IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

No. 34885

State of West Virginia Consolidated Public Retirement Board,

Appellant (Respondent below)

v.

Paul E. Nesselroad,

Appellee (Petitioner below).

FILED
JUN 15 2009
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY
Civil Action No. 06-AA-135
The Honorable Paul Zakaib, Jr., Judge

WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD'S BRIEF

IN SUPPORT OF

PETITION FOR APPEAL

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I. NATURE OF PROCEEDING AND RULING OF COURT BELOW

This is Appellee's, Dr. Nesselroad's, third attempt to require the Appellant, West Virginia Consolidated Public Retirement Board, to recompute his retirement benefit in such a manner as to afford him a retirement annuity far in excess of the annuity for which he has made contributions. His request has previously been denied by two Circuit Court Orders and a previous opinion from this honorable Court.[1]

Twenty years after Dr. Nesselroad began receiving his retirement annuity and subsequent to two prior court actions, he filed an administrative appeal, yet again, requesting a recalculation of his retirement benefit. On August 17, 2006, the Board issued a *Final Order* adopting the *Recommended Decision* of the hearing officer in its entirety, which denied Dr. Nesselroad's request. Dr. Nesselroad appealed this decision to the Circuit Court of Kanawha County, West Virginia.

As to this latest third attempt, Dr. Nesselroad was successful in Circuit Court, and now the State of West Virginia Consolidated Public Retirement Board (hereinafter "Board") respectfully Petitions for Appeal from the Circuit Court of Kanawha County's Final Order entered on September 9, 2008, overturning the administrative decision of the Board denying Paul E. Nesselroad's request for reclassification of 6.592 years of service credit at West Virginia University during the period of 1950 through 1960 from statutorily salary capped "$4,800 years" (higher education) to "full salary years" (non-higher education) and a corresponding recalculation as to his annuity benefits.

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See attached as Exhibit A, *Opinion and Order*, Kanawha County Circuit Court, 88-MISC-267, order limiting higher education members full participation in STRS to a "prospective basis only".
Also, see attached as Exhibit B, *Final Order*, Kanawha Circuit Court, 89-MISC-229, finding the above-referenced Order (88-MISC-267) to be dispositive and further denying Dr. Nesselroad's second request for recalculation of his annuity.
Also, see Nesselroad v. Ansel, 188 W.Va. 193, 423 S.E.2d 596, Supreme Court's opinion affirming above-referenced Circuit Court Order (89-MISC-229).

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Historically, participation in STRS (State Teachers Retirement System, also known as TRS) is available to two different groups. One group includes teachers and service personnel employed in the elementary and/or secondary school systems of West Virginia. The second group includes teachers, administrators and other employees of institutions of higher education.[2] Since its inception in 1941, there have been many changes to the Teachers Retirement System. West Virginia Code §18-7A-14 governs the amount of retirement system contributions. Until 1963, the percentage of contributions was the same for both higher education and non-higher education members with a statutory salary limitation of $2,500 from 1941-49, $3060 from 1949-53, and $3,067 from 1953-63.[3]

In 1963, the statute was amended in which non-higher education members began making contributions on the basis of a statutory salary maximum of $7,500 from 1963-67 and $12,000 from 1967-69 at which time the statutory cap was removed and they contributed on the basis of their full salary. In 1969, the statutory salary cap was increased and remained at $4,800 for higher education members.

During the years in question, TRS was a defined contribution plan not the defined benefit plan it became in 1970. When a member retires from a defined contribution plan, he receives a lump sum amount reflecting the total of his contributions, plus his employer's contributions, along with the interest and other earnings accumulated by those combined contributions; whereas, when a member retires from a defined benefit plan, he receives a monthly annuity based upon various actuarial assumptions, such as percentage of contributions, salary, and years of service.

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[2]*Nesselroad v. Ansel,* at p. 598.

[3]Acts of the Legislature, 1963, c. 53.

All members of the defined contribution plan from 1941 until 1963 were expected to contribute a percentage (4% from 1941-49, 5% from 1949-53 and 6% from 1953-63) of a fixed dollar amount of salary ($2,500 from 1941-1949, $3,080 from 1949-53 and $3,067 from 1953-63) and the state would match the contribution, dollar for dollar, similar to the employer match on today's 401 ks. If the member made less than the maximum salary, the member would contribute to TRS the listed percentage of his actual salary and the employer would match that dollar amount. If the member made more than the salary cap, his salary and his contribution were based on the salary cap and contribution cap in effect for that particular year.

In 1963, with the salary cap primarily affecting higher education members, the higher education community successfully petitioned the legislature for a supplemental pension plan, now commonly referred to as TIAA-CREF [see §18-23-4a]. This supplemental plan allowed higher education members to contribute on earnings in excess of the statutory cap.

At the time § 18-23-4a was enacted, the legislature also passed Senate Bill 81 which amended § 18-7A-14 to restrict the contributions of any member employed by the Board of Regents (higher education members) to their first $4,800 of annual earnings because of their ability to participate in the supplemental plan. During this time, non-higher education members were contributing on a salary maximum of $7,500 which was increased to $12,000 in 1969.

Then, in 1970, the legislature enacted the 2% formula [see §18-7A-26] and removed the $12,000 salary cap for non-higher education members; however, the $4,800 salary cap remained for higher education members participating in TRS.

Recognizing that non-higher education members were now receiving more liberal retirement benefits than they were, the higher education community successfully lobbied the legislature to

provide them the opportunity to participate on an unlimited basis like non-higher education members.

In 1971, West Virginia Code § 18-7A-14a was enacted and allowed higher education members the option full participation in TRS by paying on full salary **if** they made back payments, which had to be received between March 1971 and March 1972 to cover the difference in the higher contribution rates that non-higher education members had been paying during the years of 1963-1970. For those who selected this option, their annuity would be calculated pursuant to § 18-7A-26 the same as non-higher education members. Members were also given the option to participate solely in TIAA-CREF, or remain in TRS up to the $4800 maximum and contribute/participate in TIAA-CREF as to any amount over the maximum. This last group of members became known as split participants, having accounts in both TRS and TIA-CREF.

Dr. Nesselroad failed to take advantage of this legislation and remained in the system as a split participant. He continued to contribute to TRS based upon the statutory salary cap of $4,800. He also continued to participate and received a retirement benefit from his twenty five years of service in TIAA-CREF.

During the 1988 regular session of the legislature, West Virginia Code § 18-23-4a was temporarily amended to allow higher education members to elect to join the Teachers Retirement System as unlimited participants; however, the legislature neglected to amend § 18-7A-14a to require back payments to TRS. So, realizing their mistake, three months later during the Third Extraordinary Session of the 1988 legislature, this amendment was rescinded by yet another amendment to § 18-23-4a which stated:

"The Legislature declares that the amendment of this section in Enrolled Committee Substitute for

House Bill N. 4672, enacted at regular session, one thousand nine hundred eighty-eight was inadvertent and remained in said bill contrary to legislative intent that the same be deleted; therefore, such language is hereby retroactively deleted and expunged as of the effective date of said Enrolled Committee Substitute for House Bill N. 4672 as curative and technical corrective action. **The Legislature further declares that such ambiguous and deficient language inadvertently enacted in said bill shall be given no force and effect whatsoever in any litigation involving such language."**

Prior to the Extraordinary Session, Dr. Nesselroad and other higher education members petitioned to join the Teachers Retirement System as unlimited participants but were denied access by the Board, who was anticipating the legislative rescission of the amendment. They then petitioned the Circuit Court for a writ of mandamus to compel the Board to permit them to join TRS as unlimited participants and additionally to require the Board to recalculate their annuity as though they had always been unlimited participants.

On June 30, 1988, Judge Paul Zakaib granted a writ of mandamus as to the participation but denied their request for recalculation of their prior contributions. Judge Zakaib's Order directed the Board to accept as members those who so elected as unlimited participants (full salary) in the Teachers Retirement System ***on a prospective basis only***, finding that the unamended § 18-7A-14a [1971] clearly limited the time to make back payments to STRS to March 6, 1971 to March 6, 1972.[4] Neither side appealed this decision.[5] Dr. Nesselroad then opted to participate as an unlimited

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[4]See attached Exhibit A, *Opinion and Order*, Kanawha County Circuit Court, 88-MISC-267, order allowing higher education members full participation in STRS, but limiting full participation to a "prospective basis only".

[5]Although this Order was never appealed by either side, it appears to be inconsistent with this Court's later holding in Booth v. Sims, 193 W.Va. 32, 456 S.E.2d 167. This short-lived 1988 amendment did not create a new pension plan, but rather it was an amendment to an existing plan which amendment was rescinded three months later. The Court in *Booth* held that the legislature could make such amendments provided it did not deprive an individual of benefit that he had detrimentally relied upon because it had existed for a number of years. The type of detrimental reliance required to preclude legislative amendments could not possibly occur in a

participant in the Teachers Retirement System, and approximately one year later retired.

A year later, Dr. Nesselroad and other higher education members sought another writ of mandamus to compel the Board to, once again, recompute their benefit based upon their final average salary and their total years of service in both higher education and non-higher education. On March 8, 1991, Judge MacQueen denied their writ citing as authority Judge Zakaib's earlier Order limiting participation to a *prospective basis only.*[6] Dr. Nesselroad appealed this decision to the Supreme Court.

In Nesselroad v. Ansel, 188 W.Va. 193, 423 S.E.2d 596, the Court upheld Judge MacQueen's decision confirming that full participation was limited to a *prospective basis only* and further reasoning that had the legislature intended for members to be given such benefits, the legislature would have *at least* required such members to buy back their previous years of service. *Id at p. 197.*

In 1989, Dr. Nesselroad retired with approximately 37.172 years of total service credit. Pursuant to statute and this Court's previous decision, the Board performed a bifurcated calculation to determine the amount of his annuity in which all service credit prior to 1988 was divided into two categories - 31.410 years of higher education service at a final statutory salary cap of $4,800.00 (as direted by W. Va. Code §18-7A-26(c)(1)) and 5.762 years of non-higher education at a final average salary of $44,840.00. This non-higher education service was primarily earned prior to 1955 in public elementary schools with the exception of his final year of service at West Virginia University when

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three month window.

[6]See attached as Exhibit B, *Final Order*, Kanawha Circuit Court, 89-MISC-229, finding the above-referenced Order (88-MISC-267) to be dispositive and further denying Dr. Nesselroad's request for recalculation of his annuity.

he elected to be a full participant in TRS. This last year of service was the only time he ever made retirement system contributions on the on the basis of a $44,840.00 salary.

In 2005, this present action, Dr. Nesselroad once again petitioned the Board to have his annuity recalculated by including 6.592 years of higher education at West Virginia University earned during the years of 1950-1961 upon his final average salary as opposed to the statutory cap, reducing his previous requests addressed by two Circuit Courts and this Court of all 37 years of service to 6.592. He requested that his annuity should be recalculated based upon 12.345 years assessed as full salary years ($44,840.00) and 24.818 years assessed at the statutory salary cap ($4,800.00). The Board denied his request

Dr. Nesselroad appealed this denial to the Board's hearing officer. On July 13, 2006, Hearing Officer Jack W. DeBolt issued a *Recommended Decision* which recommended that Dr. Nesselroad's request be denied, in part, because the statutes when read in connection to one another unmistakably separate higher education members who have only contributed on a statutory cap of up to $4,800 of salary, such as Dr. Nesselroad, from those who have opted to be full contributors as their full salaries. On August 17, 2006, the Board issued a *Final Order* adopting the *Recommended Decision* of the hearing officer in its entirety.

Dr. Nesselroad appealed this decision to the Circuit Court of Kanawha County, West Virginia. On November 13, 2006, counsel for Dr. Nesselroad filed *Petitioner's Brief in Support of Administrative Appeal.* On December 14, 2006, counsel for the Board filed *West Virginia Consolidated Public Retirement Board's Brief in Opposition to Petitioner's Appeal.* On January 22, 2007, counsel for Dr. Nesselroad filed *Petitioner's Reply to West Virginia Consolidated Public Retirement Board's Brief in Opposition to Petitioner's Appeal.*

By Order entered on the 9th day of September 2008, by the honorable Paul Zakaib, Jr., the Circuit Court reversed the final decision of the West Virginia Consolidated Public Retirement Board, finding that the Board had ignored the long-standing principle of "grandfathering" and that these higher education years should be computed based upon his final average salary as opposed to the statutory salary cap. It is from this decision, the Board filed this appeal.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE COURT BELOW

A. The Circuit Court's Order is Contrary to Two Previous Circuit Court Orders and this Court's Prior Opinion in Nesselroad, et al. v. Ansel, 188 W.Va. 193, 423 S.E.2d 598 (1992). The Circuit Court Erred by Ruling that the Board Neglected to Observe the Holding in Nesselroad.

B. The Circuit Court Erred by Ruling that the Board had Inappropriately Applied the Wrong Statutory Provision in Denying Dr. Nesselroad's Claim.

C. The Circuit Court Erred by Ruling that the Board had Failed to Address the Long Standing Principle of "Grandfathering" as Applicable in this Case.

D. The Circuit Court Erred by Failing to Afford Appropriate Deference to the Board's Reasonable and Permissible Construction of Applicable Statutes and Rules as the Administrative Body Charged with Enforcing such Statutes and Rules.

E. The Circuit Court Erred in Awarding the Petitioner his Reasonable Attorney's Fees and Costs which have been Incurred in this Action.

IV. DISCUSSION OF LAW

A. The Circuit Court's Order is Contrary to Two Previous Circuit Court Orders and this Court's Prior Opinion in Nesselroad, et al. v. Ansel, 188 W.Va. 193, 423 S.E.2d 598 (1992). The Circuit Court Erred by Ruling that the Board Neglected to Observe the Holding in Nesselroad.

Twenty years after he retired, Dr. Nesselroad has now been given a third judicial attempt to have his retirement benefit recalculated in such a manner as to afford him a retirement annuity far in excess of the annuity for which he has made contributions. The two previous Orders issued by the Kanawha Circuit Court and the prior opinion of this honorable Court in *Nesselroad* (1992) are simply res judicata to this present action.[7]

The doctrine of res judicata applies when the following four conditions exist: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity in the quality of the persons for or against whom the claim is made.[8] All four conditions exist in this present action.

Dr. Nesselroad's first attempt to have his retirement benefit recalculated was addressed by Judge Zakaib's *Order and Opinion* entered on June 30, 1988 and attached to this brief as Exhibit A. This Order explicitly rejected Dr. Nesselroad's request for retroactive application of the short-lived amendment to W. Va. § 18-23-4a to recalculate his annuity on the basis of full salary as opposed to the statutory cap which limited the amount of his contributions. In that Order Judge Zakaib framed the issue as follows:

> "Simply put, whether the law then existing allowed petitioners not only to re-elect STRS s the preferred option, but whether this right included the option to choose STRS and make accrued back payments to become 100% fully vested participants in STRS."[9]

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[7]See attached Exhibits A and B.

[8]Schenerlein & Sliger, Inc. v. Hancock County Savings and Loan Assoc., 176 W.Va. 98, 341 S.E.2d 844 (1986).

[9]See attached as Exhibit A, *Opinion and Order*, Kanawha County Circuit Court, 88-MISC-267, p. 8.

Citing W. Va. Code § 18-23-4a, Judge Zakaib ruled, in 1988, that the election of higher education members to participate on an unlimited basis in STRS applies on a ***prospective basis only,*** and further held:

> "To construe the express language in section four-a, article twenty three otherwise would place the respondent governmental agency in the unduly burdensome position of attempting to budget, make appropriation requests, etc. from year to year without the knowledge of any fixed financial obligations owing to STRS due to unexpected influx of participants desiring to make accrued back payments, thereby substantially increasing their pension allotments, and unexpectantly depleting the State's revenues by denying the STRS program the benefits of accrued interest over the years. **This would be an obviously absurd result."** *Id.* at p. 10.

Judge Zakaib further explicitly ruled that "there shall be excluded any applications to make back payments" by higher education members. *Id.* at p.10.

Despite this explicit language in Judge Zakaib's Order, shortly thereafter, Dr. Nesselroad again petitioned the Court to have his retirement annuity recalculated on the basis of his full salary as opposed to the statutorily mandated salary cap. On March 8, 1991, Judge MacQueen issued a *Final Order* denying his request and finding Judge Zakaib's previous Order limiting participation as 100% members to a **"prospective basis only"** as dispositive.[10]

Judge MacQueen further ruled as follows:

> "Clearly back payments would be required for the former split participants to expect their benefits to be calculated in the same manner as the non-split participants. This Court can not imagine Judge Zakaib would allow prospective participation only to disallow back payments, and then expect split participants who selected other retirement options and still have the funds from those options, to receive full benefits.". *Id.* at p.2.

Dr. Nesselroad appealed this decision to this honorable Court. In *Nesselroad v. Ansel* (1992), this honorable Court affirmed Judge Macqueen's Order holding that unlimited participation in TRS

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[10]See attached as Exhibit B, *Final Order*, Kanawha Circuit Court, 89-MISC-229, p. 2.

for higher education members was restricted to a **"prospective basis only"** and further concluding "any other conclusion would be a fiscal and actuarial travesty". *Id.* At p. 199, 601.

The issue addressed in the two prior suits and this Supreme Court's opinion is the same. For purposes of res judicata, the inquiry is whether the same evidence would support both actions(or in this case three actions).[11] Dr. Nesselroad's request for retroactive application of the short-lived 1988 amendment to W. Va. Code § 18-23-4a has been explicitly rejected twice by the Circuit Court, and the rejection upheld by this honorable Court. Although Dr. Nesselroad has cleverly attempted to frame the issue differently on this attempt by reducing his request from 37 years to 6.592, his request is the same and cannot be awarded without retroactive application of the statute. The ultimate issue in this case has clearly been decided on two separate occasions and this Court.

Consequently, in this present action, the Circuit Court erred by ruling that the Board had neglected to observe the holding in *Nesselroad, et al. v. Ansel*, 188 W.Va. 193, 423 S.E.2d 598 (1992). The Circuit Court held as follows:

> "In addition, the Board's final order neglects to observe West Virginia case law on point wherein the West Virginia Supreme Court specifically addressed the treatment of service years in higher education prior to 1963, such as are at issue in this appeal. This class action notes that, "[b]efore 1963 all members of both groups were enrolled in the same retirement system, namely STRS. Their contributions to the system, **and their future benefits were limited to their full salary or statutorily maximum, whichever was the higher."** *Nesselroad v. Ansel,* 188 W.Va. 193, 423 S.E.2d at 598 (W.Va. 1992)(emphasis added).[12]

This statement is clearly taken out of context from the Supreme Court's opinion in *Nesselroad.* The purpose of a statutory maximum is to limit the amount. The phrase "whichever

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[11] *White v. SWCC,* supra at 756.

[12] See Circuit Court's Order, *Nesselroad v. CPRB,* 06-AA-135, p. 6.

was higher" actually refers to the limitation on participation, whichever is higher "full salary or statutory maximum". The calculation is based upon whichever was higher. If a member's full salary was lower than the statutory maximum, then his contributions and benefits would be based upon his full salary. If a member's salary was higher than the statutory maximum, then his contributions and benefits would be limited to the statutory maximum; otherwise there would be no reason to have a statutory maximum. Non-higher education full salaries would likely be below the statutory maximum, contrary to the salaries of higher education members.

When read in proper context, the *Nesselroad* paragraph cited by the lower court supports the Board's position in this case. The preceding two sentences of the paragraph which were not cited by the Circuit Court state the following:

> "Historically, participation in STRS is available to two different groups. One group includes teachers and service personnel employed in the elementary and/or secondary school system of West Virginia. The second group includes teachers, administrators and other employees of institutions of higher education."*Id.* at 598.

The Supreme Court in *Nesselroad* recognized that from its inception, STRS has always been comprised of two distinct groups - higher education and non-higher education. The Board, in this present case, correctly calculated Dr. Nesselroad's annuity by separating all of his service prior to 1988 (the year he elected to be a full participant) into two categories - higher education and non-higher education.

As to the calculation of annuity benefits, the Circuit Court, again erred by finding that the Board failed to comply with the holding in *Nesselroad* (1992). The Circuit Court cited the following passage from that opinion:

> "Pursuant to Judge Zakaib's order {referencing the 1988 Order} appellees have bifurcated appellants' STRS accounts for purposes of calculating the

> annual benefit payment due them. For the period before 1988, when the appellants were split participants contributing to STRS only on the basis of the first $4,800 of salary, appellees compute the retirement benefit for appellants, in accordance with W.Va. Code 18-7A-26, as 2 percent of $4,800 multiplied by the total service credit compiled during appellants' status as split participants. For the period since appellants' 1988 election to be unlimited participants in STRS, appellees compute the retirement benefit as 2 percent of the appellants' average salary for the five highest years during the years since the election, multiplied by the appellants' **total number of years compiled as full members.** These two figures are then added to determine the total retirement benefit payable. *Nesselroad v. Ansel,* 188 W.Va. 193, 423 S.E.2d at 599 (W.Va. 1992)(emphasis added).[13]

The Board did comply with the Court's opinion in *Nesselroad* to calculate Dr. Nesselroad's annuity. A full member is someone who makes retirement system contributions (6% of salary) on the basis of their full salary, which includes nearly all nonhigher education members whose salaries never exceeded the statutory cap, those higher education members who opted to make back payments to the fund in 1971, and those higher education members who opted to be full members on a prospective basis from 1988 forward. It is clear from the legislative and judicial history of this case, the only higher education members who are considered to be "full members" prior to 1971 are those who elected to take advantage of the 1971 amendment by choosing to make back payments to cover the difference in the contribution rates created by the statutory cap. This is abundantly clear when the *Nesselroad* (1992) opinion is read in its entirety.

Pursuant to the *Nesselroad* (1992) opinion, the Board did a bifurcated calculation in which Dr. Nesselroad's service credit was separated into two accounts – higher education years assessed with a $4,800 statutory salary cap and non-higher education years assessed as full salary years ($44,840 final average salary).

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[13]See Circuit Court's Order, *Nesselroad v. CPRB,* 06-AA-135, p. 7.

Dr. Nesselroad's request to have 6.592 years of higher education years earned from 1950-1960 treated as full salary years because the statutory cap for both higher and non-higher education members was the same during this time, ignores the fact that the salary cap at that time primarily affected higher education members because non-higher education members' salaries simply were not that high. His argument also ignores the explicit statutory limitation placed on higher education members of $4,800 contained in W. Va. Code §18-7A-26(c) and his failure to take advantage of the 1971 amendment, the only time there was statutory authority for him to be treated as an unlimited participant of TRS. Additionally, this argument is contrary to this Court's opinion in *Nesselroad* and would create an unjust windfall for Dr. Nesselroad at the expense of the fund.

Dr. Nesselroad retired in 1989, approximately one year after he elected to be an unlimited participant in TRS. His salary for his last year of service was approximately $44,840. Normally, pursuant to West Virginia Code § 18-7A-26, a final average salary consists of an average of the highest five annual salaries earned during the last fifteen years of total service; however, since Dr. Nesselroad's only prior non-higher education service occurred prior to 1955, the Board used (probably incorrectly) his final annual salary rather than his final average salary to compute his benefit. This last year of service was the only year in which he made contributions based upon any amount remotely close to $44,840. The remainder of the 5.762 full salary years of non-higher education credit was earned prior to 1955 as an elementary school teacher at a yearly average salary of approximately $3,000 and yearly contributions ranging from $98 to $148.

If Dr. Nesselroad's request is granted, then he would be given credit for an additional 6.592 years of higher education as full salary years at $48,840 despite having made contributions of only

$184 or less for each of those years.[14] This would credit him with a total of 12.345 years assessed as full salary years. Should this occur, then his final average salary should be recalculated to reflect his true final average salary ($11,848) rather than his final salary of $44,840.

Consequently, the Board not only followed the directives of the earlier *Nesselroad* opinion, but also strictly applied the decision in a manner which calculated Dr. Nesselroad's annuity with his final annual salary as opposed to his final average salary because he retired one year after the 1988 election to become a full participant, and the Court's opinion states that the average salary stems from the five highest years "since the election."[15] Unlike the Court's opinion, the statute does not place such a limitation on "final average salary". West Virginia Code § 18-7A-26 defines final average salary as "the average of the highest annual salaries received by the member during any five years contained within his or her last fifteen years of total service credit." The "since the election" phrase more than likely is just additional clarification by the Court that the amendment applies "**on a prospective basis only**". The Board's strictly literal misinterpretation of the phrase in the Court's opinion is contrary to statute and created a substantial windfall for Dr. Nesselroad when one compares the amount he contributed to the amount he receives as an annuity.

B. The Circuit Court Erred by Ruling that the Board had Inappropriately Applied the Wrong Statutory Provision in Denying Dr. Nesselroad's Claim.

The Circuit Court erred by ruling that the Board had inappropriately applied the wrong statutory provision in denying Dr. Nesselroad's claim.[16] The lower court found that the Board's

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[14]Attached as Exhibit C is a breakdown of Dr. Nesselroad's years of service, salary and contributions.

[15]*Nesselroad* at p. 599.

[16]Circuit Court's Order, *Nesselroad v. CPRB, pp. 4-6.*

hearing officer placed emphasis on an incorrect portion of §18-7A-14a of the West Virginia Code in denying the request. The court ruled that Hearing Officer DeBolt underlined (thereby emphasizing) that portion of the code which permitted higher education members for a one year period to make back payments so that their annuities would be computed the same as non-higher education members. The Court found that since that provision requiring back payments only applies to the years of 1963-1970 that it is not relevant to Dr. Nesselroad's request for the years of 1951-1961.

This is an incorrect interpretation of Hearing Officer DeBolt's analysis and opinion, and, more importantly, the statute. The hearing officer utilized the correct statutes for the computation of the annuity and emphasized that specific section of the code to illustrate how the statute "unmistakably separates higher-education members who have only contributed on a $4,800.00 statutory salary cap, such as the Dr. Nesselroad, from those who have opted to be full contributors (on the basis of full salary)."[17] Hearing Officer DeBolt further concluded that §18-7A-26 and its reference to §18-7A-14a provide an express statutory cap on final salary for higher education members of $4,800.00.[18]

The Circuit Court's analysis fails to address the limitation on back payments in W. Va. Code §18-7A-14a, and ignores the language in W. Va. Code §18-7A-26 regarding split participants. The Court is required to read statutes relating to the same subject in pari materia.[19] All statutes in pari materia must be read and construed together so that the legislature's intention can be gathered from

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[17]See p.9 of *Recommended Decision* of Hearing Officer.

[18]*Id. at p. 9.*

[19]*State ex rel. Rowe v. Ferguson,* 165 W.Va. 183, 268 S.E.2d 45 (1980).

the whole of the enactments.[20] West Virginia Code sections §18-7A-26, §18-7A-14a, §18-23-4a all directly relate to the funding of TRS benefits, and must therefore be read and construed together to give effect to the intention of the legislature.

West Virginia Code § 18-7A-14 governs the amount of retirement system contributions. Until 1963, the percentage of contributions was the same for both higher education and non-higher education members with a statutory salary limitation for both groups of $2,500 from 1941-49, $3060 from 1949-53, and $3,067 from 1953-63.[21] In 1963, the statute was amended and non-higher education members began making contributions on the basis of a statutory salary maximum of $7,500 from 1963-67 and $12,000 from 1967-69 at which time the statutory cap was removed and they contributed on the basis of whatever their full salary was. Inn 1970, the statutory salary cap was increased and remained at $4,800 for higher education members.

During the years in question, 1950 through 1960, Dr. Nesselroad's contributions ($184 per year) were limited to statutory salary cap of $3,067. His actual salary during these years exceeded the cap.

In 1971, West Virginia Code § 18-7A-14a was enacted and allowed higher education members the option of paying on full salary **if** within one year, they made back payments to cover the difference in the higher contribution rates that non-higher education members had been paying for the years of 1963-1970 (prior to 1963 the statutory cap was the same for both groups). For those who selected this option, their annuity would be calculated pursuant to § 18-7A-26 the same as non-higher education members for all years of service including those prior to 1963.

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[20] *Kimes v. Bechtold,* 176 W.Va. 182, 342 S.E.2d 147 (1986).

[21] Acts of the Legislature, 1963, c. 53.

The Circuit Court clearly erred in finding that the since the 1971 amendment to § 18-7A-14a only required higher education members to make back payments to cover the years of "July 1, 1963 to July 1, 1970" in order to become full members that it is not relevant to the years prior to 1963 which are at issue here.[22]

The 1971 amendment only required higher education members to make back payments from "July 1, 1963 to July 1, 1970" because prior to 1963 the percentage of contributions was the same for both higher education and non-higher education members with a statutory salary limitation for both groups of $2,500 from 1941-49, $3060 from 1949-53, and $3,067 from 1953-63. Unlike Dr. Nesselroad, for those higher education members who so elected and made the required back payments, they became full members as to all of their prior service including those service years prior to 1963. Because higher education and non-higher education members had the same statutory salary caps and corresponding contributions, there was no need for the Legislature to require higher education members to make back payments prior to 1963.

The time for Dr. Nesselroad to select to be a full member to count the years at issue here (1955-1963) was during the 1971 amendment. He did not elect that option. He did not make the requisite back payments, and his time to do so expired on March 6, 1972. The 1988 Court Order interpreting the short-lived 1988 amendment found that it allowed participation on a "prospective basis only" specifically because the Legislature failed to amend that portion of the Code to require back payments like the 1971 amendment did.

Dr. Nesselroad did not select this option, and continued to contribute to TRS based upon the statutory salary cap of $4,800. He also participated in the supplemental plan (TIAA-CREF) on that

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[22]See page 5, paragraph 7 of Circuit Court Order, 06-AA-135.

portion of his salary which was in excess of the statutory cap.

Pursuant to West Virginia Code, § 18-7A-26 and this Court's previous opinion,[23] the Board performed a bifurcated calculation in which Dr. Nesselroad's total service credit prior to 1988 was separated into two categories - higher education (statutorily capped $4800) members and non-higher education (full) members as follows:[24]

Higher Education $4800 statutory cap	Statutory Salary Max	Max Contribution	NonHigher Education Full Salary Years		Average Annual Salary	Average Annual Contributions
1954-87 WVU	$4,800/yr	$184/yr	1947-51	Hampshire	$ 2,930	$115
31.410 total years of service			1954-55	Jackson	$3,715	$223
			1988-89	WVU	$44,840	$4,124 (post 1988 election)
			5.762 total years of service			

Dr. Nesselroad contends that his 6.592 years at West Virginia University prior to 1963 should have been calculated on his final average salary of $44,840.00 rather than on the statutory salary cap of $4,800.00 and his annuity recalculated so that his final average salary of $44,840.00 would be multiplied by 12.354 years as opposed to 5.762. Normally, pursuant to West Virginia Code § 18-7A-26, a final average salary consists of an average of the highest five annual salaries earned during the last fifteen years of total service; however, since Dr. Nesselroad's only prior non-higher education service occurred prior to 1955, the Board (perhaps incorrectly) used his final annual salary rather than an average salary. Dr. Nesselroad also contends that he is entitled to a reclassification of these years because during the years of 1950-61 the contribution rates were the same for higher education and non-higher education members.

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[23]*See Nesselroad v. Ansel,* 188 W.Va. 193, 423 S.E.2d 596 at 196, 599.

[24]This chart is for illustrative purposes only. Attached as Exhibit E is a more detailed breakdown of Dr. Nesselroad's years of service, salary and contributions.

As the Hearing Officer concluded, this reasoning is flawed "because it is not the difference in contribution rates between higher education and non-higher education, which occurred from 1963 forward that causes the annuity limitation for higher education members but rather the express limitation on final average salary to $4,800 as contained in § 18-7A-26(c)(1) of the Code,"[25] which states as follows:

(c) Upon establishment of eligibility for a retirement allowance, a member shall be granted an annuity which shall be the sum of the following:
(1) Two percent of the member's average salary multiplied by his or her total service credit as a teacher. In this subdivision "average salary" shall mean the average of the highest annual salaries received by the member during any five years contained within his or her last fifteen years of total service credit: Provided, That the highest annual salary used in the calculation for certain members employed by the West Virginia higher education policy commission under its control shall be four thousand eight hundred dollars, as provided by section fourteen-a [§18-7A-14a] of this article and chapter;

Additionally, West Virginia Code § 18-7A-14a unquestionably separates higher education members, like Dr. Nesselroad, who opted to only contribute on a statutory salary cap of $4,800 from those who opted to be full contributors. West Virginia Code § 18-7A-14a states, in pertinent part:

> Notwithstanding the provisions of subsection (a) of Plan B, section twenty-six of this article, or any other provision herein, any such member who exercises such option and makes the required additional payment will then be considered entitled to retirement, death, withdrawal and all other benefits under the retirement system to the same extent as if he had been paying into the retirement system the full amount provided by law for members of the system other than employees of the board of regents throughout the period of his membership in the retirement system.
>
> Any such member who does not make such election shall have the options of retaining his present status under the retirement system and the supplemental retirement plan as provided by section four-a, article twenty-three of this chapter, or of ceasing to pay any portion of his salary into the retirement system and paying a percentage of his entire salary into a retirement plan established by the board of regents pursuant to the provisions of said section four-a, article twenty-

[25] See *Recommended Decision,* p. 9.

> three of this chapter. In the event he makes the latter election he shall, upon retirement, receive benefits under the retirement system as if he had retired at the date he ceased making payments into the system, except that between such time and the time of actual retirement regular interest shall be considered in computing such benefits.
>
> A person employed by the West Virginia board of regents in the future shall have the option, as of the date of his employment, to elect whether he is to pay a percentage of his entire salary into the state retirement system, or to pay a percentage of such salary into a retirement plan established by the board of regents pursuant to the provisions of section four-a, article twenty-three of this chapter, and shall receive benefits according to the retirement plan he selects.
>
> Since persons employed by the former board of governors of West Virginia University, and by the state board of education at institutions of higher education, on July one, one thousand nine hundred sixty-nine, became employees of the West Virginia board of regents on that date, employment by such board of governors and the state board of education at institutions of higher education shall be deemed to have been employment by the board of regents for the purposes of this section.

West Virginia Code §18-7A-26 and §18-7A-14a clearly distinguish between higher education members and non-higher education members. These statutes provide an expressly limit the calculation for higher education members to the statutory cap on salary of $4,800.00. These are the only relevant statutory provisions for the calculation of Dr. Nesselroad's annuity. Consequently, the Circuit Court clearly erred by ruling that the Board had inappropriately applied the wrong statutory provisions in denying Dr. Nesselroad's claim.

C. <u>The Circuit Court Erred by Ruling that the Board had Failed to Address the Long Standing Principle of "Grandfathering" as Applicable in this Case.</u>

The Circuit Court erred by ruling that the Board had failed to address the long standing principle of "Grandfathering" as applicable in this case. Citing *Crock, et al. v. Harrison Co. Bd. of Educ.*, 211 W.Va. 40, 560 S.E.2d 515, the Circuit Court found that "this doctrine operates to exempt Dr. Nesselroad, who was already involved in a regulated activity or business, from new regulations

established by statute."[26]

The legal principle of "grandfathering" is not applicable to this case. All of the amendatory changes which have occurred in the Teachers Retirement System have operated to greatly enhance, not reduce, Dr. Nesselroad's benefit.

During the years in question, TRS was a defined contribution plan not the defined benefit plan it became in 1970. Dr. Nesselroad's first benefit came when the plan was converted from a defined contribution to a defined benefit plan. Secondly, the salary cap of $4,800 did not come into effect until 1963; however, it was the policy of the Board to credit higher education members who earned service both before and after 1963 with $4,800 years. For service years between 1953 and 1963, this policy credited the member with $1,733 more than the law provided. For years between 1949 and 1953, this law credited the member with $1,740 more than the law provided. This policy resulted in a windfall for Dr. Nesselroad by giving him credit for more than the maximum salary and for more than what he had contributed to the fund for those years.

Additionally, in 1988, a brief amendment to the statute and the Court's ruling created another substantial windfall for Dr. Nesselroad. Approximately one year after he elected to join TRS as an unlimited participant based upon full salary, he retired. This permitted Dr. Nesselroad to have his final annual salary ($44,840.00) at WVU to be treated as his final average salary for the purpose of calculating his annuity. Normally, pursuant to West Virginia Code § 18-7A-26, a final average salary consists of an average of the highest five annual salaries earned during the last fifteen years of total service; however, since Dr. Nesselroad's only prior non-higher education service occurred prior to 1955, the Board (perhaps incorrectly) used his final annual salary rather than an average

[26]See Circuit Court's Order 06-AA-135, *Nesselroad v. CPRB,* p. 6.

salary. This was the only year in which he made contributions based upon a salary of $44,840. The remainder of the 5.762 years of non-higher education credit was earned prior to 1955 as an elementary school teacher when his annual salary was less than $3,000 and he only contributed approximately $153 per year; yet, all of these years were based upon a final average salary of $44,840.00. Dr. Nesselroad now contends this multiplier should be 12.345 as opposed to 5.762.

Furthermore, the legal principle of grandfathering contradicts the Circuit Courts' prior Orders and this Court's opinion in *Nesselroad (1992).*[27] These post 1988 rulings clearly limit full participation of higher education members in TRS to ***a prospective basis only***. If the Court applied the principle of grandfathering, then Dr. Nesselroad would be given credit for all 37 years of service at a final average salary of $44,840.00 despite only having contributions to the system on the basis of this salary for little more than a year.

This issue was previously and clearly decided by this Court in *Nesselroad v. Ansel, 188 W.Va. 193* (1992). In *Nesselroad*, Dr. Nesselroad sought to have his benefits based upon his total years of service in both higher education and non-higher education. This Court affirmed the lower court's ruling that limited full participation of higher education members in TRS to *a prospective basis only,* and found that 'had the legislature intended that the appellants be able to obtain credit for service in the system for which payments had not been made to STRS, the legislature certainly would have provided, as it did in 1971, for the "purchase" of prior service credit." *Id.* at p. 197.

Therefore, the legal principle of grandfathering is not applicable to this case. The principle of grandfathering applied retrospectively to obtain additional prior service credit is specifically prohibited by the Circuit Courts' and this Court's prior rulings which limit full participation to a

[27] See attached Exhibits A and B.

"prospective basis only". The principle of grandfathering applied prospectively to prevent any negative consequences from future regulatory changes is not relevant in this case because all statutory amendments since the inception of the Teachers Retirement System have operated to greatly enhance, not reduce, Dr. Nesselroad's benefit.

D. The Circuit Court Erred by Failing to Afford Appropriate Deference to the Board's Reasonable and Permissible Construction of Applicable Statutes and Rules as the Administrative Body Charged with Enforcing such Statutes and Rules.

The West Virginia Consolidated Public Retirement Board is a public body established pursuant to W. Va. Code §5-10D-1 to serve as the statutory administrator and fiduciary for the State's several pension plans, including the Teachers Retirement System (hereinafter "TRS") established in article seven-a [§§ 18-7A-1 et seq.] chapter eighteen of the West Virginia Code. The members of the Board include the highest officials of the executive branch and a representative from each of the various plans. The Board and its members have the" highest fiduciary duty to maintain the terms of the [..TRS] trust, as spelled out in the statute." State ex rel. Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988). As a federally qualified pension plan, it is incumbent upon the Board, as part of its fiduciary duty, to ensure that the TRS plan is administered according to its terms, for the exclusive benefit of all plan participants and beneficiaries, in order to protect and preserve the plan's qualified tax status. See IRC 401(a); W. Va. Code §5-10-3a. Such a duty encompasses the duty to maintain the integrity and credibility of the plan which requires the Board to file this appeal in order to prevent an increase in the approximately $4,134,000,000 of TRS Unfunded Actuarial Accrued Liabilities. For these reasons, *inter alia,* the Board brings this Petition for Appeal before this honorable Court.

This matter came before the circuit court below pursuant to W. Va. Code § 29A-5-4, of the West Virginia Administrative Procedures Act ("Act). Section 29A-5-4(g) of the Act governs the review of contested administrative decisions and issues by a circuit court, and specifically provides that:

> (g) The Court may affirm the ...decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the...decision of the agency if the substantial rights of the petitioner...have been prejudiced because the administrative...decisions are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; 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.
>
> West Virginia Code §29A-5-4(g).

This Court has consistently held that factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or "arbitrary and capricious." See, e.g., Healy v. West Virginia Bd. of Medicine, 506 S.E.2d 89, 92 (W.Va. 1998).

Statutory interpretative issues, on the other hand, constitute questions of law which are generally subject to *de novo* review; however, with respect to judicial review of an agency's interpretations of statutes which it administers, this Court has held that "absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of a statute by [an administrative agency]" having policy making authority relating to the statute. See, e.g., Sniffen v. Cline, 193 W.Va. 370, 456 S.E.2d 451 (1995). In Sniffen v. Cline, this Court explained:

> The circuit court's adjudicatory interpretation of [the

> controlling statute] is entitled to no special deference and is subject to our independent review. However, absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of the statute by [the administrative agency] because it has policymaking authority with regard to the statute. Consistently, this Court has held that interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight. [An agency's] construction of these statutes must be given substantial deference.

Sniffen, 456 S.E.2d at 455, citing Zapata Haynie Corp. v. Barnard, 933 F2d 256, 258 (4th Cir. 1991); WV Department of Health v. Blankenship, 189 W.Va. 364, 382 S.E.2d 681 (1993); WV Non-Intoxicating Beer Commr' v. A & H Tavern, 181 W.Va. 364, 382 S.E.2d 558 (1989); Dillon v. Board of Education, 171 W.Va. 631, 301 S.E.2d 588 (1983); Smith v. State Workmen's Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (1975).

The Board's interpretation of the relevant retirement plan statutes at issue here was both reasonable and consistent with clearly expressed legislative intent. Consequently, the Circuit Court should not have substituted its judgment for that of the Board and its hearing officer, and should have instead afforded substantial deference to the Board's interpretation of the controlling statutes.

E. The Circuit Court Erred in Awarding the Petitioner his Reasonable Attorney's Fees and Costs which have been Incurred in this Action.

The Circuit Court erred in awarding Dr. Nesselroad his reasonable attorney's fees and costs which have been incurred in this action. The judicial review provisions of the West Virginia Administrative Procedures Act which are applicable here do not statutorily authorize an award of attorney's fees. There is simply no statutory or common law authority for the award of attorney fees.

In the 1986 case of *Sally-Mike Properties v. Yokum,* West Virginia's Supreme Court of

Appeals embraced the "American Rule" relating to attorney fee awards, and held that as a general rule, "each litigant bears his or her own attorney fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).

Fundamentally, the "American Rule" is predicated upon the principle that, so long as the losing party is not found to have acted in bad faith, or for vexatious or wanton reasons, "one should not be penalized for merely prosecuting or defending a lawsuit, as litigation is at best uncertain. Id. Also see, *Bureau of Employment Programs v. Gatson,* 559 S.E.2d 899 (2001) and *Vieweg v. Gatson,* 546 S.E.2d 267 (2001) (a claimant who prevails in an unemployment compensation action **may not be awarded attorney fees** unless the evidence shows the Division acted in bad faith or with vexatious, wanton, or oppressive conduct).

The Court has recently considered and affirmed its allegiance to the American Rule and has consistently embraced the attorney fee standards adopted in *Sally-Mike Properties* and its progeny. In that regard the Supreme Court has emphasized that "there are very limited circumstances in which a prevailing party may be awarded attorney fees." *Bronson v. Wilkes,* 607 S.E.2d at 403 (2004). Included within those "limited circumstances" in which departure from the American Rule has been found to be justified are those cases in which some express statutory or contractual authority for reimbursement of a prevailing party's attorney's fees exists. For example, West Virginia Code § 5-11-13(c) and § 29B-1-7 statutorily provide for the award of attorney fees in human right cases and freedom of information cases.

Even if this were a mandamus action, attorney fees in such actions are only awarded when a public official has been found to have *deliberately and knowingly* refused to exercise a clear legal

duty. *Nelson v. WV Pub. Employees Ins. Bd.,* 171 W.Va. 445, 300 S.E.2d 86 (1982); *State ex rel. WV Highlands Conservancy v. WV Division of Env. Prot.,* 193 W.Va. 650, 458 S.E.2d 88 (1995); *McGraw v. Zakaib,* 192 W.Va. 195, 451 S.E.2d 761 (1994); *Pritchard v. Crouser,* 175 W.Va. 310; 332 S.E.2d 611 (1985); *Queen v. Moore,* 176 W.Va. 27, 340 S.E.2d838 (1996).

In *McGraw,* West Virginia's Supreme Court of Appeals reasoned that:

> The showing of a "clear right" [in mandamus] does not automatically shift a petitioner's cost and attorney fees onto the public officer involved. Although some disingenuous hindsight rule would be easy to apply, accurate predictions of court decisions are not a requirement for the public official. Id.

Implicit in the *McGraw* holding is the Supreme Court of Appeals' recognition that the routine imposition of attorney's fees upon state agencies such as the Board in cases such as this would have a chilling effect upon a state official's good faith fulfillment of his or her statutory duties.

There is simply no statutory authority for the award of attorney fees in this case, nor does Dr. Nesselroad qualify for such an award pursuant to the common law "American Rule". Additionally, it is bad public policy to award attorney fees for an administrative case and deplete money from the Teachers Retirement System.

V. CONCLUSION

With the exception of 5.7 years of service as an elementary school teacher prior to 1955, Dr. Nesselroad did not become a full participating member contributing on the basis of full salary in TRS until 1988. He retired in 1989. At the time he retired his total contributions into TRS was approximately $5,000 ($4,000 of which was contributed during his last year of service). Based on this investment, he has received and will continue to receive a retirement annuity in excess of $8,000 per year for more than twenty years now. A rather astonishing return on a one year investment. He

is also receiving a retirement benefit from TIAA-CREF for more than twenty five years of service and contributions into that plan.

If the lower Court's Order is affirmed, then Dr. Nesselroad will receive an increase in his annuity of approximately $4,500 per year for the rest of his life. He would also receive a lump sum payment of approximately $100,000 (if interest is applied this figure doubles). All of this for having contributed a little more than $5,000 into TRS, $4,000 of which was contributed and invested for approximately a year. The ruling could also affect 330 other higher education members with similar service, and depending on their final average salary, this would increase the more than $4 billion dollars of unfunded accrued liability of the Teachers Retirement System by tens of millions of dollars.

The Circuit Court's Order is contrary to the two previous Orders entered in the Circuit Courts regarding this issue and this honorable Court's opinion in *Nesselroad* (1992), in which all three opinions clearly limit full participation based upon full salary contributions in TRS for higher education members to a "**prospective basis only**" from 1988 forward. Dr. Nesselroad failed to take advantage of the 1971 amendment to §18-7A-14a. Had he done so and made the required back payments of contributions for the years of 1963-70 (when the contribution rates were much higher for non-higher education members than higher education members as opposed to prior to 1963 when contribution rates were the same for both groups), then he would have received a benefit as a full member for all of his years of service, including the years at issue in this present action.

Additionally, the Circuit Court's Order is contrary to explicit statutory language contained in W. Va. § 18-7A-26(c)(1) which limits the annual salary used to calculate higher education

members' annuities to $4,800.[28] The legal principle of "grandfathering" is simply not applicable in this case and contrary to participation on a "prospective basis only". All of the statutory amendments to TRS as well as Board policy have resulted in a substantial windfall for Dr. Nesselroad. Additionally, there is no statutory or common law authority for the award of attorney fees in an administrative case of this nature.

VI. RELIEF PRAYED FOR

For the reasons set forth herein, Appellant, West Virginia Consolidated Public Retirement Board, respectfully prays that this honorable Court reverse the Circuit Court's Order entered on September 9, 2008.

Respectfully Submitted,
WV Consolidated Public Retirement Board,
Appellant,

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[28]W. Va. § 18-7A-26(c)(1) states, in pertinent part, "Provided, That the highest annual salary used in the calculation for certain members employed by the West Virginia higher education policy commission under its control shall be four thousand eight hundred dollars, as provided by section fourteen-a [§18-7A-14a] of this article and chapter".

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

No. 34885

State of West Virginia Consolidated Public Retirement Board,

Appellant (Respondent below)
v.
Paul E. Nesselroad,

Appellee (Petitioner below).
APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY
Civil Action No. 06-AA-135
The Honorable Paul Zakaib, Jr., Judge

CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, counsel for the Respondent, do hereby certify that a copy of the foregoing "WV Consolidated Public Retirement Board Brief in Opposition to Petitioner's Appeal" was served upon the Petitioner, by service upon his attorneys, David K. Hendrickson, Esq. and Lora A. Arthur, this 14th day of December, 2006, by regular mail, postage prepaid, addressed as follows:

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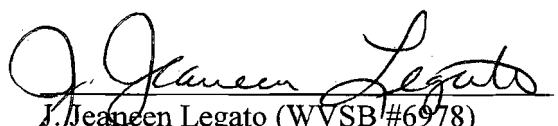

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EXHIBITS

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