutory amendment. Finally, unlike the Appellants in *Summers*, the Appellee did not request or receive any estimate of benefits which suggested that he would be permitted to include the lump sum amount in his pension calculation. *See Summers*, 217 W. Va. at 405.

Rather than acknowledge the evidence in the record that clearly supported the Board's findings and gave them a sufficient factual basis, the Circuit Court substituted its own judgment to conclude that the Appellee established detrimental reliance. The Appellant respectfully requests that this Court correct this erroneous application of the standard of review and reinstate the factual findings of the Hearing Officer.

VI. RELIEF REQUESTED

For the reasons set forth herein, Appellant, the West Virginia Consolidated Public Retirement Board, respectfully requests that this Court reverse the August 6, 2009 Final Order of the Circuit Court of Kanawha County, West Virginia, and reinstate the October 26, 2006 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.



By: Lenna R. Chambers (WVSB #10337)
Bowles Rice McDavid Graff & Love LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1777
Counsel for Appellant

RICHARD H. BURTON,

Petitioner Below, Appellee,

v.

No. 35507

**Appeal From the Circuit Court of
Kanawha County, West Virginia,
Civil Action No. 06-AA-169**

**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 "*Brief on Behalf of the Appellant, West Virginia Consolidated Public Retirement Board*" upon counsel for the Appellees by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 16th day of April, 2010, addressed as follows:

John J. Polak, Esquire
Atkison & Polak, P.L.L.C.
Post Office Box 549
Charleston, West Virginia 25322


Lenna R. Chambers (WVSB # 10337)