

# BRIEF FILED WITH MOTION

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 13-1193  
Civil Action No. 09-C-2104 (Circuit Court of Kanawha County)

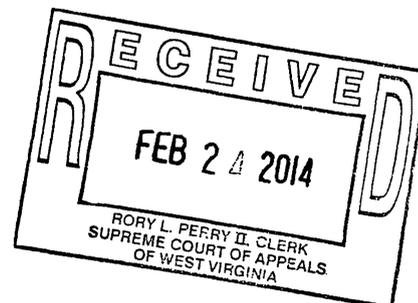
THE WEST VIRGINIA INVESTMENT  
MANAGEMENT BOARD, a public body  
Corporate, and THE WEST VIRGINIA  
CONSOLIDATED PUBLIC RETIREMENT  
BOARD, a public agency,

Petitioners,

v.

THE VARIABLE ANNUITY LIFE INSURANCE  
COMPANY, a Texas corporation,

Respondent.



*AMICUS CURIAE* BRIEF FILED ON BEHALF OF THE  
AMERICAN FEDERATION OF TEACHERS - WEST VIRGINIA, AFL-CIO

THE AMICUS CURIAE BRIEF IS FILED IN SUPPORT OF THE PETITIONERS  
AND SEEKS REVERSAL OF THE DECISION OF THE CIRCUIT COURT

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## I. INTRODUCTION

Comes now the American Federation of Teachers – West Virginia, AFL-CIO (“AFT-WV”), by its President Christine Campbell, and respectfully submits this amicus brief asking the Court to grant Petitioners’ Motion for Summary Judgment after *de novo* review and award damages to Petitioners, or alternatively, reverse the rulings and findings set forth in the October 21, 2013 Order of the circuit court of Kanawha County in all respects, and remand this case to the Circuit Court for a jury trial on the disputed issues of material fact from the record.<sup>1</sup> Furthermore, should this Court reverse the decision of the circuit court, then amicus also requests that this matter be referred to the Business Court for further development.

## II. STATEMENT OF THE IDENTITY OF THE *AMICUS CURIAE*, AMERICAN FEDERATION OF TEACHERS – WEST VIRGINIA

AFT-WV is an unincorporated labor organization which represents professional school personnel within the State of West Virginia. AFT-WV represents over 16,000 professional education employees of boards of education throughout West Virginia.<sup>2</sup> AFT-WV has members in every county in the State of West Virginia.

AFT-WV is affiliated with the West Virginia School Service Personnel Association (“WVSSPA”). WVSSPA represents over 8,000 school service employees who are employed by county boards of education. WVSSPA also has members in every county in the State of West

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<sup>1</sup>The undersigned, counsel for AFT-WV, is the sole author of this brief. Counsel for a party did not author this brief in part or in whole. No monetary contribution was made by a party or any group or individual other than the *amicus curiae* to fund the preparation of this brief in any manner.

<sup>2</sup>AFT represents 1.5 million teachers from pre-kindergarten through twelfth grade nationwide. AFT members include an array of professional personnel including teachers, counselors, social workers, school psychologists, higher education faculty, nurses and other health care workers, and state and local government employees.

Virginia.

### III. STATEMENT OF THE CASE

It is axiomatic that public employees – including teachers, professional education personnel and school service personnel – enter public service with the promise of a sound retirement as part of their benefit package. Such benefits attract qualified teachers and professional personnel for the school children of this State. Indeed, it is an important component of the West Virginia Constitutional mandate that the State provide a thorough and efficient education to our public school students.

Two state agencies, the Consolidated Public Retirement Board and the Investment Management Board share the role of protecting and administering teachers retirement funds in West Virginia. The Consolidated Public Retirement Board (“CPRB”) is a state agency responsible for administering public employee retirement accounts in the State of West Virginia. In particular, the CPRB administers “all public retirement plans in this state” including the Teachers Retirement System (“TRS”) and the Teachers Defined Contribution (“TDC”). W.Va. Code § 5-10D-1(a) The Legislature has further provided that all assets of the public retirement plans set forth in subsection (a) of this section shall be held in trust.” W.Va. Code § 5-10D-1(a) To this end, the CPRB is

a trustee with regard to the investments of the Teachers Defined Contribution Retirement System and any other assets of the public retirement plans administered by the Consolidated Public Retirement Board as set forth in subsection (a) of this section for which no trustee has been expressly designated in this code.

W.Va. Code § 5-10D-1(a). The CPRB has a fiduciary duty to the members of the TRS and TDC. This duty, is in part, established in W.Va Code § 18-7A-4 which authorizes the CPRB to “sue and be sued, plead and be impleaded, contract and be contracted with and shall make all necessary rules

and regulations to carry out the provisions of this article.”

The Investment Management Board (“IMB”) is a state agency that was created to “modernize the procedures for the investment of funds of the state and its political subdivisions for the purpose of increasing investment return of those funds.” W.Va. Code § 12-6-1. In creating the IMB, the

Legislature found:

that teachers and other public employees throughout the state are experiencing economic difficulty and that in order to reduce this economic hardship on these dedicated public employees and to help foster sound financial practices, the West Virginia Investment Management Board may develop, implement and maintain an efficient and modern system for the investment and management of the state’s money

...

West Virginia Code § 12-6-1a(b). The Legislature further determined that the IMB acts

in all respects for the benefit of the state’s public employees and ultimately the citizens of the state and the West Virginia Investment Management Board may act as trustee of the irrevocable trust created by this article and to manage and invest other state funds.

Like the CPRB, the IMB stands in a fiduciary relationship to the participants in the various retirement funds for which it invests. Moreover, the CPRB and IMB serve the same beneficiaries – the public education employees of this state who participate in the retirement funds at issue.

As Petitioners have more fully set forth in their pleadings, the options for teachers retirements in West Virginia have changed. From 1941 to 1970, teachers, other professional personnel and school service personnel were required to participate in the TRS. It was originally a defined contribution plan, but in 1970 became a defined benefit plan. In 1990, the Legislature created a second teacher retirement plan in the form of a defined contribution retirement. At that time, the TRS was closed to new employees and all new employees were required to join the new, defined contribution plan.

Petitioner CPRB was created in 1991 and one of its duties was to make investment options available to the members of the Teachers Defined Contribution System (“TDC”). Respondent VALIC was a successful bidder for one of four investment options – in this case, an individually allocated fixed annuity product. Ultimately, more than 66% of the teachers in the TDC elected to invest some or all of their assets in the VALIC fixed annuity which promised a return of 4.5%. By 2008, however, it became clear to many members of the TDC that their individual accounts had insufficient income from VALIC to support a meaningful retirement. Thus, in 2008, the Legislature stepped in and enacted W.Va. Code §§ 18-7D-1, et seq., to protect the retirement of teachers, other professional employees and school service personnel.

The underlying action herein arises from W.Va. Code §§ 18-7D-1, et seq. During the 2008 Legislative session, the Legislature passed W.Va. Code §§ 18-7D-1, et seq. This Article is entitled “Voluntary Transfer from Teachers’ Defined Contribution Retirement System to State Teachers Retirement System.” The purpose of this legislation is plainly set forth in the “Legislative Findings and Purpose” found in W.Va. Code § 18-7D-1. A review of the purpose of this legislation reveals that it was clearly designed to protect the “quality of its teachers and educational personnel” by allowing teachers and service personnel to elect to switch from the TDC to the TRS. To this end, W.Va. Code § 18-7D-1 states as follows:

(a) The Legislature hereby finds and declares as follows:

(1) *That the quality of this state’s education system is largely dependent upon the quality of its teachers and educational service personnel;*

(2) That many West Virginia teachers and education service personnel who currently are members of the Teachers’ Defined Contribution Retirement System desire to join a defined benefit system, which relieves participants of bearing the risk of investment performance and offers the security of providing participants with advanced

knowledge of their anticipated retirement benefit;

(3) That other members of the Teachers' Defined Contribution Retirement System remain comfortable with bearing the attendant market risks and performance of their investments associated with managing the individual retirement accounts of that system;

(4) *That it is in the best interests of the teachers and education service personnel in this state, as well as the state's system of public education as a whole, to permit members of the Teachers' Defined Contribution Retirement System to voluntarily elect membership in the State Teachers Retirement System pursuant to the provision of this article; and*

(5) *That the prudent and fiscally sound management of the State Teachers Retirement System necessitates that a sufficient number of members of the Teachers' Defined Contribution System elect to voluntarily transfer their assets to the State Teachers Retirement System in accordance with the provisions of this article.*

(Emphasis supplied) It is clear that the legislative purpose in enacting the voluntary transfer of teachers and their assets from the TDC to the TRS was to recognize that the retirement provided to teachers and educational service personnel is a vital component of the compensation package for those public employees; to allow those public employees to vote on the proposed transfer; and, crucially, to protect the integrity of the TRS by transferring the assets of those public education employees who elect to move from the TDC to the TRS. Indeed, the Legislature noted that “prudent and fiscally sound management” required the transfer of the assets of those public education employees who changed retirement systems.<sup>3</sup>

The transfer from TDC to TRS was contingent on the results of an election taken by the TDC members: at least 65% of “actively contributing members of the Teachers' Defined Contribution

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<sup>3</sup>W.Va. Code § 18-7D-2(9) defines “assets” as “all member contributions and employer contributions made on the member's behalf to the Defined Contribution Retirement System and earnings thereon, less any applicable fees as approved by the Board. *Provided*, That is a member has withdrawn or cashed out any amounts, the amounts must have been repaid.

Retirement System” had to affirmatively elect to transfer to the TRS. W.Va. Code § 18-7D-5(a). The election was held in April and May of 2008 and 78% (i.e., approximately 15,000 members) voted to transfer from TDC to TRS.

The date for transfer of the assets from TDC to TRS was July 1, 2008, as set by W.Va. Code § 18-7D-5(a). With the exception of VALIC, all TDC investment providers transferred the teachers’ assets without restriction or penalty in accordance with the CPRB’s instructions. VALIC refused to transfer the funds and withheld approximately \$250 million dollars belonging to the TDC members who voted to transfer to the TRS. As this process progressed, CPRB transferred its interest in the annuity contract with VALIC to the IMB. IMB thereafter entered into an identical annuity contract with VALIC. IMB then demanded that the funds at issue be transferred to TRS; however, VALIC again refused. Ultimately, VALIC surrendered the funds over a five years period – in the amount of twenty percent per year of the \$250 million. Because of the delayed payment plan, IMB was unable to fully invest all of the funds for the TRS investors. As a result, IMB and CPRB assert that they lost net investment earning of \$92 million.

In doing so, the goal of the legislation -- providing a full and adequate retirement benefit for public school employees – was frustrated.

#### **IV. ARGUMENT**

As a threshold matter, Petitioner has set forth their positions regarding the various contractual rights of the CPRB and IMB as they relate to its claim that the annuity contracts at issue allowed the full surrender of the VALIC annuity without a five year delay or surrender charge, as well as its contention regarding the grant of summary judgment. Therefore, AFT-WV simply adopts the arguments set forth by Petitioner in this regard.

AFT-WV further contends that the order of the circuit court was in error as it relates to its finding that the CPRB and IMB lacked standing to seek a declaratory judgment under the 1991 and 2008 contracts and that their dispute did not present an actual justiciable controversy.

Finally, AFT-WV contends that the actions of VALIC in this matter were directly contrary to the express language contained in W.Va. Code § 18-7D-1, et seq., and that the circuit court should have given effect to the intent of the transfer legislation and failed to do so.

**A. The Circuit Court erred when it found that CPRB was not entitled to declaratory relief or damages related to the 2008 contract “because it does not have standing to enforce the 2008 contract.”**

As it relates to standing, this Court has indicated “[f]or standing under the Declaratory Judgments Act, it is not essential that a party have a personal legal right or interest.” Syl. Pt. 2 Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Moreover, this Court has held that “[f]or the purposes of a declaratory judgment action, a justiciable controversy exists when a legal right is claimed by one party and denied by another.” Syl. Pt. 3, West Virginia Utility Contractors Association v. Laidley Field Athletic and Recreational Center Governing Board, 164 W. Va. 127, 260 S.E.2d 847 (1970) . Finally, this Court has determined that an organization may have representational standing for its membership. Affiliated Construction Trades Foundation, AFL-CIO v. Department of Transportation, Division of Highways, 227 W. Va. 653, 713 S.E.2d 809 (2011).

As noted herein, the IMB and CPRB share the identical responsibilities of protecting the retirements of the public education employees of this state who participate in the retirement funds at issue and the State as a whole. Indeed, both IMB and CPRB are *required by statute to act as trustees for the TRS*. Moreover, and as will be discussed more fully below, the CPRB was required by statute to “transfer the members and all properties held in the” TDC by July 1, 2008 to the TRS.

CPRB was authorized and required to insure that this transfer occurred. Indeed, it has attempted to meet this statutory obligation by bringing the very suit now before this Court. Clearly standing is appropriate since CPRB and IMB are statutorily required to act as the legal representatives of the participants who are affected by the statutory scheme described herein and the contracts that have been entered into on behalf of the participants to the TRS and, more specifically, to effectuate the transfer process set forth in W.Va. Code § 18-7D-5.

Not only do the IMB and CPRB share identical responsibilities in the sense that they protect retirement assets for public education employees, but both entities also serve crucial roles that are inextricably intertwined as they relate to the retirement assets at issue. CPRB acts as a statutorily-created trustee for the retirement plans and IMB will invest assets for the plans.

To conclude that either party lacks standing in this matter simply ignores this Court's case law, as well as the statutory scheme that is described herein. One of the essential purposes for both state agencies is to bring actions such as this to protect the assets of the public education employees who are reliant on the State to provide a sound and meaningful retirement. That is precisely what has occurred in this case.

It is clear that the membership of the TRS (as well as the public as a whole) has been damaged by the failure of VALIC to turn over all of the assets at issue when demanded. According to information provided by Petitioners, the amount of loss to the TRS (and the State of West Virginia) is approximately *\$92 million*. Indeed, such a massive loss to the TRS cannot only harm the integrity of the TRS but also has an adverse impact on the budget of the State of West Virginia.

- B. The statutory scheme governing the conversion of assets from TDC to the TRS required that the members who elected to transfer and “all properties” of those members held in the TDC be transferred to the TRS.**

The statutory scheme governing the conversion of assets from TDC to TRS required that all members and “all properties” of those members who elected to move from TDC to TRS “shall” be transferred by July 1, 2008. This did not occur and the plain language of W.Va. Code § 18-7D-5 was ignored.

Quite clearly, the Legislature could not meet its goals in allowing the transfer if “all properties” did not follow the transfer of the members. In other words, “all properties” of those who transferred from one retirement fund to the other were intended to fund the move and protect and continue to shore up the integrity of the TRS. By permitting VALIC to maintain the properties at issue, the goal of the transfer has been frustrated and the integrity of the funds is threatened. Moreover, the cost will be absorbed somewhere – most likely by Retirees or taxpayers to suffer the consequences of failure to timely transfer the funds. Had the plain language of W.Va. Code § 18-7D-5 been adhered to, the interest of the TRS membership and the public at large would have been properly served. Instead, as it stands, the TRS has lost out on approximately \$92 million because the statute was not adhered to.<sup>4</sup>

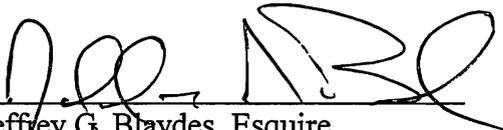
### CONCLUSION

AFT-WV respectfully requests that this Court reverse the circuit court’s decision and award damages to Petitioners.

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<sup>4</sup>AFT-WV joins in the contentions of the Amicus Curiae WVSSPA that by giving effect to the legislative intent underlying W.Va. Code § 18-7D-5, this Court would not violate the Contracts Clause in light of the legitimate public purpose underlying this statute (i.e., protecting the retirements of public education employees) and the reasonableness of adjusting the rights of the contracting parties (i.e., requiring the full transfer of funds at the time it was required by statute).

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## CERTIFICATE OF SERVICE

I, Jeffrey G. Blaydes, Esquire, counsel for American Federation of Teachers - West Virginia, AFL-CIO , hereby certify that I have served the original and ten true copies of the foregoing "*Amicus Curiae* Brief Filed on Behalf of the American Federation of Teachers - West Virginia, AFL-CIO " on the following by hand-delivery on this 24<sup>th</sup> day of February, 2014, to:

Hon. Rory L. Perry, II, Clerk of the Court  
West Virginia Supreme Court of Appeals  
State Capitol, Room E-317  
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Further, I, Jeffrey G. Blaydes, Esquire, counsel for American Federation of Teachers - West Virginia, AFL-CIO , hereby certify that I have served a true copy of the foregoing "*Amicus Curiae* Brief Filed on Behalf of the American Federation of Teachers - West Virginia, AFL-CIO" on the following by placing same in a correctly addressed envelope, First Class postage prepaid, in the United States Mail and by facsimile transmission on this 24<sup>th</sup> day of February 2014, to:

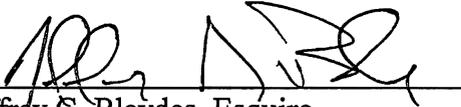
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