

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

FILED

November 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**BOARDS OF EDUCATION OF THE COUNTIES OF
BARBOUR, BERKELEY, BOONE, BRAXTON, BROOKE,
CABELL, CALHOUN, CLAY, DODDRIDGE, FAYETTE,
GILMER, GREENBRIER, HAMPSHIRE, HANCOCK, HARDY,
HARRISON, JACKSON, JEFFERSON, KANAWHA, LEWIS,
LINCOLN, LOGAN, MARION, MARSHALL, MASON,
MCDOWELL, MERCER, MINERAL, MONONGALIA, MONROE,
MORGAN, NICHOLAS, PENDLETON, PLEASANTS, POCAHONTAS,
PUTNAM, RALEIGH, RANDOLPH, RITCHIE, ROANE,
SUMMERS, TAYLOR, TUCKER, TYLER, UPHSHUR,
WEBSTER, WETZEL, WIRT, WOOD, AND WYOMING,
Plaintiffs Below, Petitioners**

vs.) No. 11-0243 (Kanawha County 10-C-327)

**PUBLIC EMPLOYEES INSURANCE AGENCY;
PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD;
AND WEST VIRGINIA STATE AUDITOR,
Defendants Below, Respondents**

MEMORANDUM DECISION

The petitioners, Boards of Education of forty-nine¹ of this State's fifty-five counties ("BOEs"), appeal from an order entered September 22, 2010, by the Circuit Court of Kanawha County. In its order, the circuit court concluded that the BOEs' claims against the respondents, the Public Employees Insurance Agency ("PEIA"); the Public Employees Insurance Agency Finance Board ("Finance Board"); and the West Virginia State Auditor ("Auditor")² present a nonjusticiable political question that cannot be resolved through the

¹Fifty county Boards of Education participated as plaintiffs in the underlying circuit court proceedings, but only forty-nine county Boards of Education are petitioners in the case *sub judice* because the Monongalia County Board of Education is not participating in the instant appeal to this Court.

²The Public Employees Insurance Agency; the Public Employees Insurance Agency
(continued...)

instant declaratory judgment action. On appeal to this Court, the BOEs contend that the circuit court erred by (1) ruling that their claims raise a nonjusticiable political question that cannot be remedied through a declaratory judgment action and (2) refusing to consider the BOEs' constitutional challenge to the subject statute. Upon a review of the parties' arguments,³ the record designated for appellate consideration, and the pertinent authorities, we affirm the September 22, 2010, order of the Kanawha County Circuit Court. In summary, we conclude that the claims for which the BOEs seek declaratory relief do not satisfy the jurisdictional requirements for a declaratory judgment proceeding enunciated by this Court in Syllabus point 4 of *Hustead ex rel. Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996). Furthermore, insofar as this case does not present a new or significant question of law, we find this matter to be proper for disposition pursuant to Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

The facts underlying the instant proceeding are not disputed by the parties. The BOEs in this case each have retired employees who receive retirement benefits, including health care coverage. Such retirees' health care coverage is provided through PEIA, and, as county boards of education, the BOEs are mandatory participants in PEIA's health care plan. The retirees' PEIA health care premiums are paid for by the retirees, themselves, and the BOEs, as the retirees' former employers. The BOEs' portion of the retirees' premiums is divided into two parts: the minimum annual employer payment ("employer payment") and the employer annual required contribution ("employer contribution"). See W. Va. Code § 5-16D-6(e) (2007) (Repl. Vol. 2011). In practice, the BOEs are required to pay the employer payment in full each year, but must pay only a portion of the employer contribution each year. The employer contribution represents the unfunded liability for the State's obligation to provide other post-employment benefits ("OPEB"), of which retirees' PEIA health care coverage and corresponding premiums form a part,⁴ and is funded by the State through the

²(...continued)

Finance Board; and the West Virginia State Auditor also may be referred to collectively as "the Respondents."

³In addition to the aforementioned parties, we also have considered the briefs submitted by the Amici Curiae herein: the West Virginia State Board of Education; three West Virginia school systems that are currently being administered by the West Virginia State Board of Education, *i.e.*, Grant County schools, Mingo County schools, and Preston County schools; the West Virginia School Service Personnel Association; and the American Federation of Teachers - West Virginia.

⁴The term "other post-employment benefits" refers to benefits provided to retired
(continued...)

West Virginia Public School Support Plan (“PSSP” or “State Aid Formula”). In other words, even though the employer contribution, in name, is defined as an obligation of the individual BOEs pursuant to W. Va. Code § 5-16D-6(e), the BOEs receive State funding to satisfy this liability.

At issue in this proceeding is the language of W. Va. Code § 5-16D-6(e) (2007) (Repl. Vol. 2011), which directs as follows:

The Public Employees Insurance Agency shall bill each employer for the employer annual required contribution and the included minimum annual employer payment. The Public Employees Insurance Agency shall annually collect the minimum annual employer payment. The Public Employees Insurance Agency shall, in addition to the minimum annual employer payment, collect any amounts the employer elects to pay toward the employer annual required contribution. Any employer annual required contribution amount not satisfied by the respective employer shall remain the liability of that employer until fully paid.

(Emphasis added). The BOEs contend that the practical effect of this statute is three-fold. First, the statute requires PEIA to bill individual BOEs for the full amount of the employer contribution established by the Finance Board, instead of only that portion of the employer contribution for which the BOEs will receive State funding. Second, the remaining, unfunded portion of the employer contribution remains a liability of the individual BOEs until it has been satisfied in full even though the State does not provide funding sufficient to satisfy the full amount of the employer contribution. Third, the Auditor requires the individual BOEs to report the entire amount of the unpaid employer contribution on their annual financial statements even though, the BOEs argue, this obligation is really a liability of the State and not of the individual BOEs. The total current unfunded OPEB liability for which the BOEs are billed via the unpaid employer contribution and that they are required to report on their annual financial statements is estimated to be approximately \$45,000,000; each individual BOE is billed for its constituent portion of this total amount.

On February 22, 2010, the BOEs filed a declaratory judgment action in the Circuit Court of Kanawha County seeking various declarations defining the actual scope of the BOEs’ liability for the unpaid employer contribution. The BOEs also requested the circuit

⁴(...continued)

employees that are in addition to and separate from the retirees’ pension benefits. *See generally* W. Va. Code § 5-16D-1(t) (2010) (Repl. Vol. 2011).

court to declare that the subject statute, W. Va. Code § 5-16D-6, is unconstitutional because it interferes with the BOEs' ability to provide a "thorough and efficient system of free schools" as required by article XII, § 1 of the West Virginia Constitution. By order entered September 22, 2010, the circuit court denied the BOEs' request for declaratory relief finding that their claims present a nonjusticiable political question that cannot be resolved through a declaratory judgment action. In short, the circuit court determined that the BOEs' claims do not satisfy the jurisdictional prerequisites for the exercise of jurisdiction because they involve uncertain and contingent events; no adversity exists between the parties; and the requested declarations would not resolve the underlying controversy.

On appeal to this Court, the BOEs contend that the circuit court erred by ruling that they have not presented a justiciable controversy so as to permit the court to award them the declaratory relief they have requested. We accord a plenary review to the circuit court's ruling: "[a] circuit court's entry of a declaratory judgment is reviewed *de novo*." Syl. pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995).

A declaratory judgment action is designed to permit courts "to declare rights, status and other legal relations" between parties. W. Va. Code § 55-13-1 (1941) (Repl. Vol. 2008). Such declarations permit "a circuit court to grant declaratory relief in a case of actual controversy." *Cox*, 195 W. Va. at 618, 466 S.E.2d at 469 (Cleckley, J., concurring) (citation omitted). However, "if there is no 'case' in the constitutional sense of the word, then a circuit court lacks the power to issue a declaratory judgment. A declaratory judgment may not be used to secure a judicial determination . . . where no controversy exists." *Id.*

Ruling that the BOEs' claims present a nonjusticiable political question over which it lacks jurisdiction to award declaratory relief, the circuit court considered the jurisdictional prerequisites for a declaratory judgment action adopted by this Court in Syllabus point 4 of *Hustead ex rel. Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996):

[i]n deciding whether a justiciable controversy exists sufficient to confer jurisdiction for purposes of the Uniform Declaratory Judgment Act, West Virginia Code §§ 55-13-1 to -16 (1994), a circuit court should consider the following four factors in ascertaining whether a declaratory judgment action should be heard: (1) whether the claim involves uncertain and contingent events that may not occur at all; (2) whether the claim is dependent upon the facts; (3) whether there is adverseness among the parties; and (4) whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest.

The circuit court concluded that it lacks jurisdiction to award the requested declaratory relief because the BOEs' claims involve uncertain and contingent events; are not between adverse parties; and the requested declarations would not resolve the underlying controversy. We agree with the circuit court's conclusions.

The circuit court found that the first *Hustead* factor had not been satisfied because the claims presented by the BOEs involve uncertain and contingent events. In rendering its ruling, the circuit court observed that, even though the BOEs have been billed for the total amount of the unfunded employer contribution, it is uncertain whether they will be required to actually satisfy this entire obligation. Pursuant to W. Va. Code § 5-16D-6(e), individual employers are granted the authority to decide the amount of the employer contribution they will pay in a given year: "The Public Employees Insurance Agency shall . . . collect *any amounts the employer elects to pay* toward the employer annual required contribution." (Emphasis added). This language clearly states that the individual BOEs are not expected to pay the entire amount of the employer contribution with which they have been charged, but, rather, only that portion of the employer contribution that they decide to pay in that particular year. This language does not require an employer to tender the full amount of the employer contribution. Moreover, the precise extent to which the individual BOEs have been adversely affected by the Respondents' administration of the subject statute is unclear from the record in this case. Although the BOEs contend that the imposition of such liability negatively affects their credit ratings and adversely impacts their ability to implement long-range planning for student resources, teacher salaries, and construction projects, no concrete evidence has been cited to demonstrate the actual injuries the BOEs have sustained in this regard. Thus, the circuit court correctly determined that the relief requested by the BOEs "involves uncertain and contingent events that may not occur at all." Syl. pt. 4, in part, *Hustead*, 197 W. Va. 55, 475 S.E.2d 55.

Next, the circuit court determined that the BOEs had failed to establish adversity between the parties named in their declaratory judgment action as required by the third *Hustead* factor. The circuit court concluded that the interests of neither PEIA nor the Finance Board are adverse to those of the BOEs insofar as both PEIA and the Finance Board, in implementing the terms of W. Va. Code § 5-16D-6(e), are simply fulfilling their mandatory, nondiscretionary duty to bill the individual BOEs for the total unsatisfied employer contribution. Rather, the circuit court ruled that the true adverse party to these proceedings is the West Virginia Legislature insofar as it is the entity that has created the subject statutory scheme that requires PEIA, the Finance Board, and the Auditor to impose such liability upon the individual BOEs. W. Va. Code § 5-16D-6(e) specifically requires "[t]he Public Employees Insurance Agency *shall* bill each employer for the employer annual required contribution. . . . The Public Employees Insurance Agency *shall* . . . collect any amounts the employer elects to pay toward the employer annual required contribution."

(Emphasis added). We repeatedly have held that “[i]t is well established that the word “shall,” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.’ Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86 (1982).” Syl. pt. 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997). Thus, the Respondents are *required*, by law, to bill the individual BOEs for the unpaid portion of the employer contribution; the Legislature has not afforded the Respondents any discretion to do otherwise. Therefore, just as the individual BOEs are statutorily subject to being billed for the total unpaid employer contribution, so, too, are the Respondents statutorily required to bill the individual BOEs therefor. Accordingly, we conclude that the circuit court properly ruled that there is no “adverseness among the parties.” Syl. pt. 4, in part, *Hustead*, 197 W. Va. 55, 475 S.E.2d 55.

Lastly, the circuit court concluded that the fourth *Hustead* factor had not been fulfilled insofar as an award of declaratory relief as requested by the BOEs would not finally resolve the underlying controversy. At issue in the instant proceeding is not whether the individual BOEs are required to submit their annual employer contributions to provide funding for their retirees’ PEIA health care premiums. Rather, the question for which the BOEs seek declaratory relief is whether the individual BOEs can properly be billed for the total unpaid portion of such employer contributions. As noted in the previous discussion, the actual extent of the harm claimed by the BOEs, though plausible, is not apparent from the record submitted for this Court’s consideration. Thus, resolution of the issues presented by the BOEs’ declaratory judgment action, in their current procedural context, would do nothing more than produce an advisory opinion. This Court is “not constituted for the purpose of making advisory decrees,” Syl. pt. 2, in part, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991) (internal quotations and citation omitted), and we will not deviate from this tenet of judicial fortitude in the case *sub judice*. Consequently, the circuit court correctly concluded that “the sought after declaration would [not] be of practical assistance in setting the underlying controversy to rest.” Syl. pt. 4, in part, *Hustead*, 197 W. Va. 55, 475 S.E.2d 55.⁵

For the foregoing reasons, we conclude that the circuit court did not err by denying declaratory relief to the BOEs based upon its conclusion that the BOEs’ claims present a nonjusticiable political question and do not satisfy the jurisdictional requirements for a

⁵Having determined that the circuit court did not have jurisdiction to decide the claims presented by the BOEs in the instant declaratory judgment proceeding, we likewise conclude that the constitutional issues with regard to which the BOEs sought declaratory relief also are not properly before the Court in their present procedural posture.

declaratory judgment proceeding enunciated by this Court in Syllabus point 4 of *Hustead ex rel. Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996). Accordingly, the September 22, 2010, order of the Circuit Court of Kanawha County is hereby affirmed.

Affirmed.

ISSUED: November 10, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh