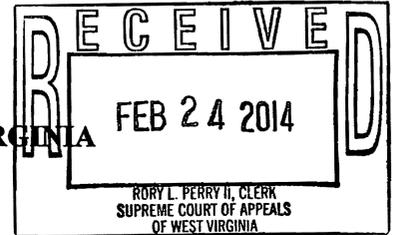


**BRIEF FILED  
WITH MOTION**

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

DOCKET NO. 13-~~1192~~ 1193



**THE WEST VIRGINIA INVESTMENT  
MANAGEMENT BOARD**, a public body  
corporate, and **THE WEST VIRGINIA  
CONSOLIDATED PUBLIC RETIREMENT  
BOARD**, a public agency,  
Plaintiffs Below, Petitioners,

Appeal from final orders of the Circuit  
Court of Kanawha County (09-C-2104)

v.)

**THE VARIABLE ANNUITY LIFE  
INSURANCE COMPANY**, a Texas  
corporation,  
Defendant Below, Respondent

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**Brief of Amicus Curiae, West Virginia Education  
Association**

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**Amicus Curiae, West Virginia Education Association**

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## **STATEMENT OF INTEREST**

The West Virginia Education Association (WVEA) is the largest association representing teachers in West Virginia. WVEA promotes the interests of its members and other educational employees throughout the state. Specifically WVEA promotes the improvement of the benefits available in public education including pensions. WVEA has been extensively involved in efforts over the years to promote adequate funding of the TRS and was extensively involved in the efforts in 2008 to provide educational employees the option of transferring from the Teacher's Defined Contribution Plan (TDC) to the defined benefit plan of the Teachers Retirement System (TRS). The membership of the WVEA also includes a significant portion of the individuals who became TRS beneficiaries as a result of the 2008 legislation, *W.Va.Code*, section 18-7D-1, *et seq.*, and current beneficiary-retirees and current participants who will become beneficiaries. Accordingly the WVEA supports reversal of the rulings below.

The WVEA seeks to file the attached brief in support of the position of Petitioners: The West Virginia Investment Management Board (IMB) and The West Virginia Consolidated Public Retirement Board (CPRB).<sup>1</sup>

## **FACTUAL BACKGROUND**

As part of the 1991 transformation of the TRS From the traditional pension format, the Teachers Defined Benefit Plan (TDC), to the Teachers' Defined Contribution Plan (TDC), under which employees manage the investments of their own accounts, VALIC and the CPRB entered into the Group Fixed Annuity Contract (annuity agreement). The agreement made it possible for participants in the TDC to have an annuity benefit as one of their investment selections. The meaning of that annuity contract lies at the heart of this lawsuit. The annuity agreement made a VALIC annuity one of the choices open to the participants of the TDC and set the stage for VALIC to induce many participants to designate VALIC annuities as their TDC investments, in whole or in part.

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<sup>1</sup> The undersigned authored this brief in whole. Neither the WVEA nor undersigned received any monetary compensation intended to fund the preparation or filing of this brief.

The fundamental change of converting the defined benefit plan to a defined contribution plan was not accepted by a significant portion of TDC beneficiaries. In 1995 and 2001 the legislature, generally speaking, allowed certain TRS members to collectively transfer their contributions made toward VALIC annuities from the TDC to the defined benefit plan of the TRS. Upon transfer of the contributions the persons who elected in 1995 and 2001 to leave the TDC and join the defined benefit plan regained the perceived advantages of being able, once eligible, to apply for a statutory annuity. The approximately 15,000 TDC participants who elected to join the TDC in 2008 also sought that advantage. The 2008 legislation, *W.Va.Code*, section 18-7D-1, *et seq.*, specifically 18-7D-18-7D-5(a) and 7(b)(1), directed that the contributions towards the VALIC annuities be transferred collectively to the TRS. The value of all of those contributions to be transferred in 2008 was approximately \$250,000,000. The refusal of VALIC to transfer the amount when requested in 2008 precipitated an extended dispute as to the meaning of the 1991 annuity agreement and gave rise to this litigation.

### **ARGUMENT**

WVEA joins the arguments made by the Petitioners, CPRB and IMB that VALIC should have made the transfer when requested in June of 2008. Amicus limits its written argument to the position that, if the duty to make the transfer under the 1991 annuity contract is deemed to be ambiguous, the ambiguity should be construed against the insurer VALIC and in favor of the CPRB and IMB. During the process of construction, the Court should consider that in 1995 and 2001 VALIC applied the same contract in the same general setting of transferring the value of contributions made towards VALIC annuities held in TDC accounts to the defined benefit plan.

1. Any ambiguity as to the meaning of the terms in the 1991 contract has already been resolved by the behavior of VALIC in 1995 and 2001. VALIC did not flinch at smaller transfers in 1995 and 2001 from the TDC back to the TRS.. It was not until 2008 that VALIC refused to transfer the funds, valued by the Petitioners at \$250 million following the successful vote under the auspices of the 2008 amendments, *W.V.Code*, section 18-7A-1 et seq. The funds

were not completely transferred until 2013, after a passage of 4 years. The Petitioners CPRB and the IMB asserted in the circuit court that the present value of the investment returns lost during that period of about 5 years was approximately \$92 million.

It is no secret that the TRS is severely underfunded to the extent of approximately \$4.568 billion. The opportunity to generate \$92 million would benefit educational employees and taxpayers greatly. WVEA does not argue the obvious economic benefit of the remedy sought by the petitioners. Rather, it submits that, if there are ambiguities, the magnitude of underfunding and the cost of the delayed transfer of \$250 million calls for the courts to "drill down" and closely examine the history of the formation of the contract and in particular application of the contract with respect to the 1995 and 2001 transfers.

In the Circuit Court the IMB and the CPRB argued alternatively, assuming the court found some ambiguity, for the invocation of the rules of construction which construe ambiguities in the wording of the 1991 annuity contract against the insurance company, VALIC, and resolved any doubts in favor of the insured. *Mylan Labs., Inc. v. Am. Motorists Ins. Co.*, 700 S.E. 518, 520 (W.Va. 2010), Syl. Pts. 1, 5.

The respective journeys of the TRS participants through the, 1995, 2001 and 2008 informational campaigns and the actions taken by VALIC in 1995 and 2001 of immediately making the collective transfer of contributions towards VALIC annuities from the TDC to dwfined benefit plan of TRS should be considered, if it becomes necessary to resolve any ambiguities in the language of the 1991 annuity agreement. So far as the affected teachers and educational employees knew, the 2008 vote was cast on the assumption that, consistent with the wording of the 2008 amendment, *W.V.Code*, section 18-7-1 et seq., the transfer of the value of the annuities would take place effective July 1, 2008 as directed by *W.V.Code*, section 18-7D-5(a) and 7(b)(1).

2. The CPRB and the IMB have standing and are eligible for declaratory relief because the pension beneficiaries, present and future, need their expertise and protection in execution of the process envisioned by *W.Va.Code*, sections 18-7D-5(a) and 7(b)(1).

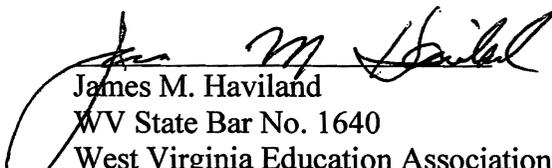
The arguments that the TRS and IMB do not have standing , or any right to declaratory relief, deprives the affected active and retired public employees of the knowledgeable and experienced governmental intermediaries designated by statute, especially *W.V. Code*, section 18-7D-1, *et seq.*, to effectuate the changing public policy. Certainly, well before the Petitioners are to be denied the present value of the amount which accrued on the \$250 million claim, the specialized governmental agencies involved, the CPRB and the IMB should have their full day in court and the court should have the benefit of their special knowledge and skills, and a full record. Petitioners day in court is all the more important because the outcome will affect the long-term funding of the TRS, the major educational pension plan and, consequently, the long-term interests of active and retired teachers and educational employees.

**RELIEF**

For the reasons already argued by the CPRB and the IMB before the Circuit Court, the contract is unambiguous and should be enforced in accordance with the relief requested by the CPRB and IMB. Alternatively, if the 1991 annuity agreement is deemed to be ambiguous, the court should consider the extensive record of the surrounding circumstances and find that VALIC was obligated to transfer the funds in question to the IMB, on behalf of the TRS

Respectfully Submitted,

WEST VIRGINIA EDUCATION  
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**CERTIFICATE OF SERVICE**

I, James M. Haviland, do hereby certify that I have caused a copy of the foregoing **Amicus Curiae Brief, West Virginia Education Association** be served upon:

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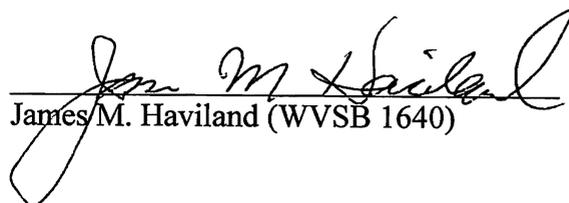
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by placing the same in the regular United States Mail, postage prepaid, on this 23<sup>rd</sup> day of February 2014.

  
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