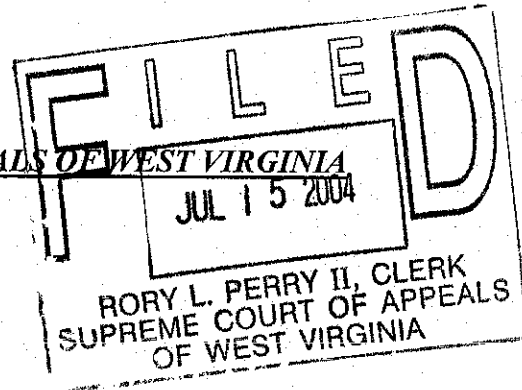


No. 31749

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



THE HONORABLE JOHN D. PURDUE,
Treasurer of the State of West Virginia, and
THE HONORABLE GLEN B. GAINER, III,
Auditor of the State of West Virginia
Appellants,

v.

THE HONORABLE BOB WISE, as
Governor of the State of West Virginia, and
TOM SUSMAN, as Acting Secretary
Of the Department of Administration
Of the State of West Virginia,
Appellees.

BRIEF OF AMICUS CURIAE
for the WEST VIRGINIA EDUCATION ASSOCIATION
and the WEST VIRGINIA ASSOCIATION of
RETIRED SCHOOL EMPLOYEES

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AUTHORITIES

Booth v. Sims, 193 W.Va. 323, 456 S.E2d 167, (1994)

Dadisman v. Moore, 181 W.Va. 779, 384 S.E2d 816 (1989)

Gainer v. West Virginia Bd of Investments, 194 W.Va. 143, 459 S.E.2d 531 (1995)

Harshbarger v. Gainer, 184 W.Va. 656, 403 S.E2d 399 (1991)

In re Dostert, 174 W.Va. 258, 324 S.E.2d 402 (1984)

State ex rel. Dadisman v. Caperton, 186 W.Va. 627, 413 S.E.2d 684 (1991)

State ex rel. State Building Commission v. Moore, 155 W.Va. 212, 184 S.E.2d 94 (1971)

W.V.E.A. v. C.P.R.B., 194 W.Va. 501, 460 S.E.2d 747 (1995)

West Virginia Public Employees Retirement System v. Dodd, 183 W.va544, 396 S.E2d 72 (1990)

W.Va. Const. art. X, § 4

W.Va. Code §§ 12-8-1 *et seq.*

W.Va. Code §§ 15-21 *et seq.*

W.Va. Code §§ 18-7A-1 *et seq.*

W.Va. Code §§ 51-9-1 *et seq.*

INTRODUCTION

The West Virginia Education Association (WVEA) and the West Virginia Association of Retired School Employees (WVARSE) join together by counsel to submit the following arguments and authorities as its Amicus Curiae Brief in this case. The parties to this action have presented extensive and well researched briefs related to the major legal issues in this controversy. Therefore, the WVEA and WVARSE will not repeat or restate all of the arguments set out therein. Rather, this brief is intended to highlight certain issues raised in this litigation and of significant interest to the WVEA and WVARSE members. In general, your Amicus Curiae support the position of the Appellees in this matter that the bond funding legislation passed by the legislature is constitutional to the extent that the extensive legal and policy arguments in favor of that proposition are not restated in this brief, the two associations are in agreement with those arguments. Similarly, we will not restate the procedural history or the extensive factual recitals set out by the parties.

STATEMENT OF FACTS

The basic facts related to this action are as follows:

The West Virginia Legislature passed a statutory system for paying the unfunded actuarial accrued liability (UAAL) of the following State pensions systems:

- The Judicial Retirement System, W.Va. Code §§ 51-9-1, *et seq.*;
- The Department of Public Safety System, W.Va. Code §§ 15-2-1 *et seq.*;
- The Teachers Retirement System, W.Va. Code §§ 18-7A-1 *et seq.*;

The consolidate Public Retirement Boards recent evaluation shows that as of June 30, 2003 the combined UAAL for these three plans exceeds \$5.4 billion with the

Teachers system having by far the lion's share of the liability at \$5.05.

The Legislative plan was titled the Pension Liability Redemption Act, W.Va. Code §§ 12-8-1 *et seq.*, and provides for the issuance and sale of bonds by the State with the proceeds from the sales to redeem the UAAL of the three pension plans.

The named pension plans are contributory defined benefit plans in which the employees contribute a specific percentage of their salary and the State promises to pay the employees a specific defined benefit at the time of their retirement. For education employees the defined benefit is generally two percent of the employees final average salary times the years of service the employee has in the school systems. In the defined benefit plans it is the State's obligation to provide sufficient funds each year in addition to the funds paid by the employees to insure that employees in the system will receive their promised benefit.

Unfortunately, in past years, for a number of reasons the State did not always place sufficient funds into the system to keep up with future obligations. Thus, the UAAL has accumulated.

The WVEA and the WVARSE together represent thousands of West Virginia School Employees who are presently employed in the West Virginia public schools and have retired from such employment. The members of these associations have been, and continue to be, concerned about the stability of the Teachers Retirement System (TRS) and the ability of the State to meet the payments necessary to keep the promise of defined pension benefits that employees have earned. At least in part due to litigation initiated by the WVEA the legislature established a forty-year plan for paying the UAAL of the TRS. Under that plan the required payments already exceed \$300 million a year and are estimated to reach \$600 million by 2030.

The Pension Liability Redemption Act is an initiative to address the adverse consequences of the State being compelled to devote more and more general revenues to catch up with the UAAL of the pension systems and provide for a more predictable payment systems of these pension debts. Your Amicus Curiae believe this approach is a sensible solution to a difficult public policy issue. However, whether the Act is ultimately a good or bad idea is not an issue for this Court. The issue *sub judice* is whether the Act is constitutional.

ISSUE AND ARGUMENT

THE UNFUNDED ACUARIAL ACCRUED LIBILITY OF THE STATE PENSION SYSTEMS IS A "PREVIOUS LIABILITY OF THE STATE". THEREFORE, THE ISSUANCE OF BONDS UNDER THE ACT DOES NOT VIOLATE THE DEBT LIMITATION SET OUT IN WEST VIRGINIA CONSTITUION ARTICLE X SECTION 4.

As stated previously, the WVEA and WVARSE will not address all issues arising in this action. However, both associations want to take the opportunity to stress to the Court that the defined benefits provided in the now closed Teachers Retirement System constitute a previous, present and future liability of the State. The promise of deferred compensation constitutes a debt owed to education employees for their years of service in West Virginia public schools. The State's obligation to fund this system must be met annually from ever increasing appropriations from the State's general revenue.

On this specific issue Judge Berger held:

"The court finds that the Unified Actuarial Accrued Liability (UAAL) of each of the three pension systems covered by the Pensions Liability Redemption Act (the "Act"), is a legitimate debt that constitutes a "previous liability of the State," given the case law that charges the state with adequately funding its retirement systems. Accordingly, the Act's proposed bond issuance does not violate the constitutional debt limitation of *W.Va. Const, art. X, § 4*

Perdue et al. v. Wise et al. Kan. Co. Cir.
Court, Civil Action No. 03-C-1651 (March 15, 2004)

W.Va. Const., art. X, §4 specifically provides:

“No debt shall be contracted by this state, except to meet casual deficits in the revenue, to redeem *a previous liability of the state*, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that of the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.” (*emphasis added*) *id.*

Appellants assert that the State’s pension obligations do not constitute “a previous liability of the State” and therefore the Act violates this constitutional provision. As Judge Berger found, this assertion is not supported by the previous decisions of this Court. In *WVEA V. CPRB* 194 W.Va. 501, 460 S.E2d 747 (1995) *syl. pt.1* this Court wrote:

“The realization and protection of public employees’ pension property rights is a constitutional obligation of the state... *Id.*”

In the same case the court discussed the contractual nature of the State’s obligation to participants in the TRS as follows:

“This Court put to rest any doubt that may have existed, that the realization and protection of a public employees pension property right is a contractual obligation of the State. *Syl pt 18, Dadisman v. Moore* 181 W.Va. 779, 684 S.E2d 816 (1989); *WVEA v. CPRB*, *supra* p 755.

Thus the payment of the defined benefits provided to the public school employees through *W.Va. Code § 18-7A-1* (1941) *et seq.* is both a constitutional obligation and an existing contractual obligation of the State. The Court additionally held that the recipients need not wait until the State defaulted on payment of a specific pension, but may enforce this ongoing obligation if the State’s funding for the TRS was found to be actually unsound. *State ex rel. Dadisman v. Caperton* 186 W.Va. 627, S.E2d 684 (1991); *WVEA v. CPRB, Supra*, p. 756.

Justice Neely may have described the State's obligation to fund the TRS best in his dissent in *State ex rel. Gaines v. West Virginia Bd. Of Investments* 194 W.Va. 143, 459 S.E2d 531 (1995) when he wrote:

“This Court has already held in *Booth v. Sims*, 193 W.Va. 323, 456 S.E2d 167 (1995) (as modified) that pension contracts with current and former State employees are lawful debts of the State. That means that the State *must* come up with the money to pay state employee pensions when they come due. The pension *obligations* are set in stone (at least for persons currently in the system who have relied to their detriment, see *Booth*, supra); the only question yet to be answered is how much money will be available to pay these pension debts from cash accumulated in the pension fund itself and how much money will need to be gathered in new taxes from our yet unborn children? *Gainer*, supra p. 539 & 540. (*emphasis in original*)

The State's liability to pay these pension contracts is of a general and mandatory nature. Each year hundreds of millions of dollars are appropriated from general revenues to cover the UAAL presently existing in the public pension programs. It is simply hard to imagine a more clear “previous liability of the state.”

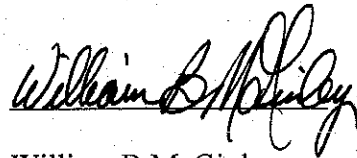
CONCLUSION

It is well established in West Virginia jurisprudence that legislative enactments are entitled to a presumption of constitutionality and may be overturned only if unconstitutional beyond a reasonable doubt.

State ex rel. Gainer v. West Virginia Board of Investments, 194 W.Va. 146, 459 S.E2d 531 (1995); *West Virginia Public Employees Retirement System v. Dodd*, 183 W.Va. 544, 396 S.E2d 725 (1990), overruled on other grounds. *Booth v. Sims*, 193 W.Va. 323, 327-28, 456 S.E2d 167, 171-72 (1994). “In considering constitutional restraint, the negation of legislative power must be manifest beyond a reasonable doubt.” Syllabus Pt. 2, *State ex rel. State Building Commission v. Moore*, 155 W.Va. 212, 184 S.E.2d 94(1971); see also *In re Dostert*, 174 W.Va 258, n.20, 324 S.E2d 402, 413, n.20 (1984), overruled on other grounds, Syl. Pt.3, *Harshbarger v. Gainer*, 184 W.Va 656, 403 S.E.2d 399 (1991).

For the reasons set out herein, and more fully developed by the Appellees, the WVEA and the WVARSE respectfully assent that the Appellants have not met this significant burden. The Associations jointly urge this Court to affirm the ruling of Judge Berger in the Kanawha County Circuit Court.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "William B. McGinley".

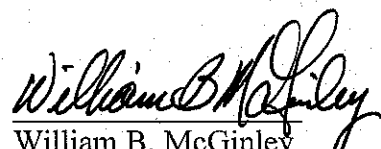
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CERTIFICATE OF SERVICE

I, William B. McGinley, counsel for Amicus Curiae WVEA and WVARSE, hereby certify that I have served a true and exact copy of the foregoing *Brief of Amicus Curiae* this the 14th day of July, 2004, by mailing the same in a properly stamped and addressed envelope to the following:

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