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2008 SEP 10 PM 3:23
CIRCUIT COURT OF KANAWHA COUNTY
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PAUL E. NESSELROAD,

Petitioner,

v.

Civil Action No. 06-AA-135
Judge Paul Zakaib, Jr.

2008 SEP 25 P 3:54
W.V.P.E.I.A.

STATE OF WEST VIRGINIA
CONSOLIDATED PUBLIC
RETIREMENT BOARD,

Respondent.

ORDER
REVERSING THE FINAL DECISION OF THE WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD

This matter came before the Court for consideration and judicial review pursuant to W.Va. Code § 29A-5-4. This appeal is from the final order rendered by the State of West Virginia Consolidated Public Retirement Board ("Retirement Board") dated August 17th 2006. This "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 13th 2006. The issue before this Court is whether the Retirement Board erred in its Final Order by denying Paul Nesselroad's request for re-classification of his service credit years from the period of 1950 through 1960 which total 6.592 from capped "4,800.00 years" to "full salary years" and a corresponding re-calculation as to his annuity benefits.

After due and mature consideration of the briefs, the entire record made before the agency, and having reviewed pertinent legal authorities, the Court is of the opinion that a hearing on this matter is not necessary to render its decision.

Findings of Fact

1. The Petitioner, Dr. Paul E. Nesselroad, is a resident of Morgantown, West Virginia.
2. The Respondent, the West Virginia Consolidated Retirement Board, is an administrative agency of the State of West Virginia pursuant to West Virginia Code § 5-10D-1.
3. The Petitioner, Dr. Nesselroad, is a retired member of the Teachers Retirement System who commenced annuity on April 1, 1989. At the time of his retirement he had total service credit of 37.172 years.
4. When Dr. Nessleroad retired in 1989 his service years were partitioned into two different groups--"\$44,840.00 full salary years" or capped "\$4,800.00 years." The years of service Dr. Nesselroad spent at WVU for the fiscal years prior to the passage of the \$4,800.00 cap split retirement system of 1951 through 1961 totaled 6.592 years.
5. Dr. Nesselroad asserts that his service years from fiscal 1950 through 1960 which total 6.592 years were incorrectly classified as capped \$4,800.00 years and should be considered salary years. His claim requests that this reclassification be made by the Board and a re-calculate his annuity be made accordingly.
6. The Petitioner, through counsel, followed all available administrative remedies to assert his position regarding the classification of service years and corresponding calculation of his annuity. However, the Retirement Board's final order denied Paul Nesselroad's request for re-classification of his service credit years from the period of 1950 through 1960 which total 6.592 from capped "4,800.00 years" to "full salary years" and a corresponding re-calculation as to his annuity benefits.

7. The Board's single page "FINAL ORDER" dated August 17th 2006 reflects the Board's final administrative decision and it was from this final administrative order that the Petitioner appealed this Court for review pursuant to *West Virginia Code* § 29A-5-4(g).

Conclusions of Law

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:

- (1) In violation of constitutional or statutory provisions; or
 - (2) In excess of the statutory authority or jurisdiction of the agency; or
 - (3) Made upon unlawful procedures; or
 - (4) Affected by other error of law; or
 - (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
5. 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. We review *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).
6. In its final order, the Board sets 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.

7. The aforementioned section of *W.Va. Code § 18-7A-14(a)* 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 are not disputed in this matter and Dr. Nesselroad has acknowledged he did not make the optional back payment for the specified time period.
8. Dr. Nesselroad retained his status of participation in the “split retirement system” and the Code provision appropriate for consideration of the present matter, which concerns such STRS members who did not make the election to buy back is provided in *W.Va. Code § 18-7A-14(a)* 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.”

9. 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. Therefore, the Retirement Board inappropriately applied the wrong statutory provision in denying his claim.
10. The Board’s final decision failed to address the long standing recognition of “Grandfathering” as is applicable in this case. This doctrine operates to exempt Dr. Nesselroad, who was 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.
11. 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 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). 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.

12. Further, the West Virginia Supreme Court observed 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 for 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, et al. v. Ansel , 188 W.Va. 193, 423 S.E.2d at 599 (W.Va. 1992)(emphasis added) at 599.

13. In the present appeal, 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 the Supreme Court in the previous paragraph. These years, when correctly classified, give the Petitioner a total of 12.345 full salary years for annuity computation purposes.
14. Membership in the West Virginia Teachers Retirement System is mandatory for employees of participating public employers. *W.Va. Code* § 18-7A-13.

15. When reviewing a case involving the analogous West Virginia Public Employee Retirement System, the West Virginia Supreme Court of Appeals noted, “that 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).

RULING

Accordingly, the Court does hereby ORDER the August 17th 2006 decision of the Consolidated Public Retirement Board **REVERSED** and **REMANDED**, finding that the substantial rights of the Petitioner were clearly prejudice in this case as the Board's actions in misapplying the correct statutory provisions to which he is entitled liberal construction and arbitrarily ignoring to address applicable West Virginia case law supporting the re-classification of his service years constitutes a violation of statutory provisions and an abuse of discretion or clearly unwarranted exercise of discretion. The Retirement Board is **DIRECTED** to properly classify the Petitioner's service years from fiscal 1950 through 1960 which total 6.592 years as being full salary years and re-calculate his annuity accordingly. The Court further GRANTS the Petitioner his reasonable attorney's fees and costs which have been incurred in this action. The Court hereby notes the Respondent's objections and exceptions to this ruling.

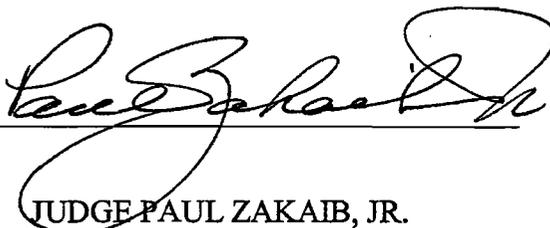
This matter is hereby DISMISSED and STRICKEN from the open docket of this Court.

Further, the court DIRECTS the Circuit Clerk to send certified copies of this Order to:

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Charleston, West Virginia 25305

Entered this 9th day of Sept 2008.



JUDGE PAUL ZAKAIB, JR.

Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF September 2008
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA