

**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,**

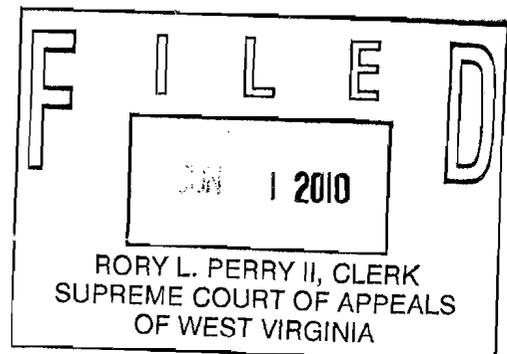
**Respondent Below, Appellant.**

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**REPLY ON BEHALF OF APPELLANT, WEST VIRGINIA CONSOLIDATED PUBLIC  
RETIREMENT BOARD, TO RESPONSE TO APPELLEE RICHARD H. BURTON**

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**TABLE OF CONTENTS**

**I. ARGUMENT ..... 1**

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

B. 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 Because the Evidence Clearly Establishes That Appellee Did Not Actually Detrimentally Rely on the Statute.....3

**II. CONCLUSION AND RELIEF REQUESTED.....5**

## TABLE OF AUTHORITIES

### Statutes

W. VA. CODE § 5-5-3 .....1, 2, 3, 4

### Cases

*Adams v. Ireland*, 207 W. Va. 1, 528 S.E.2d 197 (1999).....4

*Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995).....2, 3, 4

*Summers v. W. Va. Consol. Pub. Ret. Bd.*, 217 W. Va. 399, 628 S.E.2d 408 (2005).....3

## I. ARGUMENT

### 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 Because the Appellee Cannot Be Presumed to Have Detrimentally Relied on a Statute Prior to its Existence.**

The Appellee's Response fails to explain why he should be concluded to have detrimentally relied on a statutory amendment before it was enacted. The Appellee simply argues that because he had more than ten years of service at the time of the 1989 amendment, removing the ability to include lump sum payments for accrued unused annual leave in a final average salary calculation, this amendment cannot be applied to him. It is undisputed, however, 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, and it was only one year later that the Legislature rescinded the provision on which Appellee claims to have relied.

In *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995), the Court emphasized that the question of whether a State employee's contract rights have been violated can be determined only on a case-by-case basis. *Booth*, 193 W. Va. at syl. pt. 21. In applying the presumption of detrimental reliance in this case, the Circuit Court ignored the fact that for all but one year of the Appellee's tenure in the system, there was no statute which permitted him to use accrued unused annual leave in calculating his final average salary. The petitioners in *Booth*, on the other hand, had not only been members of the system for more than ten years, but had been members of a system in which the provision at issue had been in effect for six of those years. *Booth*, 193 W. Va. at 330 (holding that a 1994 amendment by the legislature reducing a 3.75%

cost of living increase, first adopted in 1988, to 2%, violated the petitioners' contract rights). Thus, Appellees' attempt to apply the presumption of detrimental reliance described in *Booth v. Sims*, 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.

Interestingly, the Court opined that the legislature could choose to remove benefits it had enacted in the prior session, if the legislature had intended those benefits to be tied to the reduction of the cost of living, suggesting that a modification of a short-lived statute could meet with the Court's approval. *Booth*, 193 W. Va. at 343-344. This statement, coupled with the Court's holding that these questions are to be resolved on a case-by-case basis, should have led the Circuit Court to consider all of the relevant facts, rather than looking only to the number of years of participation in the system to decide the case.

It is the illogical result of this blind application of the presumption that the Board challenges, and for which the Appellee has 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 does not suggest that the number of years a statutory amendment is in effect should control, but rather argues that this fact should be considered when applying the *Booth* presumption. The Board respectfully requests that this Court affirm this principal.

**B. 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 Because 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. The Appellee's only basis for claiming actual detrimental reliance is his statement at the administrative hearing that he relied on the ability to participate in the system and because of this ability, remained employed by the State. Adm. Hr'g Tr., p. 9. His reliance on the general ability to participate in the system does not, however, establish reliance on each and every specific provision set forth in the statute's that govern the system. The Appellee's ability to participate in, and draw a pension from, the PERS plan was not changed in 1989 when the Legislature amended W. VA. CODE § 5-5-3. Moreover, his ability to derive a benefit from the accumulated leave was not eliminated either, as he remained able to be paid in lump sum for the leave, or alternatively to use the leave to obtain extended health insurance coverage as a retiree.

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 before he ever believed he could include unused leave in calculating his final average salary, and remained so employed even after his ability to 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. Tr. of Adm. Hr'g, at pp. 9, 10, 12. 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. 7. Each of these undisputed facts establish that the Appellee did not actually detrimentally rely on the version of W. VA. CODE § 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.

Finally, in his Response, the Appellee incorporates by reference the arguments made by Appellees Rodney A. and Diane M. Myers in briefs filed on their behalf in Supreme Court Appeal Number 35470. The Board hereby incorporates by reference the responses and replies made on behalf of the Board in that proceeding as well.

## II. CONCLUSION AND RELIEF REQUESTED

For the reasons set forth herein, Appellant, the West Virginia Consolidated Public Retirement Board, respectfully requests that this Court reverse the August 5, 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.



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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 Appellee Richard H. Burton”* upon counsel for the Appellees by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 28th day of May, 2010, addressed as follows:

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