

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,

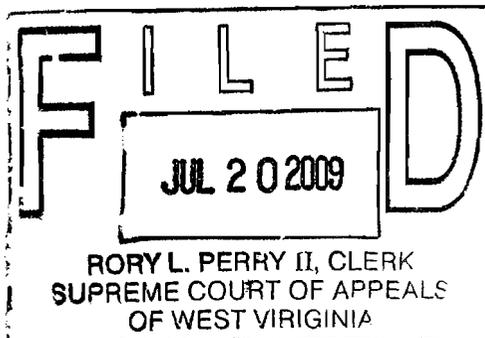
Appellee (Petitioner below),

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Kanawha County Civil Action No.: 06-AA-135

The Honorable Paul Zakaib, Jr.

**PAUL E. NESSELROAD'S BRIEF IN RESPONSE TO THE WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT BOARD'S BRIEF IN SUPPORT OF
PETITION FOR APPEAL**



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**TO THE HONORABLE JUSTICES OF THE
WEST VIRGINIA SUPREME COURT OF APPEALS:**

I. NATURE OF PROCEEDINGS AND RULING BELOW

This response to the Appellant's brief is submitted to this honorable court pursuant to *West Virginia Rules of Appellate Procedure* Rule 10(b). The Appellant, the West Virginia Consolidated Public Retirement Board ("Board"), appeals from the final order rendered by the Circuit Court of Kanawha County, West Virginia dated September 9, 2008 (attached hereto as Exhibit A) which reversed and remanded the Board in regard to the miscalculation of the Appellee educator Paul Nesselroad's annuity. The Circuit Court's "FINAL ORDER" adopts the Findings of Fact and Conclusions of Law set forth in the Recommended Decision of Administrative Hearing Officer Jack W. DeBolt dated July 13, 2006 (attached hereto as Exhibit B). The issue before this Court on appeal is whether the Circuit Court erred by reversing the State of West Virginia Consolidated Public Retirement Board's final order dated August 17, 2006 (attached hereto as Exhibit C) which denied Paul Nesselroad's plea for proper classification of his service credit years from the period of 1950 through 1960 as "full salary years" and a corresponding re-calculation as to his annuity benefits.

The West Virginia Consolidated Public Retirement Board assigns five errors in its petition. These assignments of error concern the Circuit Court's application of the appropriate standard of review for the applicable administrative agency and the Circuit Court's application of West Virginia law to the facts of the underlying action. Petitioner's assignments of error in this petition present questions of law.

The Appellant's brief sets forth in lengthy and unnecessary detail the facts and procedural history of this and other cases. This action by the Board intentionally mischaracterizes the pleas

of Dr. Nesselroad and other West Virginia educators to have their retirement investments calculated appropriately and also confuses the issue presently before the Court. Dr. Nesselroad has not “been given” attempts to have his earned and invested retirement benefits calculated appropriately. To the contrary, he has been forced to our courts of equity for relief from what has become vexatious, wanton, and oppressive conduct by the Board concerning the retirement benefits for which he invested, earned, and relied upon over the long course of his service as a state educator.

The material issue before this honorable Court is the Board’s error in how Dr. Nesselroad’s years of experience as an educator between the years of 1950 and 1960 were classified by the Board as \$4,800.00 capped years and not as full salary years for purposes of calculating his annuity benefits. There are two statutory Acts which define when \$4,800.00 capped years are to be utilized in calculating Dr. Nesselroad’s retirement. The first one was passed in 1963 when the “split system” began. The second Act was in 1970 when a buyback into the split system was made available. This 1970 Act specifically defines the applicable years for buyback as those between 1963 and 1970.¹ This was because prior to 1963, everyone paid into the retirement system on the same percentages, as there was no difference between the contributions of higher and non-higher educators during the relevant years of 1950 through 1960. Therefore, both higher and non-higher education should uniformly be treated as full salary years

The Board contends that it is their “policy” to categorize higher education members who earned service credit before and after 1963 with \$4,800.00 capped years. However, there is no statutory directive for this action, nor is there any written Board policy to such effect. No evidence was ever presented that such a policy was enacted nor that any eligible participant was

¹ These years, 1963 through 1970, were the focus of the cases which the Board spent great time and detail discussing in its brief. However, they are not the appropriate years at issue in the case presently before the Court.

ever notified of such a policy decision. Therefore, Dr. Nesselroad sought relief and was granted the same by the Circuit Court of Kanawha County to have his full salary credit years earned prior to 1963 properly classified by the Board and correspondingly to have his annuity benefits appropriately calculated.

II. STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals reviews decisions of the Circuit Court under the same standard as that by which the Circuit Court reviewed the administrative decision of the Retirement Board. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297 at 304, 465 S.E.2d 399, at 406 (1995). On appeal of an administrative order, the Court is bound by the statutory standards in *West Virginia Code* § 29A-5-4 (Administrative Procedures Act, “APA”) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless clearly wrong. Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). The scope of judicial review of a contested case generally is delineated in the case of *Shepherdstown V.F.D. v. W.Va. Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983), *see also West Virginia Code* § 29A-5-4(g):

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudice because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
in excess of the statutory authority or jurisdiction of the agency; or
- (2) Made upon unlawful procedures; or
- (3) Affected by other error of law; or
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must determine whether the ALJ's findings were reasoned, *i.e.*, whether he or she considered the relevant factors and explained the facts and policy concerns on which he or

she relied, and whether those facts have some basis in the record. The Court reviews *de novo* the conclusions of law and application of law to the facts. *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 465 S.E.2d 399 (1995). The Court affords the factual findings of the Retirement Board deference in the absence of an error of law. *Healy v. W.Va. Bd. of Medicine*, 203 W.Va. 52, 506 S.E.2d 89 (1998). However, “deferential standards have no application if an agency’s decision is based upon a mistaken impression of the legal principles involved. Under such circumstances, the findings and conclusions of an agency will be accorded diminished respect on appeal.” Syl. Pt. 1, *Walker v. West Virginia Ethics Com’*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

This Court has stated that it is “the task of the circuit court to determine ‘whether the [Retirement Board’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’ (citations omitted). *Frymier-Holloran v. Paige*, 193 W.Va. 687, at 695, 458 S.E.2d 780, 788 (1995). As discussed below, the Circuit Court did observe the appropriate standards of review and determined that the Retirement Board was clearly in error insofar as it applied the wrong statutory provision to the service credit years 1950 through 1960.

III. ISSUES PRESENTED

- A. Whether the Circuit Court Properly Reviewed the Administrative Findings, Inferences, Conclusions, and Final Order of the Consolidated Public Retirement Board and Afforded Appropriate Deference to the Same.**
- B. Whether the Circuit Court Properly Applied West Virginia Law to the Facts of this Action in regard to:**
 - a. the Board’s Inappropriate Application of the Wrong Statutory Provision to Deny Paul Nesselroad’s Claim;**
 - b. ruling that the Board Failed to Address the Long Standing Principle**

of “Grandfathering” as Applicable to the Case;

- c. **ruling that the Board Committed Error by Neglecting to Observe the Holding in *Nesselroad, et al. v. Ansel*, 188 W.Va. 423 S.E.2d 598 (1992); and**
- d. **awarding Paul Nesselroad’s Reasonable Attorney’s Fees and Costs which were Incurred in this Action.**

IV. DISCUSSION OF LAW

- A. **The Circuit Court Properly Reviewed the Administrative Findings, Inferences, Conclusions, and Final Order of the Consolidated Public Retirement Board Pursuant to the West Virginia Administrative Procedures Act as well as Applicable West Virginia Case Law, Including, Affording Appropriate Deference to the Same.**

The Circuit Court’s “FINAL ORDER” dated September 9, 2008 (*see* Exhibit A) clearly sets forth the appropriate standard it utilized in reviewing the Retirement Board’s Administrative Findings, Inferences, Conclusions, and Final Order under the “Conclusions of Law” section beginning on page 3:

1. Pursuant to West Virginia Code § 5-10D-1, the Consolidated Public Retirement Board is charged with administering the Public Employees Retirement System established in West Virginia Code § 5-10-1, et seq., the Teachers Retirement System established in West Virginia Code § 18-7A-1, et seq., the Teacher Defined Contribution Retirement System established by West Virginia Code § 10-7B-1, et seq., as well as other various State public retirement plans.
2. This Court is properly vested with statutory authority to review the contested administrative case at bar pursuant to the provisions of the West Virginia Administrative Procedures Act. *West Virginia Code* § 29A-5-4. Specifically the West Virginia Supreme Court in the case of *State ex rel. Young v. Sims* stated, “[t]he West Virginia Consolidated Public Retirement Board is subject to and governed by the West Virginia Administrative Procedures Act set forth in West Virginia Code §§ 29A-1-1 to -7-4.” Syl. Pt 1, 192 W.Va. 3, 449 S.E.2d 64 (1994).
3. On appeal of an administrative order, the Court is bound by the statutory standards in *West Virginia Code* § 29A-5-4 (Administrative Procedures Act, “APA”) and reviews questions of law presented *de novo*; findings of fact by the

administrative officer are accorded deference unless clearly wrong. Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

4. The scope of judicial review of a contested case generally is delineated in the case of *Shepherdstown V.F.D. v. W.Va. Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983), *see also West Virginia Code* § 29A-5-4(g):

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudice because the administrative findings, inferences, conclusions, decision or order are:

- (5) In violation of constitutional or statutory provisions; or
- (6) In excess of the statutory authority or jurisdiction of the agency; or
- (7) Made upon unlawful procedures; or
- (8) Affected by other error of law; or
- (9) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Having noted and recorded the applicable West Virginia Code Provision relating to the Court's review of this administrative action in its "FINAL ORDER", the Circuit Court is well aware of the appropriate standard by which it reviews such cases. Further, the Circuit Court observed West Virginia Case law relevant to this action which notes that the Court "must determine whether the [Retirement Board's] findings were reasoned, i.e. whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied." *Id.*

In its "Conclusions of Law" section, the Circuit Court's order clearly sets forth the relevant applicable statutory and case law provisions which concern this action. Further, the circuit court correctly observed this honorable court's direction in the case of *Flanigan v. W.Va. Public Employees' Retirement System*, 176 W.Va. 330, 419, 342 S.E.2d 414, 335 (1986), "to give substantial weight to the remedial nature of the PERS

Act by the legislative ordination to *construe its provisions liberally in favor of the intended beneficiaries.*” (emphasis added).

The appeal of the Retirement Board asserts that the circuit court substituted its own judgment regarding the facts for the findings submitted by the Retirement Board’s hearing examiner and cites various West Virginia cases in support of the Board’s findings being accorded substantial deference. However, it fails to observe that “deferential standards [to which it alludes] have no application if an agency’s decision is based upon a mistaken impression of the legal principles involved. Under such circumstances, the findings and conclusions of an agency will be accorded diminished respect on appeal.” Syl. Pt. 1, *Walker v. West Virginia Ethics Com’.*, 201 W.Va. 108, 492 S.E.2d 167 (1997). The Circuit Court’s order specifically lays out the legal principles involved in this action and correspondingly shows why the Retirement Board’s findings and conclusions were accorded diminished respect on appeal.

First, the Circuit Court notes that “[m]embership in the West Virginia Teachers Retirement System is mandatory for employees of participating public employers.” *W.Va. Code* § 18-7A-13. Such a mandatory trust is an important function and its administration places on the government body entrusted with it, “a most stringent duty to abstain from giving inaccurate or misleading advice.” Syl Pt. 2, *Flanigan v. W.Va. Public Employees’ Retirement System*, 176 W.Va. 330, 342 S.E.2d 414 (1986). Specifically, this honorable court observed the high standard of care with which it is vested in the case of *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988) by stating, “the Board has a fiduciary duty to protect...the interests of all beneficiaries thereof, and it must exercise due care, diligence, and skill in administering the

trust.”(emphasis added).

The Retirement Board and other similar agencies are now required to “cause an annual financial and compliance audit of the assets managed by the board to be made by a certified public accounting firm....” *W.Va. Code* § 12-6-6(a). The statute additionally requires that “[t]he financial and compliance audit shall be made of the Board’s books, accounts and records with respect to it’s receipts, disbursements, investments, contracts and all other matters relating to its financial operations.” *W.Va. Code* § 12-6-6(b).

Lastly, the circuit court observed the mandate of the West Virginia Supreme Court of Appeals “that under *W.Va. Code* § 5-10-3a (1979 Replacement Vol.) we are directed to give substantial weight to the remedial nature of the PERS Act by the legislative ordination to *construe its provisions liberally in favor of the intended beneficiaries.*” *Flanigan v. W.Va. Public Employees’ Retirement System*, 176 W.Va. 330, 419, 342 S.E.2d 414, 335 (1986)(emphasis added).

Upon review and application of the aforementioned, the circuit court correctly ordered that the Retirement Board was in error. Therefore, it appropriately reversed the State of West Virginia Consolidated Public Retirement Board’s final order dated August 17, 2006 which denied Paul Nesselroad’s plea for proper classification of his service credit years from the period of 1950 through 1960 as “full salary years” and a corresponding re-calculation as to his annuity benefits.

The circuit court’s order observes the relevant facts and legal principles it utilized in the determination of its “FINAL ORDER.” Based on the above, the Circuit Court utilized the appropriate standard for review and correctly found that the Retirement Board’s decision constituted an abuse of discretion or clearly unwarranted exercise of

discretion under its mandated standard of review by not construing the applicable statutory provisions liberally in favor of the intended beneficiary, Paul Nesselroad.

B. The Circuit Court Properly Applied West Virginia Law to the Facts of this Action in regard to:

a. the Board's Inappropriate Application of the Wrong Statutory Provision to Deny Paul Nesselroad's Retirement Benefits

At the administrative level, the West Virginia Consolidated Retirement Board specifically adopted the findings of fact and conclusions of law proposed by Hearing Officer Jack W. DeBolt in the "Recommended Decision of Hearing Officer" by means of a single paged "FINAL ORDER" dated August 17th 2006 (see Exhibit B). In its final order, the Board set forth the following W.Va. Code provision with "emphasis supplied" as principle reason for denying the recalculation of Dr. Nesselroad's annuity:

Notwithstanding the provisions of subsection (a) of Plan B, section twenty-six [§18-7A-26] of this article, or any other provision herein, any such member who exercises such option and made the required additional payment will then be considered entitled to the retirement, death, withdraw 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.

W.Va. Code § 18-7A-14.

This total section of the W.Va. Code refers to State Teachers Retirement System ("STRS") higher education members only who participated in both the STRS on a limited basis and a Supplemental Retirement System ("SRS" which is commonly referred to as the "split system") beginning in 1963 and ending in 1979 which made the optional back payment as required by W.Va. Code § 18-7A-14(a). Such members, by making the back

payment, became fully vested in the STRS and received the benefits outlined. The West Virginia legislature specified the exact time period of "July 1, 1963 to July 1, 1970" as the period for which optional back payment was required in order to gain full STRS benefits during a specific time period. It is also of note that this is the only time period that the legislature authorized optional back payment in order to gain full STRS. Optional back payments were never disputed in this matter and Dr. Nesselroad has acknowledged he was not able to make the optional back payment for the specified time period. As previously noted, all of Dr. Nesselroad's service years beginning 1963 and thereafter are NOT at issue in the case.

Dr. Nesselroad's claim involves the years of September 1, 1950 through December 31, 1960 which do not fall within the legislatively enumerated time period of July 1, 1963 to July 1, 1970. Accordingly, the Circuit Court ruled it is inappropriate to deny his claim based on a section of the Code which applies to the wrong time period at issue as the Board has done in this case. The Board acknowledges in its brief that "Until 1963, *the percentage of contributions was the same for both higher education and non-higher education members* ." (emphasis added). Therefore, the 6.592 years of service Dr. Nesselroad accrued prior to the 1963 amendment are full salary years just the same as non-higher education participants.²

Appropriately, the Circuit Court utilized the paragraph subsequent to the one emphasized by the Board in its order in consideration of Dr. Nesselroad's claim. This

² In its brief, the Board alleges a ruling in this case "could" affect "330" other higher education members with similar service and "depending" on the member's final average salary, increase the liability of STRS by "tens of millions of dollars." These assertions are conjecture which were never presented below nor made to face evidentiary scrutiny. As far as Dr. Nesselroad is aware, there is only one other person with similar service history (most other similarly situated persons are deceased) and that person's service years between 1950 and 1960 **ARE ALREADY** classified as full salary years for purposes of annuity calculations by the Board.

provision concerns STRS members who did not make the election provided in W.Va. Code § 18-7A-14(a) and reads in pertinent part, “[a]ny member who does not make such election shall have the options of retaining his present status under the retirement system and the supplementary retirement plan as provided by section four-a (18-23-4a) article twenty-three of this chapter.” Insofar as Dr. Nesselroad retained his status of participation in the “split system” the Circuit Court properly applied this section of the Code in considering the action and recognized that the relevant years between 1950 and 1960 are full salary years for both higher and non-higher education members as there was no difference between the classifications at that time.

b. The Board Failed to Address the Long Standing Principle of Grandfathering” as Applicable to the Case;

The final order which was adopted by the Board completely fails to address applicable West Virginia case law which supports Dr. Nesselroad’s claim. The Board ignored relevant precedential West Virginia case law, despite it having been presented by the Petitioner in the underlying administrative actions. The applicable case law was presented to the Board for consideration at the administrative level and supports the Petitioner’s claim.

Dr. Nesselroad’s claim is based on his service credit accumulated prior to 1963. During the period from 1950 to 1961 he was employed in Higher Education at West Virginia University for a total of 6.592 years. These years, should likewise properly be included with the other 5.762 years of full salary years, not as capped \$4,800.00 years as they were calculated by the Board for annuity purposes.

The capped \$4,800.00 years did not even begin until 1963, when the “split system” option became available to higher education workers. During the relevant years

of 1950-1961, Dr. Nesselroad made the maximum contribution requirements. These 6.592 years are “Grandfathered” as full salary years and as discussed previously the legislative Act of 1963 does not include the time period which is at issue in this case. The long standing recognition of “Grandfathering” as applicable in this case operates to exempt those already involved in a regulated activity or business from new regulations established by statute. In an analogous West Virginia Supreme Court case, *Crock, et al. v. Harrison Co. Bd. Of Educ.*, 211 W.Va.40, 560 S.E.2d 515 (W.Va. 2002), the Court observed this long held legal principle and ordered that the Harrison County Board of Education restore certain experience credits and remit the resulting difference in increased salary for their respective experience credits.

The Board goes to great lengths to confuse the legal issue presented and mischaracterize Dr. Nesselroad and his earned benefits of lifelong service as a West Virginia educator. By standing up to the Board for recognition and appropriate calculation of 6.592 years of service as a teacher under the appropriate statute, he has been slandered as taking an “unjust windfall at the expense of the fund.” The Board does nothing to acknowledge that Dr. Nesselroad not only contributed the amounts due to the fund at the times in question but that he also **WORKED** for the State of West Virginia doing one of the most important and challenging jobs there can be, educating our youth. Dr. Nesselroad invested in the retirement system the same as all other participating members for the applicable time period and he is entitled to the same classification of his service credit years. The Circuit Court, upon review of the law and facts of this case, appropriately ordered the Board to do just that and it should therefore be affirmed.

c. ruling that the Board Committed Error by Neglecting to Observe the Holding in *Nesselroad, et al. v. Ansel*, 188 W.Va. 423 S.E.2d 598 (1992);

There is 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 case 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 established maximum, whichever was the higher.**” *Nesselroad, et al. v. Ansel*, 188 W.Va. 193, 423 S.E.2d at 598 (W.Va. 1992)(emphasis added).³ Having fully complied with the required contributions into STRS during his years of higher education employment before 1963, Dr. Nesselroad is therefore entitled to receive full salary benefits for those credit years.

Further, the Court outlined how annuity benefits should be calculated for members who retire from the “split system”:

Pursuant to Judge Zakaib’s order, appellees have bifurcated appellants’ STRS accounts for purposes of calculating the annual benefit payment due them. For the period before 1998, when appellants were split participants contributing the 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

³This case is attached hereto as Exhibit C and was found to be very helpful in understandably setting forth the legislative history and statutory framework of the STRS. This case, nor the Circuit Court orders referenced by the Board in its brief, are *res judicata* to the issue at bar. Further, the Board did not raise an issue of *res judicata* in the underlying action nor in its petition to this honorable Court. Therefore, such argument is inappropriate.

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. *Id* at 599.

In the case at bar, there are 6.592 years of higher education full salary service years (1950-60) prior to being a "split participant" (1963-88) as described by Justice Neely in the aforementioned West Virginia Supreme Court case. These years, when correctly classified, result in a total of 12.345 full salary years for annuity computation purposes.

The Board's final order arbitrarily ignored and failed to address the applicable provisions of law afforded in the proceeding paragraphs. For this reason the Board's final order was properly reversed and remanded by the Circuit Court with directions to correctly classify Dr. Nesselroad's 6.592 years of higher education as full salary years and correspondingly re-calculate his annuity.

d. awarding Paul Nesselroad's Reasonable Attorney's Fees and Costs which were Incurred in this Action.

It is within the Circuit Court's discretion to award Dr. Nesselroad fair reasonable attorneys' fees and costs associated with the underlying action. Having prevailed on his claim to have his state wage salary years properly categorized and correspondingly re-calculate the annuity thereof, the granting of reasonable attorneys' fees and costs was fair, just, and equitable by the Circuit Court in making the claimant whole. West Virginia Code § 21-5-1 et seq.

concerns “Wage Payment and Collection” within the State of West Virginia. Although the particular action at bar is brought under the Administrative Procedures Act, Dr. Nesselroad’s retirement benefits are part and parcel of the wages he has earned over the course of his many years of service of employment with the State of West Virginia. Correlatively, he should be properly entitled to an award of his reasonable attorney fees as provided for under the West Virginia Wage Payment and Collection statutes. In relevant part *W.Va. Code § 21-5-12(b)* states, “The court in any action brought under this article *may*, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant.” (emphasis added). In this action, the Circuit Court properly found within its justified discretion that Dr. Nesselroad should be awarded reasonable attorney fees and ruled accordingly. Awards of reasonable fees have similarly been granted by various Circuit Courts in other analogous cases where petitioners prevail against the West Virginia Consolidated Retirement Board. In the case of *JoAnn Huffman v. State of West Virginia Consolidated Public Retirement Board*, Civil Action No. 03-AA-69 (Kanawha County Circuit Court) the Petitioner, Ms. Huffman, was awarded fair and reasonable attorney fees. (Order Approving Petitioner’s Reasonable Attorney Fees and Costs attached hereto as Exhibit D). The West Virginia Supreme Court declined the Board’s Petition of Appeal in the *Huffman* case by a 4-1 vote February 15, 2007. *JoAnn Huffman v. State of West Virginia Consolidated Public Retirement Board*, No. 063209. Additionally, in the case of *Butler v. West Virginia Consolidated Public Retirement Board*, Civil Action No. 04-C-2508 (October 6, 2005) (Randolph County Circuit Court) Judge Henning approved an hourly rate for Andy Katz, Esq. of \$250.00 as fair and reasonable in an action against the Board.

Having prevailed on his claim to have his state wage salary years properly categorized and the annuity thereof recalculated, the Circuit Court's grant of Dr. Nesselroad's reasonable attorneys' fees and costs was fair, just, equitable, and based on sound legal statutory doctrine. As discussed above, it was well within the Circuit Court's legal discretion to award Dr. Nesselroad reasonable attorneys' fees and costs associated with the underlying action. To the extent that the Board wishes to invoke review of the "American Rule" under *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986), the actions of the Board in deliberately classifying his service credit years for the time period of 1950-1960 were done so vexatiously, wantonly, and oppressively. Former executive officer, Willard Ansel, personally denied Dr. Nesselroad's service years accrued between 1950 and 1960 as full salary years after a Writ of Mandamus was issued requiring the Board to accept the parties of the class action *Nesselroad*⁴ back into the retirement system on their full salaries. Dr. Nesselroad does not know the extent to which certain other similarly situated members' service credit years were classified correctly by the Board as full salary years. However, insofar as the Board has introduced issues and evidence not part of the record or underlying proceedings to this Court in its brief, this information could likewise be made available to the Court by FOIA request.⁵ In any event, there exists ample evidence in the existing underlying record, which the Circuit Court reviewed, to find that the actions of the Board regarding the calculation of Dr. Nesselroad's annuity benefits were vexatious, wanton, or oppressive.

⁴ The *Nesselroad* case was a class action with multiple parties involved, other than Dr. Nesselroad.

⁵ The Board has had all of the information and resources to make whatever case and introduce whatever evidence it pleased in the underlying proceedings. Dr. Nesselroad is presently 85 years old, it is inappropriate for the Board to now introduce, on APPEAL and for the first time, irrelevant evidence to this Court which it may have properly made part of the record below and subject to the scrutiny afforded by the trial court. This is a blatant attempt to mire what slow progress has been made toward the proper resolution of this matter. Unlike the Board, Dr. Nesselroad properly presented all of his evidence and made all of his arguments below.

The Circuit Court was well within its legal discretion when it found that Dr. Nesselroad's reasonable attorneys' fees and costs associated with the underlying action should be paid by the Board. As such, the Circuit Court's ruling as to this issue should stand.

CONCLUSION

**The Final Order of the Circuit Court of Kanawha County, West Virginia
Which Appropriately Reversed and Remanded the West Virginia
Consolidated Retirement Board's Last Miscalculation of Dr. Nesselroad's
Annuity Benefits Should be Affirmed**

Contrary to the Board's assertion, Dr. Nesselroad has not "been given" attempts to have his earned and invested retirement benefits calculated appropriately, he has been forced to our courts of equity for relief from what has become vexatious, wanton, and oppressive conduct by the Board concerning the retirement benefits for which he invested, earned, and relied upon over the long course of his service as a state educator.

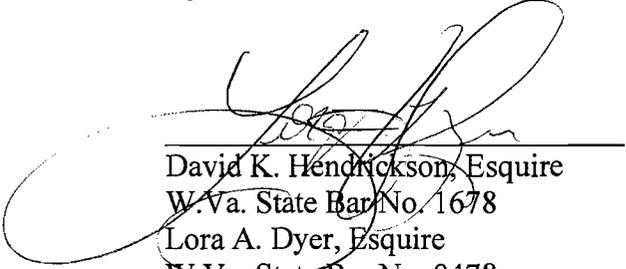
The Board advances a great deal of misleading information as well as facts and evidence which were not part of the underlying action. The material issue before this honorable Court is the Board's error in how Dr. Nesselroad's years of experience as an educator between the years of 1950 and 1960 were classified by the Board as \$4,800.00 capped years and not as full salary years for purposes of calculating his annuity benefits. There are two statutory Acts which define when \$4,800.00 capped years are to be utilized in calculating Dr. Nesselroad's retirement. The first one was passed in 1963 when the "split system" began. The second Act was in 1970 when a buyback into the split system was made available. This 1970 Act specifically defines the applicable years for buyback as those between 1963 and 1970. This was because prior to 1963, everyone paid into the retirement system on the same percentages. There was no difference between the contributions of higher and non-higher educators during the relevant years of 1950

through 1960. Therefore, both higher and non-higher education should uniformly be treated as full salary years

The Board contends that it is their “policy” to categorize higher education members who earned service credit before and after 1963 with \$4,800.00 capped years. However, there is no statutory directive for this action, nor is there any written Board policy to such effect. No evidence was ever presented that such a policy was enacted nor that any eligible participant was ever notified of such a policy decision. Therefore, Dr. Nesselroad sought relief and was granted the same by the Circuit Court of Kanawha County to have his full salary credit years earned prior to 1963 properly classified by the Board and correspondingly to have his annuity benefits appropriately calculated. The Circuit Court observed the appropriate standards of review in determining that the Retirement Board was clearly in error and set forth those applicable standards in its Final Order. Therefore, the Appellee respectfully requests that Circuit Court’s order in this matter be affirmed.

Paul E. Nesselroad,

By Counsel,



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CONSOLIDATED PUBLIC RETIREMENT
BOARD OF THE STATE OF WEST VIRGINIA,

Petitioner (Respondent below),

v.

Supreme Court Case No.:
Kanawha County Civil Action No.: 06-AA-135

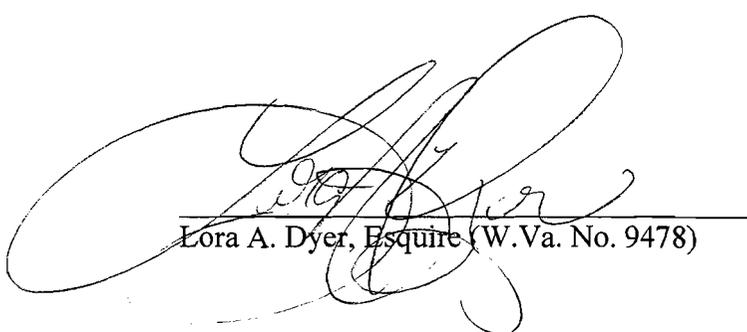
PAUL E. NESSELROAD

Respondent (Petitioner below).

CERTIFICATE OF SERVICE

I, Lora A. Dyer, do hereby certify that service of the foregoing **“PAUL E. NESSELROAD’S BRIEF IN RESPONSE TO THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD’S BRIEF IN SUPPORT OF PETITION FOR APPEAL”** has been made to the following by placing true copies thereof in envelopes deposited in the regular course of the United States Mail, with postage prepaid, on this 20th day July, 2009, addressed as follows:

J. Jeaneen Legato, Esquire
WV Consolidated Public Retirement Board
4101 MacCorkle Avenue, SE
Charleston, WV 25304
(304) 558-3570 EXT. 52409


Lora A. Dyer, Esquire (W. Va. No. 9478)

EXHIBITS

ON

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CLERK'S OFFICE