WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1987

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ENROLLED

Com. Sub. for

HOUSE BILL No. 2255

(By Delegate Mr. Speaker Mr. Chambers

and Delegate Swann)

[By Request of the Executive]

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Passed ................. March 14, 1987

In Effect .................. Passage
ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 2255
(By Mr. Speaker, Mr. Chambers and Delegate Swann)
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[Passed March 14, 1987; in effect from passage.]

AN ACT to repeal section six-c, article nine, chapter fifty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections three, four, five, six, six-b, eight and sixteen of said article nine; and to further amend said article nine by adding thereto two new sections, designated sections one-a and one-b, all relating to the judges’ retirement system; providing for the definition of certain terms relating thereto; providing a statement of legislative intent, policy and findings with respect to certain decisions of the West Virginia supreme court of appeals with respect to the expansion of eligibility for and payments of benefits under such system; declaring the necessity of certain legislative amendments having retrospective and prospective application in such retirement system and a statement of compelling state interest in the preservation of legislative constitutional powers and responsibilities to legislate and to establish judicial compensation and preserving the financial integrity of the system; enlarging permissible investments for fund moneys; reaffirming that state auditor be primary fiscal officer and administrator of judges’ retirement system with required independent review and final determination by the state auditor with
respect to eligibility for and amount of benefit payments; directing the state auditor to refund certain moneys, with interest, in respect of payments made to acquire service pursuant to certain decisions of the West Virginia supreme court of appeals; requiring contributions be made so long as members of the system sit as judges, irrespective of whether or not such persons would otherwise qualify for benefits under said article; providing for credits toward eligibility; granting certain credits for military service without requiring payment therefor; granting certain credits for services as prosecuting attorney in certain cases, requiring payment therefor and establishing the rate of such payment; providing for the transfer of credits between the judges retirement system and the public employees retirement system; limiting the use of the same retirement credits in both systems; deleting obsolete provisions, including any required payments by county commissions into judges’ retirement system trust fund; specifying military service credits allowable up to five years maximum; allowing retirement at earlier age through use of acturially reduced percentage for pension benefit determination, receivable throughout retirement; providing for increase in retirement benefits due to increases in judicial salaries occurring during retirement; authorizing state auditor to determine reasonable rate of interest for judicial members acquiring service credit periods and payments therefor; providing for spousal annuities to be payable from all trust fund moneys, including appropriations made thereto; establishing certain benefits for surviving orphans of judges in certain cases; establishing certain new criteria for eligibility for receipt of retirement benefits by judges; requiring of minimum of twelve years actual service as a judge as a condition of eligibility of benefits; providing for shorter service period for entitlement to disability retirement for judges; revising disability retirement benefit applicable to new judge members retiring upon disability subsequent to specified date; specifying certain effective dates; and providing for severability of the provisions of said article and of the amendments thereto.
Be it enacted by the Legislature of West Virginia:

That section six-c, article nine, chapter fifty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that sections three, four, five, six, six-b, eight and sixteen of said article nine, as amended, be amended and reenacted, and that said article nine be further amended by adding thereto two new sections, designated sections one-a and one-b, all to read as follows:

ARTICLE 9. RETIREMENT SYSTEM FOR JUDGES OF COURT OF RECORD.

§51-9-1a. Definitions.

1 As used in this article the term “judge” or “judge of any court of record” or “judge of any court of record of this state” shall mean, refer to and include judges of the several circuit courts and justices of the supreme court of appeals.

§51-9-1b. Statement of legislative intent, policy and finding.

1 The decision and opinion of the state supreme court of appeals in the case of In re Judge Dostert, which was rendered on the seventh day of November, in the year one thousand nine hundred eighty-four and other decisions and opinions of that court based upon the Dostert decision have served to make substantial and fundamental changes in the retirement system for judges as established by the Legislature under the provisions of this article. These substantial and fundamental changes have served to or resulted in (i) expanding and greatly easing the requirements necessary to qualify to receive retirement annuity benefits from the system, (ii) making many persons eligible for retirement annuity benefits from the system at an earlier date than would have been the case under the provisions of the article, (iii) unjustly increasing the amount of retirement annuity benefits to be received by certain judges or justices would or will receive and (iv) altering or reducing the authority of the state auditor as the primary administrator of the judges retirement fund and of the Governor to determine the eligibility of persons seeking to claim retirement annuity benefits...
from the fund and placed these functions within the
provenience of the court administrator; thus removing the
statutory authority of public officers outside the judicial
branch of state government to determine the eligibility
of judges and justices to receive such benefits or to see
to the financial stability and soundness of the fund or
to insure fiscal accountability with respect thereto.

The Legislature hereby declares that the Dostert
decision and the subsequent decisions of the supreme
court of appeals which were based upon the Dostert
decision were not and do not constitute sound legal
principles, in that they have served to rewrite contrac-
tual arrangements found to exist by the supreme court
of appeals in the case of Wagoner v. Gainer decided on
the fifteenth day of June, one thousand nine hundred
eighty-one and, further, usurped the authority of the
Legislature to determine or formulate the public policy
of this state as required by article V, section 1 and
article VI, section 1 of the Constitution of West Virginia
and further usurped the authority of the Legislature to
set judicial compensation.

The Legislature hereby states and finds that its intent
and policy recognizes a compelling state interest is
present in carrying out its constitutional responsibilities
of establishing, determining and setting reasonable
compensation guidelines and amounts for judicial
officers, by law, and of protecting the fiscal responsibil-
ity and soundness of the moneys required for payment
into the trust fund, as a part of the judicial branch
budget request, which is determined by benefits payable
from the judicial retirement system, and which judicial
budget request may not be reduced by the Legislature,
constitutionally.

The amendments now made to the provisions of this
retirement system by the Legislature are made within
the original and continuing framework of such system
and with the benefits hereunder being directed toward
those meeting the strict and fundamental requirements
of career judicial service on the bench, of military
service and service as a prosecuting attorney as granted
by this article.
§51-9-3. Custody, permissible investment and administration of retirement system trust fund; state auditor's authority as administrator and trust fund fiduciary; refunds required, including interest.

The state treasurer shall be the custodian of the fund and of any investment securities of the retirement system and shall give a separate and additional bond for the faithful performance of his or her duties as such custodian. The governor shall fix the amount of such bond which shall be approved as to sufficiency and form by the attorney general and shall be filed in the office of the secretary of state. The premium on such bond shall be paid from the fund.

In a manner and to an extent consonant with sound administrative principles, the state board of investments shall have authority to invest such fund in interest-bearing securities of the United States of America, of the state of West Virginia and of any political subdivision thereof or such other investments as may be authorized or permitted by the provisions of article six, chapter twelve of this code.

The state auditor shall be the primary fiscal officer, responsible for the records and administration of the trust fund, including budgetary matters incident to the authority vested in him or her with respect to judicial department appropriations under article VI, section 51 of the Constitution of West Virginia. The state auditor shall also, as trust fund fiduciary, independently determine anew, in a substantive sense and as a check and balance, any information concerning eligible service years, required money contributions, computation of judge's retirement benefit or spousal benefit or any other substantive element of qualification supplied or certified to the state auditor by any other public officer, including the supreme court administrator or the chief executive, toward proper final review before issuance of a state warrant in payment of any benefit under the judges' retirement system.

In respect of any credited service heretofore acquired
under the *Dostert* decision and subsequent related decisions, the state auditor shall make refund to any person heretofore making payment to acquire such service credit, primary or derivative, in the amount so earlier paid, together with interest at the same rate such sum actually earned because of its investment by the auditor or treasurer, as the case may be, in the consolidated pension pool or with the interest such sum would have earned if timely invested in such pool, whichever amount of interest be greater.

§51-9-4. Required percentage contributions from salaries; any termination of required contributions prior to actual retirement disallowed; military service credit and maximum allowable; qualifiable prosecutorial service.

Every person who is now serving or shall hereafter serve as a judge of any court of record of this State shall pay into the judges’ retirement fund six percent of the salary received by such person out of the state treasury: *Provided,* That when a judge becomes eligible to receive benefits from such trust fund by actual retirement, no further payment by him or her shall be required, since such employee contribution, in an equal treatment sense, ceases to be required in the other retirement systems of the state, also, only after actual retirement. Any prior occurrence or practice to the contrary, in any way allowing discontinuance of required employee contributions prior to actual retirement under this retirement system, is rejected, as erroneous and contrary to legislative intent, and as violative of required equal treatment and is hereby nullified and discontinued fully, with the state auditor to require such contribution in every instance hereafter, except where no contributions are required to be made any of the provisions of this article.

In drawing warrants for the salary checks of judges, the state auditor shall deduct from the amount of each such salary check six percent thereof, which amount so deducted shall be credited by the state treasurer to the trust fund.
Any judge seeking to qualify military service to be claimed as credited service, in allowable aggregate maximum amount up to five years, shall be entitled to be awarded the same without any required payment in respect thereof to the judges’ retirement fund. Any judge holding office as such on the effective date of the amendments to this article adopted by the Legislature at its regular session in the year one thousand nine hundred eighty-seven, who seeks to qualify service as a prosecuting attorney as credited service, which service credit must have been earned prior to the year one thousand nine hundred eighty-seven, shall be required to pay into the judges’ retirement fund six percent of the annual salary which was actually received by such person as prosecuting attorney during the time such prosecutorial service was rendered prior to the year one thousand nine hundred eighty-seven, and for which credited service is being sought, together with applicable interest. No judge whose term of office shall commence after the effective date of such amendments to this article, shall be eligible to claim any credit for service rendered as a prosecuting attorney as eligible service for retirement benefits under this article, nor shall any time served as a prosecutor after the year one thousand nine hundred eighty-eight, be considered as eligible service for any purposes of this article.

§51-9-5. Election not to participate, contribute, or be a member; authorized transfers of service credit by a judge; duplicate use of service credit prohibited.

(a) Notwithstanding any provisions of this article, any judge may in writing notify the auditor within thirty days after he or she takes office, or, if he or she is in office, on the date this article becomes effective, then within thirty days from such latter date, that such judge elects not to become a member or make any payments or contributions to the trust fund, in which event every judge, so electing, shall not thereafter at any time be entitled to receive any retirement pay or benefits under provisions of this article, and any deduction that may have theretofore been made from the salary of such
judge and paid into the fund shall be refunded without
interest, to him or her by the auditor by warrant drawn
on the trust fund. Any judge who has so elected not to
become a member or not to contribute, shall neverthe-
less thereafter be permitted to become such member,
contribute and become eligible for retirement benefits
by paying into the judges' retirement fund all contribu-
tions such judge would have been required to pay into
the fund, together with interest thereon at a rate to be
determined by the state auditor as reasonable for such
prior periods, as if such judge had not previously elected
not to be a member and not to contribute.

(b) There may be transfers of service credit on proper
basis between the judges' retirement system and the
public employees retirement system, where such service
credit constitutes qualified and eligible credit under the
recipient system's statutes, in order to allow full
flexibility of choice of option by a judge or judicial
member; but in no case shall benefits be receivable from
more than one of such state retirement systems, nor
shall any service credit be usable more than once and
then only in the finally chosen state retirement system.

§51-9-6. Eligibility for and payment of benefits.

(a) Except as otherwise provided in sections five,
twelve and thirteen of this article, and subject to the
provisions of subsection (e) of this section, any person
who is now serving, or who shall hereafter serve, as a
judge of any court of record of this State and shall have
served as such judge for a period of not less than sixteen
full years and shall have reached the age of sixty-five
years, or who has served as judge of such court or of
that court and other courts of record of the State for a
period of sixteen full years or more (whether continu-
ously or not and whether said service be entirely before
or after this article became effective, or partly before
and partly after said date, and whether or not said judge
shall be in office on the date he or she shall become
eligible to benefits hereunder) and shall have reached
the age of sixty-five years, or who is now serving, or who
shall hereafter serve, as a judge of any court of record
of this State and shall have served as such judge for a
period of not less than twenty-four full years, regardless of age, shall, upon a determination and certification of his or her eligibility as provided in section nine hereof, be paid from the fund annual retirement benefits, so long as he or she shall live, in an amount equal to seventy-five percent of the annual salary of the office from which he or she has retired based upon such salary of such office and as such salary may be changed from time to time during the period of his or her retirement and the amount of his or her retirement benefits shall be based upon and be equal to seventy-five percent of the highest annual salary of such office for any one calendar year during the period of his or her retirement, and shall be payable in monthly installments: Provided, That such retirement benefits shall be paid only after such judge has resigned as such or, for any reason other than his or her impeachment, his or her service as such has ended: Provided, however, That every such person seeking to retire and to receive the annual retirement benefits provided by this subsection must have served a minimum of twelve years as a sitting judge of any such court of record.

(b) Notwithstanding any other provisions of this article, any person who is now serving or who shall hereafter serve as a judge of any court of record of this state and who shall have accumulated sixteen years or more of credited service, at least twelve years of which is as a sitting judge of a court of record, and who has attained the age of sixty-two years or more but less than the age of sixty-five years, may elect to retire from his or her office and to receive the pension to which he or she would otherwise be entitled to receive at age sixty-five, but with an acturial reduction of pension benefit to be established as a reduced annuity receivable throughout retirement. The reduced percentage (less than seventy-five percent) actuarially computed, determined and established at time of retirement in respect of this reduced pension benefit shall also continue and be applicable to any subsequent new annual salary set for the office from which such judge has retired and as such salary may be changed from time to time during the period of his or her retirement.
(c) In determining eligibility for the benefits provided by this section, active full time duty (including leaves and furloughs) in the armed forces of the United States shall be eligible for qualification as credited military service for the purposes of this article by any judge with twelve or more years actual service as a sitting judge of a court of record, such awardable military service to not exceed five years.

(d) If a judge of a court of record has who is presently sitting as such on the effective date of the amendments to this section enacted by the Legislature at its regular session held in the year one thousand nine hundred eighty-seven, and who has served for a period of not less than twelve full years and has made payments into the judges’ retirement fund as provided in this article for each month during which he served as judge, following the effective date of this section, any portion of time which he or she had served as prosecuting attorney in any county in this state shall qualify as years of service, if such judge shall pay those sums required to be paid pursuant to the provisions of section four of this article: Provided, That any term of office as prosecuting attorney, or part thereof, commencing after the thirty-first day of December, one thousand nine hundred eighty-eight, shall not hereafter in any way qualify as eligible years of service under this retirement system.

(e) Any retirement benefit accruing under the provisions of this section shall not be paid if otherwise barred under the provisions of article ten-a, chapter five of this code.

§51-9-6b. Annuities for surviving spouses and surviving dependent children of judges; automatic escalation and increase of annuity benefit; proration designation by judge permitted.

(a) There shall be paid, from the fund created or continued by section two of this article, or from such funds as may be appropriated by the Legislature for such purpose, an annuity to the surviving spouse of a judge, if such judge at the time of his or her death is eligible for the retirement benefits provided by any of
the provisions of this article, or who has, at death, actually served five years or more as a sitting judge of any court of record of this state, exclusive of any other service credit to which such judge may otherwise be entitled, and who dies either while in office or after resignation or retirement from office pursuant to the provisions of this article. Said annuity shall amount to forty percent of the annual salary of the office which said judge held at his or her death or from which he or she resigned or retired. In the event said salary is increased or decreased while an annuitant is receiving the benefits hereunder, his or her annuity shall amount to forty percent of the new salary. The annuity granted hereunder shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month for which the annuity shall have accrued. Such annuity shall commence on the first day of the month in which said judge dies and shall, subject to the provisions of subsection (b) of this section, terminate upon the death of the annuitant or shall terminate upon the remarriage of the annuitant.

(b) If there be no surviving spouse at the time of death of a judge who dies after serving five years or more as a sitting judge of any court of record and such judge leaves surviving him any dependent child or children such dependent child or children shall receive an amount equal to twenty percent of the annual salary of the office which said judge held at the time of his or her death: Provided, That the total of all such annuities payable to each such child shall not exceed in the aggregate an amount equal to forty percent of such salary. Such annuity shall continue as to each such child until (i) he or she attains the age of eighteen years or (ii) attains the age of twenty-three years so long as such child remains a full-time student. The auditor shall by legislative rule establish the criteria for determining a person’s status as a full-time student within the meaning and intent of this subsection. In the event there are surviving any such judge three or more dependent children, then each such child’s annuity shall be proratably reduced in order that the aggregate annuity received by all such dependent children does not exceed
forty percent of such salary and the amount to be so received by any such child shall continue throughout the entire period during which each such child is eligible to receive such annuity. The provisions of this subsection shall also apply to those circumstances and situations wherein a surviving spouse of a deceased judge shall die while receiving benefits pursuant to subsection (a) of this section and who shall leave surviving dependant children of such deceased judge who would be entitled to benefits under this subsection as if they had succeeded to such annuity benefits upon the death of such judge in the first instance. In the event the salary of judges is increased or decreased while an annuitant is receiving benefits pursuant to this subsection, the annuities payable shall be likewise increased or decreased proportionately to reflect such change in salary. The annuities granted hereunder shall accrue monthly and shall be due and payable in monthly installments on the same day as surviving spouses benefits are required to be paid. Such annuities shall commence on the first day of the month in which any such dependent child becomes eligible for benefits hereunder and shall terminate on the last day of the month during which such eligibility ceases.


(a) Whenever a judge of a court of record of this state, who is not disqualified from participation herein as provided in section five of this article, who shall have served for ten full years, or if over the age of sixty-five years, who shall have served at least six years as a judge of a court of record, shall become physically or mentally incapacitated to perform the duties of his or her office as judge during the remainder of his or her term and shall make a written application to the governor for his or her retirement, setting forth the nature and extent of his or her disability and tendering his or her resignation as such judge upon condition that upon its acceptance he or she be retired with pay under the provisions of this article, the governor shall make such investigation as the governor shall deem advisable and, if the governor shall determine that such disability
exists and that the public service is suffering and will continue to suffer by reason of such disability, the governor shall thereupon accept the resignation and, by written order filed in the office of the secretary of state, direct the retirement of the judge for the unexpired portion of the term for which such judge was elected or appointed. The secretary of state shall thereupon file a certified copy of such order with the state auditor. When so accepted, said resignation shall create a vacancy in such office of judge, which shall be filled by appointment or election as provided by law. The retired judge shall thereupon be paid annual retirement pay during the remainder of his or her unexpired term in an amount equal to the annual salary he or she was receiving at the time of his or her disability retirement, which annual retirement pay, so long as it shall be paid to him or her, shall be in lieu of any and all retirement benefits such judge may otherwise have received under provisions of this article: Provided, That when the payment of such full salary as disability retirement pay shall have terminated with the close of his or her term of office, such judge, even though he or she shall not have arrived at the age of sixty-five years, shall, so long as the disability determined by the governor continues to exist, be paid the retirement benefits for which provision is made in section six of this article: Provided, however, That in the event any such judge shall die during the continuation of his or her disability, then such judge's surviving spouse shall receive the benefits to which he or she would have been entitled pursuant to the provisions of section six-b of this article and subject to the limitations thereon: Provided further, That any judge becoming a new member of this retirement system on or after the first day of April, one thousand nine hundred eighty-seven, and retiring upon disability retirement subsequent to such date shall be paid upon the basis of seventy-five percent of highest annual salary, with allowable salary increase, as provided in section six of this article during all disability retirement receipt periods.

(b) Any other provision of this section to the contrary notwithstanding, no judge shall be eligible pursuant to
this section unless such judge is also disabled to such an extent so as to preclude such judge from engaging in the practice of law during all of the period of such disability.

§51-9-16. Severability of article and amendments thereto.

If any section, subsection, clause, phrase or requirement of this article or if any section, subsection clause, phrase or requirement of this article as amended by the Legislature at its regular session held in the year one thousand nine hundred eighty-seven, if for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions. The Legislature hereby declares that it would have passed this article, and each section, subsection, sentence, clause or phrase and requirement thereof, including any amendments thereto adopted by the Legislature at its regular session held in the year one thousand nine hundred eighty-seven, irrespective of the fact that any one or more sections, subsections, clauses, phrases or requirements be declared unconstitutional.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Bruce A. Addison  
Chairman Senate Committee

Laurel L. Lewis  
Chairman House Committee

Originating in the House.

Takes effect from passage.

Joseph C. Williams  
Clerk of the Senate

Donald L. Hoff  
Clerk of the House of Delegates

Robert C. Ferguson  
President of the Senate

Robert C. Mathias  
Speaker of the House of Delegates

The within bill approved this the 31st day of March, 1987.

Alex B. Barnes  
Governor
PRESENTED TO THE
GOVERNOR
Date 3/25/87
Time 4:36 p.m.