

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICHARD H. BURTON,

Appellee/(Petitioner Below),

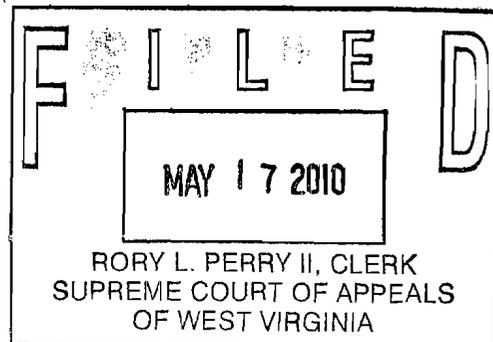
v.

No. 35507
From the Circuit Court of
Kanawha County, West Virginia,
Civil Action No.: 06-AA-169

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Appellant/(Respondent Below).

BRIEF OF APPELLEE RICHARD H. BURTON



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**I. KIND OF PROCEEDING AND NATURE
OF RULING OF THE CIRCUIT COURT**

Pursuant to W. Va. Code § 29A-5-4, Appellee Richard H. Burton brought a Petition for Review in the Circuit Court of Kanawha County, West Virginia of the October 26, 2006 administrative decision of the West Virginia Consolidated Public Retirement Board (“the Board”). Mr. Burton contended that the Board’s October 26, 2006 Order erroneously concluded that the Board was not required to include the lump sum payment for accrued annual leave received by Mr. Burton at retirement in the calculation of Mr. Burton’s retirement benefit, as mandated by the 1988 version of W. Va. Code § 5-5-3. Mr. Burton prosecuted his appeal on both questions of fact and law, arguing that the Board’s October 26, 2006 Order erroneously found that he had failed to make a showing that he had relied on the 1988 amendment to W. Va. Code § 5-5-3, and that the Board’s Order erroneously applied legal principles previously enunciated by this Court that governed his claim.

By order dated August 5, 2009, Kanawha County Circuit Court Judge James C. Stucky reversed the Board’s final administrative order. In so ruling, the Circuit Court analyzed the administrative record in the context of this Court’s prior decisions and concluded that, “[i]f applied to [Mr. Burton], the 1989 amendment to W. Va. Code § 5-5-3 for annual leave for final salary purposes, would impair and diminish the vested property rights possessed by [Mr. Burton] in 1988 as an active PERS plan participant with ten or more years of service.” *August 5, 2009 Order at 5*. Judge Stucky ordered the Board to include the lump sum payment of \$12,050.29 for forty-two days of accrued annual leave in the calculation of Mr. Burton’s final average salary for purposes of the

calculation of his retirement benefit, retroactive to his retirement date of January 31, 2005. The Circuit Court further ordered that the Board pay interest on the recalculated unpaid portion of the benefit. *August 5, 2009 Order at 5-6*. The Board brings this appeal of Judge Stucky's August 5, 2009 Order.

II. STATEMENT OF FACTS

Richard H. Burton, is a member of the Public Employees Retirement System ("PERS"). He retired effective February 1, 2005, with thirty-two years, three months, of contributing service as an employee of the State, being employed initially by the Division of Highways and then by the Department of Unemployment Compensation. He was born in August 1948. At the time of Mr. Burton's retirement, he was paid the sum of \$12,050.29 for accrued unused annual leave. No retirement system contributions were withheld from this payment. Mr. Burton requested that this payment be included in the calculation of his final average salary which, in turn, would enhance the amount of his annuity. Mr. Burton had been employed more than 17 years by the Division of Highways at the time certain amendments were made in 1988 to § 5-5-3 of the West Virginia Code. He had participated in the Public Employees Retirement System throughout this tenure. *See Hearing Examiner's Recommended Decision at 2-3.*

In the administrative hearing of July 7, 2006, Mr. Burton testified that he relied on the ability to participate in the state retirement system in making his decision to stay employed by the State of West Virginia through his tenure of employment. *July 7, 2006 Administrative Hearing Transcript at 9*. The Board presented no evidence in response to Mr. Burton's hearing testimony.

In its August 5, 2009 Order, the Circuit Court found that the record reflected that Mr. Burton “relied on his ability to participate in the State’s retirement system as one of the important factors of keeping his job with the State.” *August 5, 2009 Order at 4*. The Circuit Court observed that Mr. Burton had testified in the Administrative Hearing 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.” *Id. at 4, quoting July 7, 2006 Administrative Hearing Transcript at 10*. Further, the Circuit Court found that the administrative record demonstrated that Mr. Burton “had foregone other employment opportunities because of the retirement benefits the State offered.” *Id. at 5, citing July 7, 2006 Administrative Hearing Transcript at 10*.

III. POINTS OF LAW AND CITATIONS OF AUTHORITIES

Statutes

W.Va.Code § 5-5-3 (1988)	<i>passim</i>
W.Va.Code § 5-5-3 (1989)	<i>passim</i>
W.Va.Code § 29A-5-4(a)	1

Cases

<u>Adams v. Ireland</u> , 207 W. Va. 1, 528 S.E.2d 197 (1999)	<i>passim</i>
<u>Booth v. Sims</u> , 193 W. Va. 323, 456 S.E.2d 167 (1995)	<i>passim</i>
<u>Craig v. City of Huntington</u> , 179 W. Va. 668, 371 S.E.2d 596 (1988)	13
<u>Dadisman v. Moore</u> , 181 W. Va. 779, 384 S.E.2d 816 (1989)	<i>passim</i>
<u>Flanigan v. West Virginia Public Employees' Retirement System</u> , 176 W.Va. 330, 342 S.E.2d 414 (1986)	9
<u>Muscatell v. Cline</u> , 196 W.Va. 588, 474 S.E.2d 518 (1996)	5
<u>State ex rel. City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling</u> , 185 W.Va. 380, 407 S.E.2d 384 (1991)	9
<u>West Virginia Consol. Public Retirement Bd. v. Carter</u> 219 W.Va. 392, 633 S.E.2d 521 (2006)	5, 13

IV. STANDARD OF REVIEW

“On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va.Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syllabus Point 1, Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996); Syllabus Point 1, West Virginia Consol. Public Retirement Bd. v. Carter 219 W.Va. 392, 633 S.E.2d 521 (2006).¹

V. DISCUSSION OF LAW

During the 1988 Legislative session, the West Virginia Legislature amended Chapter 5, Article 5, Section 3 of the West Virginia Code to allow PERS members to utilize their lump sum payment for unused annual leave as part of their final average salary. This Code section, which became effective July 1, 1988, stated in part:

“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 payment, 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

¹ The Circuit Court was aware of and properly applied this same standard. See *August 5, 2009 Order at 2*.

granted in relation thereto; **however, such lump sum payment is to be a part of final average salary computation...**" (Emphasis added.)

This Code section was amended again by the Legislature during the 1989 Legislative session, effective July 6, 1989, removing the section of the statute which allowed the use of lump sum payments for annual leave for final average salary purposes. Since this Code section was amended in 1989, the Board has consistently denied retirees the usage of their lump sum payments for annual leave as part of their final average salary.

This Court's opinions in Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1989), 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), control the rights of state retirees and the obligations of the Public Employees Retirement System with regard to the application of this statute. Mr. Burton's claim required the Circuit Court to review whether the Board's conduct complied with this Court's prior directives. Judge Stucky properly applied this Court's prior decisions and concluded that Mr. Burton should be able to utilize the lump sum payment for unused annual leave as part of his final average salary to properly calculate his benefit.

Significantly, in this regard, syllabus points 16 and 24 of Dadisman held:

16. Retired and active PERS plan participants have contractually vested property rights created by the pension statute, and such property rights are enforceable and cannot be impaired or diminished by the State.

...

24. Members, retirants, and other beneficiaries are only entitled to participate in the retirement system as defined by the statutory contract. If the Legislature modifies the

contract so as to result in new or additional benefits, whether out of gratitude, compassion, or any other motivation, it must provide additional funding to pay for those benefits and beneficiaries.

Booth set forth the following significant holdings in the syllabus points cited

below:

3. When considering the constitutionality of legislative amendments to pension plans, an employee's eligibility for a pension does not determine whether he or she has vested contract rights. The 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.

• • •

5. In public employee pension cases, what often concerns the court is not the technical concept of "vesting," but rather the conditions under which public employees have a property right protected under the contract clauses because of substantial detrimental reliance on the existing pension system.

6. In pension cases, then, there are two distinct issues of contract: (1) an employee's contract right to collect a pension after statutory eligibility requirements have been met; and (2) an employee's legitimate expectations, also contractual in nature, that the government will not detrimentally alter the pension scheme once the employee has spent sufficient time in the system to have relied to his or her detriment. The first issue involves whether the employee has remained in government service for such a length of time that he or she can collect benefits; the second issue involves the employee's reliance on promised government benefits after years of government service but before actual retirement age. Pension eligibility and reasonable expectations about the system's benefits are entirely separate issues.

7. By meeting certain eligibility requirements, a public employee acquires a *right* to payment under a pension plan.

For any employee not yet eligible for payment, this is a mere expectancy; if the public employee does not meet the age and service requirements for benefits, his or her participation in a state pension plan does not allow receipt of a pension. But substantial employee participation in the system *does* create an employee's reliance interest in pension benefits. An employee's membership in a pension system and his or her forbearance in seeking other employment prevents the legislature from impairing the obligations of the pension contract once the employee has performed a substantial part of his or her end of the bargain and relied to his or her detriment. (Emphasis in original.)

...

15. Changes may be made in pension systems with regard to new employees who have not yet joined the system and who have *not* yet relied to their detriment on government promises of future benefits. Furthermore, changes can be made with regard to employees with so few years of service that they cannot be said to have relied to their detriment. Line drawing in this latter regard must be made on a case-by-case basis, but after ten years of state service detrimental reliance is presumed. (Emphasis in original.)

...

19. The pension rights of *all* current state pension plan members who have substantially relied to their detriment cannot be detrimentally altered at all, and any alterations to keep the trust fund solvent must be directed to the infusion of additional money. "Detrimentially alter" means the legislature cannot reduce the existing benefits (including such things as medical coverage) of the pension plan or raise the contribution level without giving the employee sufficient money to pay the higher contribution. Should the legislature seek to reduce certain advantages of a pension plan, it must offer equal benefits in their place as just compensation. (Emphasis in original.)

...

21. Although the legislature may augment pension property rights, the legislature cannot simply reduce a participating employee's pension property rights once it establishes the system unless the employee acquiesces in the change to the

pension plan or unless the employee has so few years in the system that he or she has not detrimentally relied on promised pension benefits.

Finally, in Adams, this Court stated:

The 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.

The determinative factor, as we held in Booth, is whether the employee may be said to "have substantially relied to their detriment" on the statute.

207 W. Va. at 8, 528 S.E.2d at 204.

This Court has also mandated that, "under West Virginia Code § 5-10-3a [courts] are directed to give substantial weight to the remedial nature of the PERS Act by the legislative ordination to construe its provisions liberally in favor of its intended beneficiaries." Flanigan v. West Virginia Public Employees' Retirement System, 176 W. Va. 330, 335, 342 S.E.2d 414, 419 (1986). *See also* State ex rel. City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling, 185 W. Va. 380, 383, 407 S.E.2d 384, 387 (1991) ("the 'West Virginia Public Employees Retirement Act,' W. Va. Code, 5-10-1 to 5-10-54, as amended, is a remedial statutory enactment, and is 'liberally construed so as to provide a general retirement system for the employees of the state[.]'"") The Circuit Court's decision properly followed these mandates.

A. The Circuit Court Did Not Err In Applying The Presumption Of Detrimental Reliance Established in Booth v. Sims.

Although he was not yet eligible to retire in 1988, it was uncontested that Mr. Burton had state service in excess of ten years at the time of the 1988 Legislative Amendment to W. Va. Code § 5-5-3. Under this Court's holding in syllabus point 15 of Booth, detrimental reliance by Mr. Burton on the contractual promises made by the Legislature with the 1988 Amendment was presumed.

Mr. Burton's testimony established that, in deciding to keep his employment with the State of West Virginia and not seek employment in the private sector or otherwise outside the state system, he relied on his ability to participate in the State's retirement system as one of the important factors in his decision-making process. *Hearing Transcript at 9-10*. As this Court stated in Booth:

By promising *pension benefits, the State entices employees to remain in the government's employ*, and it is the enticement that is at the heart of employees' constitutionally protected contract right after substantial reliance not to have their own pension plan detrimentally altered.

Booth, Syllabus point 10, in part, emphasis added. Moreover, there was no evidence presented to rebut the presumption of Mr. Burton's reliance.

In Dadisman, this Court held that "... active PERS plan participants have contractually vested property rights created by the pension statute, and such property rights are enforceable and *cannot be impaired or diminished by the State.*" Dadisman, Syllabus point 16 (in part) emphasis added. If applied to Mr. Burton, the 1989 Amendment to W. Va. Code § 5-5-3 (which removed the section of the statute which

allowed the use of lump sum payments) for annual leave for final average salary purposes, would impair and diminish the vested property rights possessed by Mr. Burton in 1988 as an active PERS plan participant with ten or more years of service. This Court's prior case-law clearly prohibits such a result and Judge Stucky was correct in following that law.

In Booth, this Court held that "an employee's eligibility for a pension does not determine whether he or she has vested contract rights. The 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." Booth , Syllabus point 3 (in part). Booth makes clear that the question of whether or not Mr. Burton was eligible for retirement in 1988 while the prior version of W.Va. § 5-5-3 was in effect, **does not control** the disposition of this appeal. As this Court further observed in Booth, the issue in a case such as this one, "involves the employee's reliance on promised government benefits after years of government service but before actual retirement age. Pension eligibility and reasonable expectations about the system's benefits are entirely separate issues." Booth , Syllabus point 6 (in part).

The Circuit Court properly considered this Court's admonition that "substantial employee participation in the system **does** create an employee's reliance interest in pension benefits. An employee's membership in a pension system and his or her forbearance in seeking other employment prevents the legislature from impairing the obligations of the pension contract once the employee has performed a substantial part of his or her end of the bargain and relied to his or her detriment." Booth , Syllabus point 7

(in part), emphasis in original. This is precisely what was present in this case. It was uncontested in the record that Mr. Burton in deciding to keep his employment with the State of West Virginia and not seek employment in the private sector or otherwise outside the state system, relied on his ability to participate in the State's retirement system as one of the important factors in his decision-making process.

Further, as mandated by Booth, Mr. Burton's pension rights cannot be "detrimentally altered" if he relied to his detriment on the state's promises of future benefits. Booth, Syllabus point 19. As noted above, because of his years of service, the Circuit Court was correct in concluding that reliance should be presumed. No evidence rebuts the presumption.

The fact that the 1988 version of W. Va. Code § 5-5-3 was only in effect for slightly more than one year, does not control the disposition of this matter. As noted above, in Adams, this Court stated:

The 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.

The determinative factor, as we held in Booth, is whether the employee may be said to "have substantially relied to their detriment" on the statute.

207 W. Va. at 8, 528 S.E.2d at 204.

The Board's attempt to explain away this statement fails. The Court in Adams made clear that Dadisman and Booth are the controlling authorities in this analysis. Id. Moreover, the appeal in Adams arose from the dismissal by the Circuit Court of the appellants' mandamus petition under W.Va.R.Civ.P. 12(b)(6). For failure to state a claim upon which relief could be granted. As such, no evidence was developed in the case. As

this court observed it was without a record and as such, was unable to even evaluate whether the appellant had substantially participated in the public employees' retirement system, much less whether he had detrimentally relied on the amendment. Id.

Moreover, contrary to the Board's suggestion, this Court's decision in West Virginia Consolidated Public Retirement Board v. Carter, 219 W. Va. 392, 633 S.E.2d 521 (2006), does not control or resolve the issue presented in this case. In Carter, the appellees contended that W. Va. Code §5-5-3 did not apply to them at all (a contention rejected by the Court). Mr. Burton makes no such contention in this case and, in fact, agrees that §5-5-3 applies to his entitlement to benefits. Mr. Burton asserts, however, as set forth above, that only the 1988 version of §5-5-3 can be applied to his benefit calculations and that the 1989 (and any subsequent) amendment to §5-5-3 cannot be applied as a matter of law under the principles enunciated in Dadisman, Booth and Adams. This issue was not addressed at all in Carter and, indeed, it appears that neither appellee in Carter had the requisite ten years of service under PERS prior to 1988 to even argue that they were entitled to the presumption set forth in Booth that is at issue in this case.

Likewise, the decision in Craig v. City of Huntington, 179 W. Va. 668, 371 S.E.2d 596 (1988) does not resolve this dispute. Craig involved the application of the statutory scheme governing disability pensions for municipal employees and the Court did not have to deal with the effect of an amendment to the statute which specifically addressed the effect of lump sum payments for annual leave on the participant's pension.

B. The Circuit Court Did Not Err in Reversing The Board's Findings Of Fact Because The Board's Findings Were Clearly Wrong.

The Circuit Court was correct in concluding that the Hearing Examiner and the Board were clearly wrong in concluding that Mr. Burton's testimony did not establish actual reliance. *See* Hearing Transcript at 9-10. Under Syllabus point 21 of Booth, the Legislature "cannot simply reduce a participating employee's pension property rights once it establishes the system" without the employee's acquiescence in the reduction unless the employee has only a few years in the system. The Circuit Court's conclusion that Mr. Burton did not acquiesce in the 1989 amendment was the only reasonable conclusion based on the record.

Further, the Board's decision that was reversed by the Circuit Court was at odds with the commands of Syllabus 21 of Booth. With regard to Mr. Burton, the Board's ruling against Mr. Burton would allow the 1989 legislative change to W.Va. § 5-5-3 to simply reduce a participating employee's pension property rights once the legislature had already established the system setting up those rights, without the employee's acquiescence in the change to the pension plan. Such a result is simply impermissible under Booth.

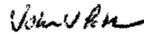
Finally, Mr. Burton notes that this Court has stated that, "the funding of any pension program is the legislature's problem-not the state employees'-and once the legislature establishes a pension program, it must find a way to pay the pensions, at least to those persons who have substantially relied." Booth, 193 W.Va. at 340, 456 S.E.2d at 184. That the Circuit Court's ruling may have financial consequences to the Board is not

grounds to reverse it. The Circuit Court's job was to apply the law to Mr. Burton's claim and it properly did so.²

CONCLUSION

For the reasons set forth above, it is clear that the Circuit Court's decision of August 5, 2009 was clearly correct. Accordingly, this Court should affirm that decision.

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² Mr. Burton concurs with and incorporates by reference the arguments made by Rodney A. Myers and Diane M. Myers in their response in Appeal No. 35470.

CERTIFICATE OF SERVICE

I, John J. Polak, do hereby certify that service of the “Brief of Appellee Richard H. Burton” was made upon the Appellant below, by mailing a true and exact copy thereof to:

Lenna R. Chambers
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on this 14th day of May, 2010.



John J. Polak (WVSB No. 2929)