

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**Charleston, West Virginia**

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**No. 34885**

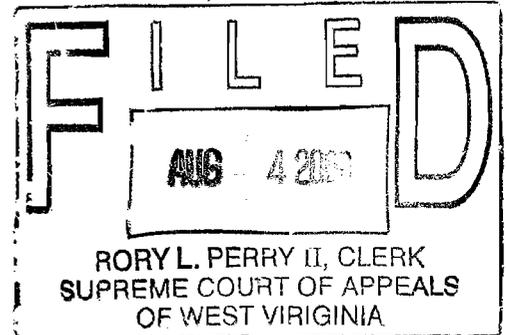
**State of West Virginia Consolidated Public Retirement Board,**

**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**

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**WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD'S**

**REPLY TO APPELLEE'S BRIEF IN OPPOSITION TO**

**PETITION FOR APPEAL**

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Submitted on behalf of Appellant by:  
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The issue in this case is whether Dr. Nesselroad's 6.592 years of service credit at West Virginia University earned during the period of 1950-1960 should be computed based upon a statutorily mandated salary cap, or based upon his final average salary.<sup>1</sup> There is simply no statutory or common law authority which would permit a recalculation of Dr. Nesselroad's annuity. To the contrary, the statutory and common law authority which exists clearly support the Board's calculation.

The computation of a member's retirement annuity is primarily governed by two statutes, West Virginia Code § 18-7A-14a and § 18-7A-26(c)(1). These statutes unmistakably distinguish between higher education members and non-higher education members, and further expressly limit the calculation of annuities 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.

West Virginia Code § 18-7A-26(c)(1) 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;

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<sup>1</sup>This case is made even more confusing because the Board used Dr. Nesselroad's final *annual* salary (\$44,840) as opposed to his true final *average* salary (\$11,848). Also, it was Board policy to give higher education members, like Dr. Nesselroad, credit for a statutory salary cap of \$4,800, when the actual statutory salary cap in effect at the time, 1953-1963, was only \$3,067. Both of these errors by the Board have resulted in Dr. Nesselroad receiving substantially more than that to which he is entitled to statutorily receive.

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-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-14a was enacted in 1971 to allow 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, those at issue in this case.

Counsel for Appellant contends that this amendment did not apply to the years prior to 1963; however, the statute clearly states that if higher education members make the required back payments then they shall be entitled to “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”.

This was the only time there was ever statutory authority for higher education members to have their years of service credit which was earned prior to 1971 and prior to 1963 calculated on the basis of their full salary as opposed to the statutory cap. 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.<sup>2</sup>

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.

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<sup>2</sup>See page 5, paragraph 7 of Circuit Court Order 06-AA-135.

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

The lower court's and counsel for Appellee's analysis is also consistent with two prior Circuit Court Orders and this honorable Court's opinion in *Nesselroad, et al. v. Ansel*, 188 W.Va. 193, 423 S.E.2d 598 (1992).

In 1988, when W. Va. Code § 18-23-4a was temporarily amended (rescinded three months later) to allow Dr. Nesselroad and other higher education members the option of becoming full participants STRS, Judge Zakaib denied their request and ruled 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.**<sup>3</sup>

Dr. Nesselroad's second attempt to have his annuity recalculated was again denied by Order of the Circuit Court entered 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.<sup>4</sup>

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 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.

Counsel for Appellee's assertion that the Appellant's brief "sets forth in lengthy and unnecessary detail the facts and procedural history of this and other cases" fails to recognize the significance of this history in determining the outcome of this case. As recognized by this Court in the *Nesselroad* (1992) opinion, the Teachers Retirement System has historically been comprised of two separate and distinct groups - higher education members and nonhigher members. In that opinion, the Court gave a detailed history of the legislative changes and prior Nesselroad cases and

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<sup>3</sup>See Exhibit A of WV CPRB's Brief in Support of Petition for Appeal, *Opinion and Order*, Kanawha County Circuit Court, 88-MISC-267, p. 10.

<sup>4</sup>See Exhibit B WV CPRB's Brief in Support of Petition for Appeal, *Final Order*, Kanawha Circuit Court, 89-MISC-229, p. 2.

determined that the 1988 short-lived amendment to § 18-23-4a, , unlike the 1971 amendment, created a second opportunity for higher education members to become unlimited participants “**on a prospective basis only.**”

Opposing counsel then argues that the issue of res judicata is inappropriate because it was not raised in the underlying action. Regardless of whether the issue of res judicata was raised below or not, the lower Court cited this honorable Court’s *Nesselroad (1992)* opinion as part of its ruling.<sup>5</sup> Nothing now limits this honorable Court from taking notice of and *correctly* applying the full *Nesselroad (1992)* opinion. This Court has previously ruled that for the years his contributions and salary were limited by a statutory cap, likewise his annuity should be so limited. The issue is the same, except now Dr. Nesselroad has refined his request from 37 years to 6.592 years.

Dr. Nesselroad has litigated this same issue on two prior occasions, one which resulted in the *Nesselroad (1992)* opinion by this honorable Court. For twenty years now, he has been well aware of how his annuity was calculated. It is somewhat unclear how he has been given this third opportunity to have his annuity recalculated in a manner inconsistent with statute when he has already been denied this request by two separate court actions nearly twenty years ago.

Even without common law and statutory authority, common sense and equity dictate that Dr. Nesselroad’s request should be denied. A retirement annuity is *usually* determined by the amount the employee contributes, the amount the employer contributes, the interest earned on those combined contributions, and the number of years of service/contributions. However, unlike the vast majority of other retirees, higher education and nonhigher education members, Dr. Nesselroad’s

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<sup>5</sup>See page 5, paragraph 7 of Circuit Court Order 06-AA-135.

retirement annuity has already been calculated in a manner which is grossly disproportionate to what he has contributed and what has been contributed on his behalf to the Teachers Retirement System.

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 mistakenly used 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.<sup>6</sup> 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. This would result in his years of service as a full member being multiplied by \$11,848 rather than his final salary of \$44,840.

If the lower Court's Order is affirmed, then Dr. Nesselroad will receive an increase in his

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<sup>6</sup>See Exhibit A of WV CPRB's Brief in Support of Petition for Appeal - a breakdown of Dr. Nesselroad's years of service, salary and contributions.

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 lower Court's ruling is not fair to the other higher education members and nonhigher education members who have contributed on the basis of full salary.

Additionally, it was the Board's policy to give higher education members, like Dr. Nesselroad, credit for a statutory salary cap of \$4,800, when the actual statutory salary cap in effect at the time, 1953-1963, was only \$3,067. Counsel for Appellant is correct in her assertion that the \$4,800 cap did not come into effect until 1963; however, there was a statutory salary cap in effect which limited Dr. Nesselroad's contributions/benefits, it just happened to be lower. The Board's policy of giving all higher education members, including Dr. Nesselroad, credit for contributions prior to 1963 based upon a cap of \$4,800 rather than the \$3,067 cap created an additional windfall for Dr. Nesselroad.

The lower Court's Order and counsel for Appellant's brief also misconstrue the holding in *Nesselroad (1992)*, in particular, in their analysis of the following passage:

“[b]efore 1963 all members of both groups (higher education and nonhigher education) 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 higher.**”<sup>7</sup>

Counsel for Appellant contends that this passage means that the member's benefit is to be whichever is higher, his full salary or the statutory salary maximum.

As discussed earlier, one's benefit is, in part, based upon how much he contributed to the

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<sup>7</sup>See Circuit Court Order p. 6 and Appellant's Response Brief p.13. The lower Court's Order was drafted by counsel for Appellant.

system. Back then, one either contributed on the basis of his full salary, or if his full salary exceeded the statutory salary cap, then his contributions and thus future benefits were limited to the statutory cap.

Under counsel for Appellant's theory, those members whose salaries exceeded the statutory salary cap would only make contributions up to the limitation imposed by the statutory cap; yet, they would receive a benefit based upon their full salary. This analysis is actuarially unsound. It challenges credulity to assert that a college professor earning a yearly salary of \$50,000.00, would only contribute \$184 based upon the \$4,800 statutory salary cap, and then would be entitled to receive an annuity based upon his full salary of \$50,000.00 rather than the statutory salary cap. There is no explanation as to where this additional money would come from; and, further, it would be unfair to those members, mostly nonhigher education, who had contributed on the basis of full salary.

Additionally, counsel for Appellant's argument and the lower Court's ruling 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.<sup>8</sup> 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.

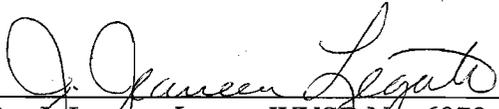
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<sup>8</sup>W. Va. § 18-7A-26(c)(1) states, in pertinent part, "Provided, That the highest annual salary used in the calculation for certain members employed by the West Virginia higher education policy commission under its control shall be four thousand eight hundred dollars, as provided by section fourteen-a [§18-7A-14a] of this article and chapter".

Furthermore, 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.

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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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Supreme Court Docket No. 34885

STATE OF WEST VIRGINIA  
CONSOLIDATED PUBLIC RETIREMENT BOARD,

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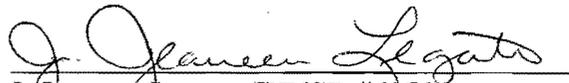
Civil Action No. 06-AA-135  
Circuit Court of Kanawha County  
(Honorable Paul Zakaib, Jr.)

PAUL E. NESSELROAD  
Respondent.

CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, Counsel for the Petitioner, do hereby certify that a copy of the foregoing "WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD'S REPLY IN OPPOSITION TO PETITION FOR APPEAL" was served upon the Respondent, by service upon her attorneys, David K. Hendrickson and Lora A. Dyer, this 4<sup>th</sup> day of August 2009, by regular mail, postage prepaid, addressed as follows:

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