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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RICHARD H. BURTON,

Petitioner,

v.

CIVIL ACTION NO. 06-AA-169
JUDGE JAMES C. STUCKY

WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,

Respondent.

FINAL ORDER

This matter comes before the Court on Petitioner Richard H. Burton's, (hereinafter "Petitioner") Petition For Review of the October 26, 2006, administrative decision of the Respondent West Virginia Consolidated Public Retirement Board (hereinafter "Board"). The administrative decision denied Petitioner's request to include his lump sum payment for accrued annual leave in the calculation of his retirement benefit. After careful consideration, this Court **REVERSES** the Board's final order.

This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states,

> 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 the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; 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.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 196 W. Va. 588, 594-95, 474 S.E.2d 518, 524-25 (1996).

A brief recitation of the facts is as follows. Petitioner is a member of the Public Employees Retirement System (hereinafter "PERS"). He retired on February 1, 2005, with thirty-two years, three months, of service as an employee of the State.

Petitioner argues that the Board erroneously concluded that his lump sum payment for accrued annual leave was not to be included in the calculation of his retirement benefit as mandated by the 1988 version of W. Va. Code § 5-5-3. Petitioner also agues that the Board erroneously applied the legal principles enunciated by the West Virginia Supreme Court of Appeals 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). This Court agrees with Petitioner.

The 1988 version of West Virginia Code § 5-5-3 stated

> 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 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 contributions of members of the department, since retirement benefits are based on cumulative earnings rather then period of service.[1]

In 1989, this Code section was amended again. The amended version states

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 may 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 contributions of members of the department, since retirement benefits are based on cumulative earnings rather then period of service.[2]

In *Booth*, the court held that "[t]he pension rights of *all* current state pension plan members who have substantially relied to their detriment cannot be detrimentally altered at all . . . . 'Detrimentally alter' means the legislature cannot reduce existing benefits . . . of the pension plan." *Booth*, 193 W. Va. at Syl. Pt. 19 (emphasis in original). Detrimental reliance can be established by showing actual detrimental reliance or by presumed detrimental reliance.

Booth held that

Changes may be made in pension systems with regard to new

1 Acts of the Legislature, 1988, c. 100, effective July 1, 1988. (Emphasis added).

2 Acts of the Legislature, 1989, c. 178, effective July 7, 1989. (Emphasis added).

> 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.
>
> *Id.*at Syl. Pt. 15 (emphasis in original).

The Court in *Booth* also held that

> [S]ubstantial 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 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.
>
> *Id.* at Syl. Pt. 7 (emphasis in original).

Petitioner was an employee of the state fifteen years before the 1988 amendment of W. Va. Code § 5-3-3. Therefore, Petitioner's reliance on the 1988 amendment of § 5-3-3 is presumed. The record also reflects that Petitioner 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. In the appeal hearing, Petitioner 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." *Administrative Hearing Transcript* p.10 (July 7, 2006).

Furthermore, *Adams* stands for the proposition that *Booth* can apply even when the promise of benefits is of short duration. *Adams*, 207 W. Va. at 8. *Adams* also held

> 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.

Id. (emphasis added).

Again, Petitioner testified in his hearing that he had foregone other employment opportunities because of the retirement benefits the State offered. *Administrative Hearing Transcript* p. 10 (July 7, 2006).

The Court in *Dadisman* stated that "active PERS plan participants have contractually vested property rights created by the pension statute, and such property rights . . . cannot be impaired or diminished by the State." *Dadisman*, 181 W. Va. at Syl. Pt. 16. If applied to Petitioner, the 1989 Amendment to W. Va. Code § 5-5-3 for annual leave for final average salary purposes, would impair and diminish the vested property rights possessed by Petitioner in 1988 as an active PERS plan participant with ten or more years of service.

Also, *Booth* states 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. *Booth*, 193 W. Va. at Syl. Pt. 21. Petitioner did not acquiesce in the 1989 amendment, and he had worked for the State seventeen years by the 1989 amendment.

RULING

For the above reasons stated in this order, this Court **ORDERS** the following the Final Order of the Board is **REVERSED** and **REMANDED** with the following directions. The Board is **ORDERED** to include the lump sum payment of $12,050.29 for forty-two days of accrued annual leave in the calculation of Petitioner's final average salary for purposes of

the calculation of his retirement benefit, retroactive to his retirement date of January 31, 2005. The Court also **ORDERS** the Board to pay interest on the recalculated unpaid portion of the benefit. This matter is **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk of the Court shall send copies of this Order to all counsel of record:

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Enter this Order the 5th day of August, 2009.

Judge James C. Stucky
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 6th DAY OF August 2009
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA