

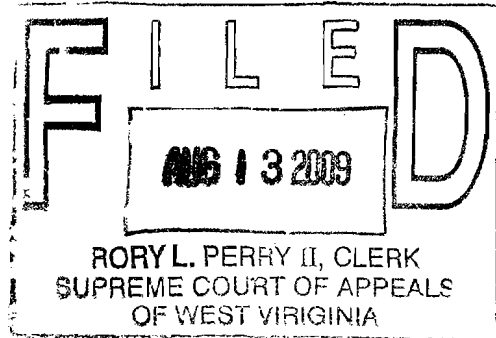
**In the Supreme Court of Appeals
of the State of West Virginia**

Docket No: 34944⁵

KATHERINE L. HOOPENGARNER,
Petitioner,

v.

STATE OF WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,
Respondent.



APPELLANT'S RESPONSE TO
BRIEF IN OPPOSITION TO PETITION FOR APPEAL

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WVSB #3428

KATHERINE L. HOOPENGARNER,
Petitioner/Appellant,

V.

DOCKET NO. 34944

STATE OF WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT BOARD,
Respondent/Appellee.

APPELLANT'S RESPONSE TO
BRIEF IN OPPOSITION TO PETITION FOR APPEAL

Yes, the loans from TRS are controlled by W.Va. Code §18-7A-31, and yes, they are not subject to bankruptcy discharge. So what? That does not address, much less resolve, the issue before the Court.

Counsel for Appellee argues Appellant's bankruptcy lawyer is to blame. Any fool with a law degree should have known that, on June 28, 1989, the debt was not dischargeable, regardless of the fact the Bankruptcy Code at that time was silent on the issue. Also, the only authority so holding was In Re Villare, 648 F.2d 810 (2nd Cir. 1981), out of the Second Circuit and not binding in the Fourth Circuit. Any idiot, however, should have been aware of that case and known it would later be codified.

Anybody should have known the transaction was not a "loan" or a "debt" and that TRS was not a creditor. This is so even though the controlling regulations and statutes employ the word "loan" and even though the TRS itself, in documents including application, correspondence and otherwise, all label the transaction a "loan". Even Appellee's brief, at part IV – Discussion of Law, part A, uses the word loan. It is not in quotation marks, nor is it italicized. Counsel for Appellee made the same mistake I did: she refers to it as a loan.

In fact, a reading of her brief reveals she uses the words “loan”, “balance owed” and other terms normally used only when identifying or discussing a loan. She uses these words in her brief and they are not in quotes or italicized. The Codified State Register refers to these transactions as loans.

The point is a reasonable layperson would have no indication the transaction was anything but a loan. When they list their loan for discharge, and nobody objected, why would they not think the loan had been discharged?

Only a creditor would comply with the automatic stay provisions of the Bankruptcy Code. TRS did. The payroll deducted loan payment was terminated upon receipt of the bankruptcy filing in response to the notice of the automatic stay, which applies only to creditors. TRS certainly acted like a creditor. Attorney General Swart must have been confused.

I agree there is no authority for discharging such a loan in bankruptcy. However, the point is the conduct of TRS was such as to make any reasonable person think the transaction was a loan, again as evidenced by the language of the statute, regulations and TRS documents and correspondence. Counsel for Appellee seems to believe the bankruptcy attorney who paid the loan for the teacher did so because it was entirely his fault. I don't know why he so generously helped the client, but it was not because he was negligent or guilty of malpractice. Although generous, it was unnecessary. Such gesture certainly does not establish a legal precedent.

The statement on page nine of Appellee's brief contending “Appellant chose this forum because of her inability to succeed in federal court...” is ridiculous. The issue has never been litigated in Federal Court. The Appellant employed the TRS grievance system and the Kanawha County Circuit Court.

While counsel admits TRS has the “highest fiduciary duty”, she agrees that duty is the trust as a whole and not to the individual of the trust. The case law cited in Appellants’ briefs holds otherwise. This Court has held in Flannigan v. West Va. Public Employee Retirement System, 176 W.Va. 330, 342 S.E.2d 414 (1986), the fiduciary duty extends to the members of the trust. The briefs also cite many federal cases which agree.


The Honorable Edward Friend was a very good bankruptcy judge. I’m certain he could distinguish a debt from a “non-debt”. The thing is Judge Friend was not in a position to make a ruling on the issue because TRS never raised the issue or objected to the discharge of the debt. Judge Friend did not mislead the Appellant. She was misinformed or not informed by TRS, not her attorney or the Court.

The Amended Recommended Decision of the hearing examiner makes no sense. The hearing examiner says, “The Board is simply not in a position to give such (legal) advice...” It is odd TRS is somehow prohibited from telling members their loans are not dischargeable in bankruptcy: in fact, that is their position and they now state it over and over again.

Finally, all of the arguments of the Appellee are trumped by Hudkins v. State Consolidated Retirement Board, 220 W.Va. 275, 647 S.E.2d 711. This case is the currently controlling law and authority in the State of West Virginia. The Appellant here clearly satisfies the requirements set forth in that opinion.

Respectfully submitted

KATHERINE L. HOOPENGARNER
PETITIONER, BY COUNSEL

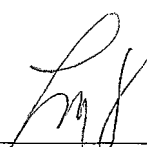


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CERTIFICATE OF SERVICE

I, Timothy M. Sirk, a practicing attorney, do hereby certify that I served a true copy of the foregoing *Appellant's Response to Brief in Opposition to Petition for Appeal* upon the Respondent by mailing a true copy thereof by United States First Class mail, postage prepaid, on this the 7th day of August, 2009, addressed as follows:

J. Jeaneen Legato
Consolidated Public Retirement Board
4101 MacCorkle Avenue SE
Charleston WV 25304



TIMOTHY M. SIRK