NO. 43114-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD E. SWANSON,

Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent.

RESPONSE BRIEF FOR DEPARTMENT OF RETIREMENT SYSTEMS

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I. INTRODUCTION

Richard Swanson is a retired state employee who is challenging the Department of Retirement Systems' correction of an error in calculating his pension benefit. On appeal, Mr. Swanson misstates the nature of his claims, the superior court's orders below, and the controlling law. He fails to assign errors, make arguments, or provide legal authorities to sustain his burden of proof. His claim fails because he ignored the Administrative Procedure Act requirements for challenging agency action, and therefore failed to invoke the superior court's jurisdiction. Even if he had properly appealed the Department's action, he failed to show any error when the Department corrected its mistake.

This case involves the Department's policy of applying a "first-in-first-out" (FIFO) accounting principle to determine when annual leave cashouts are included in retirement benefit calculations. This principle comes into play when a PERS 1 retiree's highest earning two years are not the two years immediately preceding the retiree's date of retirement. When this occurs, the Department must determine whether any portion of the retiree's final annual leave cashout is properly attributable to the earlier highest earning two-year period and therefore includable in the retiree's retirement benefit calculations. When Mr. Swanson retired in 1999, his highest earning two-year period was between June 1990 and

May 1992. However, instead of applying WAC 415-108-510, the FIFO rule, the Department erroneously included Mr. Swanson's entire 1999 annual leave cashout amount in the calculation of his retirement benefit.

In 2010, the Department discovered its error, took corrective action and notified Mr. Swanson. Mr. Swanson failed to initiate the Department's administrative appeal process. Instead, he filed two lawsuits, which he has named the Damages Case and the Rules Case,[1] challenging the Department's application of the FIFO rule. The Damages Case violated settled law on multiple grounds, including its attempt to invoke the superior court's original subject matter jurisdiction. The Rules Case was equally flawed. Among other defects, Mr. Swanson filed the lawsuit almost four months after the statutory filing deadline, thereby failing to invoke the superior court's appellate subject matter jurisdiction.

The superior court properly dismissed both cases for lack of subject matter jurisdiction and this court should affirm those orders. Even if this court reaches the merits, it should grant summary judgment for the Department.

[1] For the Court's ease of reference the Department will refer to the two lawsuits by the names selected by Mr. Swanson. These names do not accurately represent the nature of the cases or of the legal remedies available to Mr. Swanson.

II. RESTATEMENT OF THE ISSUES

1. Whether, in the Damages Case, the superior court lacked original subject matter jurisdiction because agencies such as the Department have original jurisdiction over their decisions and challenges to such decisions must invoke the superior court's appellate subject matter jurisdiction, not the court's original subject matter jurisdiction.
2. Whether, in the Rules Case, the superior court lacked appellate subject matter jurisdiction because Mr. Swanson failed to file his appeal within the jurisdictional deadline set by the Administrative Procedure Act.
3. Whether, in the Rules Case, Mr. Swanson is relieved from his obligation to exhaust administrative remedies when he has failed to offer material, non-speculative evidence to overcome the presumption that the Department would properly consider any appeal and to demonstrate that such an appeal would be futile.
4. Whether this court should grant summary judgment for the Department because Mr. Swanson failed to proffer material, non-speculative evidence that the Department's action violated Mr. Swanson's vested pension rights.

III. RESTATEMENT OF THE CASE

A. Background on the FIFO Rule and the Department's Obligation to Correct Errors

1. The Department Calculates PERS Plan 1 Members' Retirement Benefits According to a Statutory Formula That May Include Compensation for Unused Annual Leave

Mr. Swanson is a Public Employees' Retirement System (PERS) Plan 1 retiree. CP at 619. Since the Department's creation in 1976, the Department has administered PERS Plan 1. Laws of 1975-76, 2d Ex. Sess., ch. 105, § 4 (codified at RCW 41.50.020) (creation of Department); RCW 41.50.030(1)(a) (Department administers PERS Plan 1). The Department calculates PERS Plan 1 members' monthly retirement benefits when they retire. CP at 406-407, ¶ 6. The Department bases PERS Plan 1 retirement benefits on the member's years of service (i.e., service credit) and the member's average final compensation (AFC). RCW 41.40.185.[2] AFC is the PERS Plan 1 member's average monthly compensation during his or her two consecutive highest earning years. RCW 41.40.010(6)(a); RCW 41.40.010(8)(a). In some circumstances, AFC for PERS Plan 1 members may include compensation paid for accrued annual leave that

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[2] Specifically, a PERS Plan 1 member's monthly retirement benefit is calculated using the following formula:

2% x service credit x AFC = monthly retirement benefit

RCW 41.40.185(2). Service credits are stated in years or fractions of years (e.g., "30 years" or "31.5 years"). AFC is stated in months (e.g., "$4,267.30 per month"). CP at 407, ¶ 6.

remains unused at the time of retirement. RCW 41.40.010(8)(a) and (b); WAC 415-108-443; WAC 415-108-510(1); Op. Att'y Gen. 1 (1976), at 10.

2. Compensation for Unused Annual Leave that May Be Included in AFC Has for Decades Been Calculated Using a FIFO Method

Three long-standing principles apply to compensation paid for accrued annual leave. Accrued annual leave is: (1) compensation, not a non-compensatory payment made at retirement, (2) deemed to be earned when accrued, not when cashed out at retirement, *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 63, 64, 847 P.2d 440 (1993), and (3) included in AFC only if actually earned during the two-year AFC period, Op. Att'y Gen. 1 (1976), at 11. Mr. Swanson does not dispute these principles.

In other words, the earning of annual leave has been logically treated in the same fashion as the earning of salary and wages: both count toward the retiree's AFC only if they are earned during the two-year AFC period. Thus, for example, if a retiring employee had accrued a total of 60 days of unused annual leave but had only earned 24 of those days during the two-year AFC period, the employee's AFC would include only the amount of leave cashout attributable to the 24 days.[3] *Id.*

[3] State law provides that state employees may be paid for, i.e., "cashout," a specified portion of their unused annual leave when they retire. RCW 43.01.041. PERS Plan 1 members may be allowed to include this annual leave cashout in their AFC when

The treatment of annual leave is, however, different from the treatment of salary and wages in one respect. Because annual leave is not only *earned* during the AFC period, but may also be *used* during a PERS Plan 1 employee's career—either during the two-year AFC period or at some other time—the impact of such use of annual leave must be accounted for when AFC is calculated. Consistent with the principles described above, for decades AFC has included only annual leave that is earned during the AFC period and that remains unused. *Id.*; *see also Wash. Ass'n of Cnty. Officials v. Wash. Pub. Emp's. Ret. Sys. Bd.*, 89 Wn.2d 729, 731, 575 P.2d 230 (1978). The portion of annual leave that remains unused is determined by applying the FIFO principle. Op. Att'y Gen. 1 (1976), at 11 ("the first leave earned is to be regarded as the first leave used"). In other words, in determining whether accrued annual leave remains unused for purposes of calculating AFC, the Department views employees as using their annual leave in the order that it is accrued: first-in, first-out. Mr. Swanson does not dispute the propriety of this FIFO principle or offer any alternative method that the Department should apply to calculate whether annual leave remains unused.

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the Department calculates their retirement benefit. RCW 41.40.010(8)(a); WAC 415-108-443.

Consistent with this long-standing legal authority, in 1987 the Department promulgated the FIFO rule. CP at 164, 167. The FIFO rule currently states in pertinent part:

> (1) Cash compensation in lieu of unused annual . . . leave may be considered compensation earnable for Plan 1 members subject to the provisions of RCW 41.40.010(8)(a) [the definition of "compensation earnable"] and WAC 415-108-456 [on leave accrual]. . . .
>
> (2) When an employer provides cash compensation in lieu of unused annual . . . leave, the department [of Retirement Systems] applies a first-in-first-out accounting method to determine when the compensated leave was earned, and when or whether the leave was used or cashed out, with the following exceptions [not applicable to Mr. Swanson].[4]

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[4] WAC 415-108-510. Although an understanding of the intricacies of the application of the FIFO rule is not necessary to the resolution of this appeal, the Department provides the following description of the pertinent portion of the rule, WAC 415-108-510(2). Assume that a PERS Plan 1 employee starts from an empty "leave bank" and accrues annual leave over three years:

Year Employee Worked	Hours of Annual Leave Earned in That Year
2009	40 hours
2010	80 hours
2011	80 hours
Total in "leave bank"	200 hours

In 2011, after these 200 hours have accrued in the employee's "leave bank," the employee uses 80 hours of annual leave. Under WAC 415-108-510, the employee is deemed to have used the annual leave that entered the "leave bank" first, i.e., 40 hours earned in 2009 plus 40 (out of the 80) hours earned in 2010. Left in the employee's "leave bank" are 40 hours earned in 2010 and 80 hours earned in 2011:

Year Employee Worked	Hours of Annual Leave Remaining
2010	40 hours
2011	80 hours
Remainder	120 hours

3. The FIFO Rule Was Promulgated Long Before Mr. Swanson Retired

As a codified rule, the contents of the FIFO rule have remained essentially unchanged since 1987.[5] Mr. Swanson is therefore incorrect when he states that the Department promulgated the FIFO rule in 1999, after he retired. Appellant's Amend. Opening Br. at 4. Moreover, even before the FIFO principle was promulgated as an administrative rule, Attorney General opinions recognized the FIFO principle, and its derivation from requirements in the Washington Constitution, which was ratified in 1889.[6]

If the employee subsequently retires and cashes out the remaining 120 hours, these hours will be deemed attributable to payrolls during 2010 and 2011. If the employee's AFC period is the 24 months from January 2008 to December 2009, none of the cashout will be deemed attributable to the employee's AFC period, and none of the cashout will be included in his or her retirement calculation. CP at 406, ¶ 5.

[5] In 1987, the rule stated in pertinent part, "[w]hen an employer provides cash compensation in lieu of unused leave, the department applies a first-in-first-out accounting method to determine when the compensated leave was earned, unless the employer has in place a . . . written policy statement [that is not applicable in this case]." CP at 164, 167. The Department amended the rule in 1994 but that amendment again did not affect the contents of the rule as it affects Mr. Swanson. CP at 183, 184-185. The Department promulgated the current version of the rule in June 1999. CP at 266, 271-272. As described below, Mr. Swanson retired in January 1999. CP at 99-100, ¶ 6.

[6] Op. Att'y Gen. 1 (1976), at 10, 11 ("a retiring member's . . . severance pay for accumulated but unused vacation leave is to be considered in determining the salary . . . base upon which his [or her] retirement allowance is to be computed" and "look . . . only to that [severance pay] paid for accrued but unused days of leave which were actually earned during the measuring two year period" and "the first leave earned is to be regarded as the first leave used") (citing with approval at page 8, Att'y Gen Ltr. Op. 39 (1972); Att'y Gen. Ltr. Op. 39 (1972), at 2 ("[u]nder Article VIII, §§ 5 and 7 of the Washington constitution, any lump sum payments to a separating employee for accrued

Mr. Swanson also incorrectly states that the Department has described the FIFO rule as "proscrib[ing] consideration of annual leave in computing a PERS 1 retiree's AFC in a situation where AFC was not in the last two years immediately preceding retirement." Appellant's Amend. Opening Br. at 5. This language is Mr. Swanson's *own* description of the FIFO rule in a Public Records Act request that he filed with the Department, and, as indicated by the Department's email that Mr. Swanson also quotes, not an accurate representation of the Department's position. *Id*; CP at 134 (Department letter quoting Mr. Swanson's Public Records Act request), CP at 138 (email from Department staff describing meaning of the FIFO rule). As the quote from Department staff states, the FIFO rule provides an accounting method to determine which months of cashed out annual leave, if any, are attributable to a retiree's AFC, something that needs to be determined when a retiree's AFC is not the two-year period immediately preceding retirement. *Id.* By their own terms, neither the quote nor the rule "proscribe" consideration of all annual leave when a retiree's AFC is not the two-year period immediately preceding retirement.

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vacation or the like must be regarded as compensation for services previously rendered; otherwise, the payments would constituted an unconstitutional give of public monies."); Const. art. VIII, §§ 5, 7 and introductory note; CP at 140.

4. A Correction of Errors Statute Requires the Department to Correct Any Errors It Makes in Calculating Retirement Benefits

The Department's 2010 action of recalculating Mr. Swanson's retirement benefit was required by RCW 41.50.130[7] (the correction of errors statute). Mr. Swanson is not challenging the correction of errors statute or the Department's application of it to him. CP at 367-373. The correction of errors statute specifically requires the Department to recover past overpayments and to prospectively reduce retirement benefits to reflect the proper calculations.

B. The Department Recalculated Mr. Swanson's Retirement Benefits Because in 1999 the Department Had Erroneously Failed to Apply the FIFO Rule to its Calculation of His Retirement Benefit

Mr. Swanson began working for the State of Washington in 1969 and retired from service with the Department of Transportation on January 1, 1999. CP at 406 ¶ 6. Shortly after he retired, the Department finalized its initial calculations, concluding that Mr. Swanson's AFC years were not the two years immediately preceding his 1999 retirement, but was the two-year period from June 1, 1990, to May 31, 1992. CP at 406-407, ¶ 6. Mr. Swanson does not dispute this conclusion.

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[7] RCW 41.50.130 was preceded by prior RCW 41.50.390, which was originally enacted in Laws of 1947, ch. 274, § 40.

Using that 1990-92 AFC period, in 1999 the Department calculated Mr. Swanson's AFC as $5,134.21 per month and his monthly retirement benefit as $3,080.53. CP at 407, ¶ 6.[8] However, in doing this calculation the Department mistakenly included in Mr. Swanson's AFC the entire amount of annual leave he cashed out when he retired ($6,557.54) and not the amount of unused annual leave that he had earned during his 1990-92 AFC period. CP at 407-408, ¶¶ 7-8.[9] As the Department would subsequently discover, none of Mr. Swanson's 1999 annual leave balance was attributable to the 1990-92 AFC period. CP at 407-408, ¶ 8.

Mr. Swanson is incorrect about what occurred in 1999 when, in his opening brief, he states, "[a]ccording to the [Department], this [1999] version of Mr. Swanson's AFC included a credit for unused annual leave accumulated during his high two (2) years of annual compensation." Appellant's Amend. Opening Br. at 3-4. Mr. Swanson does not actually

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[8] A detailed understanding of the arithmetic involved in calculating Mr. Swanson's retirement allowance is not necessary to resolve the narrow legal issues in this appeal. In the event the Court is interested, however, the Department provides a summary in this footnote and in footnote 9. The statutory formula in RCW 41.40.185(2) was applied to Mr. Swanson as follows:

2% x 30 yrs service credit x $5,134.21 AFC/ month = $3,080.53 ret. all./mo. CP at 407, ¶ 6.

[9] The $5,134.21 AFC was calculated by adding $116,663.45 (representing the 24 months of Mr. Swanson's salary during his AFC period) *and* $6,557.54 in final annual leave cashout reported by his employer. The total of these two numbers is $123,220.99 which, when divided by 24 months, gives a $5,134.21 AFC and a continuing monthly retirement allowance of $3,080.53. Because Mr. Swanson had elected to reduce his continuing monthly retirement allowance in order to make provision for a beneficiary, the Department applied a factor of 0.863 to the continuing monthly retirement allowance, for a monthly payment of $2,658.50. CP at 407, ¶ 7.

dispute that in 1999 the Department erroneously included in Mr. Swanson's AFC his *entire* annual leave balance as it existed when he retired and that Mr. Swanson's 1999 annual leave balance did not contain any amount of annual leave attributable to the 1990-1992 AFC period. CP at 407-408, ¶ 8.

The Department's inclusion of Mr. Swanson's entire final annual leave cashout in his AFC was a mistake and not Department policy or practice. CP at 419, ¶¶ 6, 7. Further demonstrating that the Department's inclusion of his unused annual leave was simply a mistake, and not a change in policy, is that during the timeframe Mr. Swanson retired in 1999, the Department was correctly applying the FIFO rule to other, similarly situated employees. CP at 409, ¶ 12.

In 2010, the Department realized that it had made an error in 1999 when it mistakenly included Mr. Swanson's entire 1999 annual leave cashout in his 1990-92 AFC. CP at 407-408, ¶ 8. The Department recognized that no portion of the annual leave cashout had been attributable to the 1990-92 AFC period and, therefore, none of the annual leave cashout should have been included in Mr. Swanson's AFC. CP at 407-408, ¶ 8. As a result, Mr. Swanson's correct monthly retirement benefit under the law was approximately $160 less than previously calculated. CP at 408, ¶ 9.

Upon discovery of its 1999 error, and as required by the correction of errors statute, on August 23, 2010, the Department took action to advise Mr. Swanson that his corrected AFC was $4,860 and his new continuing monthly retirement benefit was $2,916.59. *Id.* As also required by the correction of errors statute, on August 23, 2010, the Department sent Mr. Swanson an invoice for the overpayments made during the preceding three years (i.e., from 2007 through 2010). CP at 408, ¶ 10.[10] Pursuant to the correction of errors statute, the Department's invoice provided Mr. Swanson with three options to reimburse the retirement system for a $5,902.20 overpayment. *Id.* In the balance of this brief the Department will refer to the issuance of the August 23, 2010 letter and invoice as the Department's "action."

Mr. Swanson did not respond to the Department's letter and invoice; did not respond to repeated offers to answer questions; and did not respond to a follow-up notice. CP at 408-409, ¶ 11. Mr. Swanson concedes that he never sought a final decision from the Department's PERS Plan Administrator about the recalculation of his AFC and never initiated the Department's internal administrative appeal process. Appellant's Amend. Opening Br. at 6.

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[10] Pursuant to the correction of errors statute, the Department may generally recover only those overpayments made within three years of discovery of the Department's mistake. RCW 41.50.130(2). The Department will not recover any overpayment made to Mr. Swanson between 1999 and 2007.

C. Procedural History

As described in the preceding section, the Department notified Mr. Swanson on August 23, 2010 that it was recalculating his retirement benefit and that he had to repay the Department for the prior three years of overpayment.

Mr. Swanson challenged the Department's action by filing his Damages Case on December 9, 2010. CP at 6. In the Damages Case, he challenged the Department's application of the FIFO rule to him and to an alleged class of similarly situated individuals,[11] seeking to invoke the superior court's original subject matter jurisdiction rather than the superior court's appellate jurisdiction under the Administrative Procedure Act (APA). CP at 8 ¶ 2.3 ("[t]he superior court . . . has jurisdiction . . . pursuant to RCW 2.08.010 and CR 23."). The Department brought a Motion to Dismiss based on two alternative arguments. CP at 38-63. First, the Department argued that appeals of agency actions do not invoke the court's original subject matter jurisdiction and that the court therefore lacked subject matter jurisdiction. CP at 48-49.[12] Second, the Department

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[11] Mr. Swanson never brought a motion seeking class certification and no class was certified by the Superior court.

[12] The Department also made the corollary arguments that even if Mr. Swanson could invoke the Superior court's original jurisdiction, the Damages Case was nonetheless fatally flawed for four additional reasons: (1) it failed to state a claim upon which relief may be granted, CP at 55-57; (2) it was barred by the pertinent statute of limitations, CP at 57; (3) it was unripe for judicial review, CP at 57-58; and (4) it was barred by the doctrine of primary jurisdiction, CP at 58-59.

argued in the alternative that even if Mr. Swanson had attempted to invoke the court's limited appellate jurisdiction (which he had not), his attempt would still be fatally flawed on multiple grounds,[13] including his failure to exhaust administrative remedies.[14]

The superior court reached only the Department's first argument, dismissing the Damages Case for lack of original subject matter jurisdiction.[15] The court did not reach any of the Department's alternative arguments, including its alternative, non-jurisdictional argument that if Mr. Swanson had invoked the superior court's limited appellate jurisdiction, he had nonetheless failed to exhaust his administrative remedies.

Mr. Swanson filed his second challenge to the Department's action on January 19, 2011, when he filed his Rules Case. CP at 618-644. The Rules Case was functionally identical to the Damages case, except this time Mr. Swanson sought to invoke the court's appellate jurisdiction to

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[13] CP at 49-50. The Department argued in the alternative that in the Damages Case, Mr. Swanson had failed to: (1) use the Department's internal review process and obtain a final order from the Department, CP at 51-52; (2) file and serve his complaint within the statutory deadline, CP at 53-54; (3) comply with the statutory content requirements for his petition, CP at 54-55; (4) properly serve the Department, thereby giving the Court personal jurisdiction over the Department, CP at 59; (5) exhaust his administrative remedies, CP at 59-60; and (6) state a claim upon which relief could be granted as required by the APA, CP at 60-61.

[14] CP at 59-60.

[15] CP at 331-332, 333-334. The Court issued its order of dismissal on May 13, 2011. CP at 331-332. The Court reiterated this holding in an October 18, 2011 order. CP at 333-334. The Court issued the second order in recognition of the fact that the two cases had originally been consolidated for the purpose of hearing only, CP at 653-654, but later fully consolidated by the Court, CP at 333.

review whether the Department's action of recalculating his retirement benefit was unconstitutional under the *Bowles* case. CP at 369 ¶ 1.11. The Department brought a combined Motion to Dismiss and Motion for Summary Judgment. CP at 527-550. In the Motion to Dismiss, the Department argued that the Rules Case was subject to dismissal for lack of appellate jurisdiction because Mr. Swanson had not demonstrated compliance with the APA's jurisdictional filing deadline. CP at 540-544. As it had argued in the Damages Case, the Department also argued in the alternative that if Mr. Swanson had successfully invoked the superior court's appellate jurisdiction, the Rules Case was nonetheless subject to dismissal because he failed to exhaust his administrative remedies. CP at 544-545.

The superior court dismissed the Rules Case on both of the two alternative grounds argued by the Department: first, for failure to meet the APA appeal deadlines and thereby failing to invoke the court's appellate jurisdiction; and second, for failure to either exhaust administrative remedies or demonstrate that exhaustion was not required. CP 614-615.

IV. ARGUMENT

A. Standard of Review

The APA establishes the exclusive means of judicial review of agency actions. RCW 34.05.510 ("[t]his chapter establishes the exclusive means of judicial review of agency action . . . .").[16]

The basis of the superior court's orders of dismissal in both the Damages Case and the Rules Case was lack of subject matter jurisdiction. CP at 331-334, 614-615.[17] Whether a court has jurisdiction is a question of law that is reviewed *de novo*. *Crosby v. Cnty. of Spokane,* 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

If the court reaches the merits of Mr. Swanson's claim, the court of Appeals applies the APA standards of review directly to the agency decision, not to the decision of the superior court. *Postema v. Pollution Control Hearings Bd.,* 142 Wn.2d 68, 76-77, 11 P.3d 726 (2000); RCW 34.05.570.

B. Mr. Swanson Bears the Burden of Proof

Mr. Swanson bears multiple burdens of proof in this appeal. To prevail, he must first prove his compliance with the APA's prerequisites to

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[16] The only exception is in the case of petitions for constitutional writs of certiorari. Const. art. IV, § 6; *Saldin Sec., Inc. v. Snohomish Cnty.,* 134 Wn.2d 288, 292, 949 P.2d 370 (1998). Mr. Swanson's petitions for judicial review did not seek a constitutional writ of certiorari. CP at 6-10; CP at 367-373.

[17] In the Rules Case, the Superior court also dismissed the case on the alternative grounds of failure to exhaust administrative remedies. CP at 614-615.

judicial review, including those jurisdictional prerequisites that invoke the court's subject matter jurisdiction. *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.,* 118 Wn. App. 212, 219, 220, 75 P.3d 975 (2003), *rev'd on other grounds,* 153 Wn.2d 207, 103 P.3d 193 (2004) (*Diehl* I) (must comply with APA requirements); *City of West Richland v. Dep't of Ecology*, 124 Wn. App. 683, 695, 103 P.3d 818 (2004) (must comply with APA requirements as jurisdictional prerequisite). If he does not do so, the case must be dismissed. *Crosby,* 137 Wn.2d at 301; *Diehl* I, 118 Wn. App. at 220.

Even if Mr. Swanson proves that the court has subject matter jurisdiction (which he has not), he must then prove that he has exhausted his administrative remedies or is excused from doing so. RCW 34.05.534; *Harrington v. Spokane Cnty.,* 128 Wn. App. 202, 114 P.3d 1233 (2005) (*citing Citizens for Mount Vernon v. City of Mount Vernon,* 133 Wn.2d 861, 947 P.2d 1208 (1997)). If he does not do so, the case must be dismissed because the court cannot grant relief. *Id.*

Even if Mr. Swanson establishes that the court has subject matter jurisdiction and that he is excused from exhausting his administrative remedies (which he has not), he must then prove that the Department's action was invalid under one of the specific bases for judicial review in the APA. RCW 34.05.570(1)(a). Of the possible bases for judicial review in

the APA, Mr. Swanson's Amended Petition in the Rules Case[18] selected only one upon which to base his claim — that the Department's action was an unconstitutional violation of vested pension rights under *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 63, 64, 847 P.2d 440 (1993).[19]

Because in the Department's summary judgment motion on this *Bowles* claim, the Department met its initial burden of showing the absence of an issue of material fact, the burden shifted to Mr. Swanson to establish the existence of the elements essential to his case and for which he bears the burden of proof at trial. *Young v. Key Pharm. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 198 (1989). In this regard, Mr. Swanson bears the burden of proving the invalidity of the Department's action. RCW 34.05.570(1)(a).[20] To defeat the Department's summary judgment motion, he must offer specific, non-speculative facts. *Young*, 112 Wn.2d at 225 (cannot rely on allegations); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (cannot rely on

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[18] Mr. Swanson's Complaint in the Damages Case did not refer to any of the allowable bases for judicial review in the APA or to any other cognizable claim for relief. CP at 6-10.

[19] CP at 369 (Mr. Swanson's amended petition stated, "[The Department's] application of the "first-in, first-out" rule set forth in WAC 514-108-510 . . . violated requirements enunciated in *Bowles v. Retirement Systems* . . . [by] represent[ing] an unconstitutional infringement on the right to contract . . . .")

[20] Although, as discussed below, Mr. Swanson's attempt to style the Rules Case as a challenge to the FIFO rule is not supported by the actual nature of his claims or the law, in an actual challenge to the rule Mr. Swanson would bear the burden of proving his constitutional claim under *Bowles* beyond a reasonable doubt. *Knudsen v. Wash. State Exec. Ethics Bd.*, 156 Wn. App. 852, 860, 235 P.3d 835 (2010); *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632-33, 949 P.2d 851 (1998).

speculation or argumentative assertions). If Mr. Swanson does not meet these burdens, the court must grant summary judgment for the Department. *Young*, 112 Wn.2d at 225.

C. Summary of the Department's Argument

Preliminarily, Mr. Swanson incorrectly claims that the superior court dismissed his lawsuits for failure to exhaust administrative remedies. Appellant's Amend. Opening Br. at 6-7, 8-9, 10. In fact, the superior court dismissed the Damages Case because Mr. Swanson incorrectly tried to appeal the Department's action by seeking to invoke the court's original subject matter jurisdiction and the superior court dismissed the Rules Case because Mr. Swanson failed to comply with the filing deadline in the APA, and therefore failed to invoke the court's appellate subject matter jurisdiction.

The court should affirm dismissal in this case for any one of three reasons. First, the superior court properly found it did not have subject matter jurisdiction. It lacked original subject matter jurisdiction in the Damages Case because agencies have primary jurisdiction over their decisions, and in any event, Mr. Swanson fails to assign error or make argument with respect to this issue. The superior court lacked appellate subject matter jurisdiction in the Rules Case because Mr. Swanson failed to appeal the Department's action within the deadline set by the APA, and

therefore failed to invoke the superior court's appellate subject matter jurisdiction. Second, Mr. Swanson failed to exhaust his administrative remedies or justify relief from that requirement, which is a prerequisite to judicial review under the APA. Finally, even if the court were to reach the merits of the case, the court should grant summary judgment for the Department because Mr. Swanson's claims are legally and factually unsupported.

D. The Superior Court Dismissed the Damages Case and the Rules Case for Lack of Subject Matter Jurisdiction, Not for Failure to Exhaust Administrative Remedies

Contrary to Mr. Swanson's contentions, the superior court expressly dismissed both the Damages Case and the Rules Case for lack of subject matter jurisdiction, not for failure to exhaust administrative remedies.[21]

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[21] The Court dismissed both cases following the Department's motions to dismiss and not, as represented by Mr. Swanson, Appellant's Amend. Opening Br. at 9, in response to motion for summary judgment. CP at 331 (Damages Case); CP at 614 (Rules Case). The Superior court dismissed the Damages Case on May 13, 2011 for lack of original subject matter jurisdiction, stating: ". . . this Court finds that: 1. The plaintiff has failed to invoke this Court's original subject matter jurisdiction . . . ." CP at 331; *see also* CP at 333 (amended order). The Superior court made no reference to exhaustion of remedies. CP at 331-332. The Superior court dismissed the Rules Case on January 27, 2012 for lack of appellate subject matter jurisdiction, stating: ". . . this Court finds that: 1. The petitioner has failed to invoke this Court's appellate subject matter jurisdiction . . . ." CP at 614. While the Superior court's order in the Rules Case also referred to Mr. Swanson's failure to exhaust his administrative remedies, the Court's reference was explicitly numbered as the second and third bases for dismissal and were clearly independent of – and alternative to – its primary holding that Mr. Swanson had failed to invoke the Superior court's appellate subject matter jurisdiction. After the Court's first holding, cited above, that it lacked appellate subject matter jurisdiction, the Court continued in holdings two and three: ". . . 2. The petitioner has failed to exhaust his

E. In the Damages Case Mr. Swanson Failed to Preserve on Appeal a Challenge to the Court's Order and, If He Had Done So, Has Failed to Prove that He Complied with the Jurisdictional Prerequisites to Judicial Review

1. Mr. Swanson Has Not Preserved on Appeal a Challenge to the Superior Court's Orders in the Damages Case

Although in his brief, Mr. Swanson referred to the superior court's orders in the Damages Case, he made no assignments of errors, specified no issues, cited no legal authority, and offered no argument that he had sustained his burden of proving that he successfully invoked the superior court's original subject matter jurisdiction. Appellant's Amend. Opening Br. at 1-16. His only pertinent assignment of error was to the superior court's conclusion that he had failed to invoke the court's *appellate* subject matter jurisdiction, Appellant's Amend. Opening Br. at 1 (Assignment of Error (A)(1)), a holding that was made only in the Rules Case and not the Damages Case. *Compare* CP at 614-615 with CP at 331 - 332.

Courts generally do not consider alleged errors if a party fails to assign error or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3(a)(4); *Escude ex rel. Escude v. King Cnty. Pub. Hosp. Dist. No. 2,* 117 Wn. App. 183, 191 n.4,

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administrative remedies; and 3. The petitioner has failed to establish the futility exception to the exhaustion of remedies requirement." CP at 614-615 (emphasis added).

69 P.3d 895 (2003) (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999) and *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)). As a result, Mr. Swanson has not preserved any challenge to the superior court's order in the Damages Case and this court should therefore affirm that order.

2. If Mr. Swanson Had Preserved a Challenge to the Superior Court's Orders in the Damages Case, He Has Failed to Prove that He Complied with the Jurisdictional Prerequisites to Judicial Review

Even if the court concludes that Mr. Swanson has preserved a challenge to the superior court's order in the Damages Case, the court should affirm dismissal because Mr. Swanson has not sustained his burden of proving that he successfully invoked the court's original subject matter jurisdiction. Administrative agencies such as the Department have original jurisdiction over their own decisions. *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000). As a result, it is settled law that appeals of agency decisions invoke the superior court's limited *appellate* jurisdiction and not the superior court's *original* jurisdiction. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 468, 70 P.3d 931 (2003); *City of West Richland,* 124 Wn. App. at 695; *Reeves v. Dep't of Gen. Admin.*, 35 Wn. App. 533, 537, 667 P.2d 1133 (1983).

In the Damages Case, Mr. Swanson sought to invoke only the superior court's original subject matter jurisdiction, expressly stating in his petition for review that "[t]he superior court has jurisdiction of plaintiffs' claims pursuant to RCW 2.08.010 and CR at 23." CP at 8. The cited RCW 2.08.010 describes the cases in which the superior court has *original* jurisdiction. The superior court, therefore, had no choice but to dismiss the Damages Case because it did not – and could not – have original subject matter jurisdiction over Mr. Swanson's challenge to the Department's action. *Ricketts v. Bd. of Accountancy,* 111 Wn. App. 113, 116, 43 P.3d 548 (2003). Mr. Swanson has offered no legal authority and no argument to the contrary.

Moreover, even setting aside the issue of the court's jurisdiction, numerous procedural defects in Mr. Swanson's claim would require dismissal.[22] On appeal, the court may affirm a lower court's ruling on any grounds adequately supported in the record. *State v. Costich,* 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (citing *In re Marriage of Rideout,* 150 Wn.2d 337, 358, 77 P.3d 1174 (2003)). Of particular significance is Mr. Swanson's failure to file and serve the Damages Case within thirty days of the Department's action as required by the APA. RCW 34.05.542(3). Mr. Swanson filed the Damages Case more than two

[22] *See* footnote 12 above.

months late and never served the Department at all. RCW 34.05.542(3).[23] Regardless of whether Mr. Swanson attempted to invoke the superior court's original or appellate jurisdiction, the legislature has specified that challenges to the Department's action must be filed and served within thirty days. RCW 34.05.542; *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 217, 103 P.3d 193 (2004) (*Diehl* II) ("[t]o invoke the superior court's jurisdiction over his petition for review, [the plaintiff] was required to file and serve his petition on the agency at its principle office . . . and serve the office of the attorney general within 30 days after service of the final order"); *Skagit Surveyors & Eng., LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 555, 958 P.2d 962, 968 (1998). Mr. Swanson did not do so.

As a result, the Damages Case is barred either because Mr. Swanson attempted to invoke the court's original subject matter jurisdiction or because he failed to file and serve his lawsuit within the statutory deadline.

F. In the Rules Case Mr. Swanson Failed to Timely Seek Review of Agency Action and, In Any Event, His Claim Has No Merit

[23] The Department took action on August 23, 2010, CP at 101, ¶¶ 9, 10, so Mr. Swanson's filing deadline was September 22, 2010. Mr. Swanson filed the Damages Case on December 9, 2010. CP at 6. Mr. Swanson never served the Damages Case on the Department. CP at 54 n. 12; CP at 64-65, CP at 104-105; CP at 108; RCW 34.05.542(6).

1. Mr. Swanson Has Failed to Comply with the Jurisdictional Prerequisites to Judicial Review in the Rules Case

With the exception of matters not pertinent to this lawsuit, the APA states that it establishes the exclusive means of judicial review of agency action. RCW 34.05.510. As described above, appeals of agency actions invoke the superior court's limited appellate subject matter jurisdiction. The superior court's appellate subject matter jurisdiction may be invoked only through compliance with the applicable statutory requirements: "The superior court and the parties are bound by the statutory mandate of the APA, and it is the statutory procedural requirements which must be met to invoke subject matter jurisdiction." *Diehl* II, 153 Wn.2d at 217; *Skagit Surveyors,* 135 Wn.2d at 555.

Under the APA, Mr. Swanson bears the burden of proving compliance with the procedural prerequisites to judicial review. RCW 34.05.546(6) ("[a] petition for review must set forth: . . . (6) [f]acts to demonstrate that the petitioner is entitled to judicial review . . ."); *Diehl* I, 118 Wn. App. at 219, 220. The procedural prerequisites are in RCW 41.40 (the PERS statutes) and the APA. The PERS statutes state: "[a]ny person aggrieved by a decision of the [D]epartment affecting his or her legal rights, duties, or privileges *must before he or she appeals to the courts*, file with the director [of the Department] . . . a notice for hearing

before the director's designee," RCW 41.40.068 (emphasis added), and "[j]udicial review of any final decision and order by the director is governed by the provisions of chapter 34.05 RCW [the APA]." RCW 41.40.078.

The APA requires that such appeals be filed within thirty days of the Department's action. RCW 34.05.542(2) ("[a] petition for judicial review of an order shall be filed with the court . . . within thirty days after service of the final order"). This same thirty-day filing deadline also applies to challenges to Department actions other than final orders. RCW 34.05.542(3) ("[a] petition for judicial review of agency action, other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency . . . within thirty days after the agency action.")

Courts have repeatedly and consistently held that strict compliance with the APA's filing and service requirements are necessary to invoke the court's appellate subject matter jurisdiction. *City of West Richland v. Dep't of Ecology*, 124 Wn. App. 683, 695, 103 P.3d 818 (2004); *Skagit Surveyors,* 135 Wn.2d at 555-57; *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617-18, 902 P.2d 1247 (1995). Thus, Mr. Swanson was required to file the Rules Case within 30 days of the Department's August 23, 2010 action, i.e., by September 22, 2010.

RCW 34.05.542(2), (3), (4); *Diehl* II, 153 Wn.2d at 217. Mr. Swanson did not so until January 19, 2011, almost four months after the jurisdictional filing deadline. CP at 421, ¶ 4.

Mr. Swanson cites no legal authority and offers no clear legal argument to demonstrate that these requirements of the PERS statutes, the APA, and case law are not dispositive of the Rules Case. At most, Mr. Swanson implies that the Rules Case is a challenge to the FIFO rule, rather than a challenge to the Department's 2010 action, perhaps in an attempt to argue that the 30-day deadline does not apply. RCW 34.05.542(1) ("[a] petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.") Mr. Swanson makes this implication by selecting the name "Rules Case" for his second lawsuit and by sprinkling the words "improper rulemaking" through his Amended Petition and in his brief on appeal. CP at 367, 370, Appellant's Amend. Opening Br. at 10, 11. If this is his intention, his attempt is fatally flawed under the plain language of the APA and his own statements of the exact nature of his legal challenge.

The APA states that while challenges to agency rule *adoption* can generally occur at any time, challenges to agency *application* of a rule must occur within 30 days of the agency's action. The APA defines the categories of agency action subject to judicial review and establishes the

jurisdictional filing deadlines for each category. The legislature defines agency action as including " . . . the *adoption or application* of an agency rule . . . ." RCW 34.05.010(3) (emphasis added). In this definition, the legislature explicitly distinguishes between the *adoption* of an agency rule and the *application* of an agency rule. When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have two different meanings. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007).

Based on this distinction between agency *adoption* of a rule and agency *application* of a rule, the legislature proceeded to assign different appeal deadlines to each category of action. Appeals of agency action *other than* the *adoption* of a rule must be brought within 30 days of the date of the agency action. RCW 34.05.542(3) ("[a] petition for judicial review of agency action other than the adoption of a rule . . . is not timely unless filed with the court . . . within thirty days after the agency action . . . .")[24] In other words, while a challenge to agency *adoption* of a rule may generally be brought at any time, a challenge to agency *application* of a rule must be brought within 30 days of the agency action.

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[24] The APA also refers to appeals of agency "orders." This category of agency action is not at issue in this appeal because Mr. Swanson did not seek administrative review of the Department's decision and so the Department never issued a final order. Appellant's Amend. Opening Br. at 6. Appeals of orders are subject to the same 30-day filing deadline as agency action other than rulemaking. RCW 34.05.542(2).

Within the context of these statutory definitions, Mr. Swanson plainly defined his legal challenge as a challenge to the Department's 2010 *application* of the FIFO rule, and not a challenge to the Department's *adoption* of the FIFO rule in 1987. Mr. Swanson stated in his Amended Petition: "DRS issued a letter to [Mr. Swanson] informing him that his monthly benefit would be *diminished* based upon a recalculated AFC . . .",[25] "DRS *application* of the [FIFO] rule" . . . represents an unconstitutional infringement on the right to contract . . .",[26] and "[t]his is a class action seeking . . . relief . . . against DRS for its *application* of the [FIFO] rule . . . ."[27] In a similar vein, Mr. Swanson's brief states: "Error of law in ruling that Appellant insufficiently invoked the court's . . . jurisdiction by challenging *application* of a rule to Appellant . . .",[28] "Error of law . . . in ruling that it was not futile for Appellant to challenge DRS' *application* of a rule to Appellant . . .",[29] "This case began with DRS' August 23, 2010, *decision* to reduce Mr. Swanson's AFC . . . retroactively to the date of his retirement . . .",[30] "[Mr. Swanson] has challenged the *application* of the FIFO rule to

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[25] CP at 369, ¶ 1.9 (emphasis added).
[26] *Id.*, ¶ 1.11 (emphasis added).
[27] *Id.*, ¶ 3.2 (emphasis added).
[28] Appellant's Amend. Opening Br. at 1 (emphasis added).
[29] *Id.* at 2 (emphasis added).
[30] *Id.* at 4 (emphasis added).

[him] . . .",[31] ". . . the Rules Petition . . . made it clear that *application* of the FIFO rule to [Mr. Swanson's] situation was not warranted . . .",[32] and that the Department's "*application* of the [FIFO] rule . . . violated . . . *Bowles* . . . ."[33]

This language is self-evidently challenging the Department's application of the FIFO rule to Mr. Swanson, not the Department's adoption of the FIFO rule. The APA is clear that challenges to agency application of a rule must be filed within thirty days of the agency action.

The Department expects that Mr. Swanson may argue that challenges to the Department's application of a rule should be treated as a challenge to the adoption of the rule itself, with no filing deadline applicable to either type of challenge. This argument is meritless for four reasons. First, the plain language of the APA belies the argument for the reasons described above. Second, if adopted, Mr. Swanson's argument would render the 30-day filing deadline largely inapplicable. Agencies generally apply rules when taking action. RCW 34.05.010(3) (definition of agency action); RCW 34.05.010(16) (definition of rule); *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 497, 173 P.3d 885 (2007) (remedy for failure to comply with APA rulemaking

[31] *Id.* at 10 (emphasis added).
[32] *Id.* at 11 (emphasis added).
[33] *Id.*

procedures is invalidation of the action). If challenges to agency actions that apply rules do not have to be filed within 30-days, then there would be no appeal deadline for a substantial portion of challenges to agency action. Third, there would be no bar to challenges brought well after the agency and other parties have acted in reliance on the agency action, and after evidence no longer exists. Fourth, the appeal deadline for identical agency action would differ significantly based solely on whether the action was linked to a rule or not. For all of these reasons, Mr. Swanson's anticipated argument violates the principle that statutes are to be interpreted to avoid unlikely, absurd, or strained results. *Kilian v. Atkinson,* 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

In summary, Mr. Swanson has failed to demonstrate compliance with the APA's jurisdictional requirements and this court should affirm the superior court's dismissal of the Rules Case.

2. Mr. Swanson Has Failed to Prove He Exhausted His Administrative Remedies in the Rules Case or that He was Relieved From the Exhaustion Requirement

Even if Mr. Swanson had successfully demonstrated his compliance with jurisdictional prerequisites to judicial review (which he has not), the Rules Case must be dismissed because he failed to prove that he exhausted his administrative remedies or that he is excused from the exhaustion requirement. The APA requires that "[a] person may file a petition for

judicial review . . . only after exhausting all administrative remedies available within the agency whose action is being challenged . . . ." RCW 34.05.534. This requirement is based on "a general rule that when an adequate administrative remedy is provided, it must be pursued before the courts will intervene." *Orion Corp. v. State*, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985). The policies underlying the exhaustion requirement are to:

> (1) insure against premature interruption of the administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision, (3) allow the exercise of agency expertise, (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by resort to the courts.

Id. at 456-457.

As discussed above, the PERS statutes and the APA mandate that those who challenge a Department decision must go through an administrative appeal process and obtain a final order before seeking judicial review. Unless an exception to the exhaustion requirement applies, a petitioner's failure to exhaust his or her administrative remedies will result in dismissal. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997), *cert. denied*, 425 U.S. 912 (1998); *Ackerley*

Commc'ns, Inc. v. City of Seattle, 92 Wn.2d 905, 908-09, 602 P.2d 1177 (1979), *cert. denied*, 449 U.S. 804 (1980).

Mr. Swanson concedes that he did not comply with these requirements, Appellant's Amend. Opening Br. at 10, but attempts to justify his failure on two grounds: first, that he challenged application of the FIFO rule on constitutional grounds, Appellant's Amend. Opening Br. at 10-12, and that exhaustion of remedies would be futile. Appellant's Amend. Opening Br. at 14-15. Both arguments are meritless.

First, Mr. Swanson provides no legal authority for his apparent contention that he need not exhaust his administrative remedies because he is "challeng[ing] the application of the FIFO rule to the Appellant . . . on constitutional grounds." Appellant's Amend. Opening Br. at 10-12. APA challenges to the application of rules may be based on constitutional grounds but the APA does not on that basis relieve such challenges from the exhaustion of remedies requirement. RCW 34.05.570(3) ("[t]he court shall grant relief from an agency order . . . if it determines that: (a) [t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied . . ."); RCW 34.05.570(4)(c) ("[r]elief for persons aggrieved by the performance of an agency action . . . can be granted only if the court determines that the action is: (i) unconstitutional . . ."); RCW 34.05.534. As the Washington

Supreme Court has stated, "[w]here a party affirmatively seeks declaratory or injunctive relief . . . it must show that its remedies have been exhausted in order to show it has standing to raise even a constitutional issue." *Ackerley Commc'ns, Inc. v. City of Seattle,* 92 Wn.2d 905, 908-909, 602 P.2d 1177 (1979); *see* also *Harrington,* 128 Wn. App. at 210 ("[the plaintiff] is challenging the County's compliance with the Act and its constitutionality *as applied to him* [so] [a]dministrative review is, therefore, required to develop the facts necessary to adjudicate this 'as applied' constitutional challenge.") (emphasis in the original).

Second, while Mr. Swanson contends that pursuing his administrative remedies would be futile because the Department is invested in its position and has defended its application of the rule in the present litigation, Appellant's Amend. Opening Br. at 14-15, the futility exception applies only if he actually *demonstrates* that the Department will not grant him relief if he pursues his administrative remedy. RCW 34.05.534(3) ("The court may relieve a petitioner of the requirement to exhaust . . . administrative remedies upon showing that . . . exhaustion . . . would be futile"); RCW 34.05.570(1)(a). Contrary to Mr. Swanson's apparent belief, Appellant's Amend. Opening Br. at 15, the Department does not bear the burden of demonstrating to the court that exhaustion is not futile. Speculation is insufficient to show that a particular adverse

result is preordained. *Ward v. Bd. of Cnty. Comm'rs, Skagit Cnty.*, 86 Wn. App. 266, 273, 936 P.2d 42 (1997). Moreover, it is axiomatic that public officers are entitled to a presumption that they will properly perform their duties until the contrary is shown. *Rosso v. State Pers. Bd.*, 68 Wn.2d 16, 20, 411 P.2d 138 (1966) (*citing Cawsey v. Brickey*, 82 Wn. 653, 144 P. 938 (1914)). Mr. Swanson has not even attempted to meet his burden of proving futility by offering non-speculative, material evidence to overcome the presumption that the Department would properly consider his administrative appeal and to demonstrate that such an appeal would actually be futile.

Moreover, if adopted, Mr. Swanson's legal theory that exhaustion of remedies is futile whenever an agency has promulgated and defended application of a rule would result in the exhaustion requirement being generally inapplicable because *every* agency promulgates and applies rules and every agency is invested in its decisions. Agencies are nonetheless deemed to have original jurisdiction over their decisions, *Chaney v. Fetterly,* 100 Wn. App. 140, 145, 995 P.2d 1284 (2000), and the legislature has specified that those who challenge agencies' application of rules must therefore exhaust their remedies before filing petitions for judicial review. RCW 34.05.534. Statutes must be interpreted and construed so that all language used is given effect, with no portion

rendered meaningless or superfluous. *G-P Gypsum Corp. v. Dep't of Rev.*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010).

Mr. Swanson has not met his burden of actually demonstrating that the futility exception to the exhaustion of remedies requirement applies and the court should therefore dismiss the Rules Case.

3. In the Alternative, This Court Should Grant Summary Judgment for the Department Because Mr. Swanson Has Not Sustained His Burden of Proving That the Department's Action Was Constitutionally Impermissible Under *Bowles*

Even if the court were able to reach the merits of Mr. Swanson's claim, it should grant summary judgment for the Department. Although the superior court did not reach the Department's motion for summary judgment in the Rules Case because the court determined that it lacked subject matter jurisdiction, this court may affirm a judgment on any grounds within the pleadings and proof. *Costich,* 152 Wn.2d at 477. This court should grant summary judgment for the Department for two reasons. First, the *Bowles* case provides no support for Mr. Swanson's challenge. Second, Mr. Swanson has not alleged facts demonstrating that the Department's action was an unconstitutional violation of Mr. Swanson's vested contractual pension rights under *Bowles*.

Bowles prohibits the Department from making certain sorts of formal changes to long-standing, consistently applied administrative

policies. *Bowles* has no bearing, however, on what occurred in this case: the Department's correction of a mistake in the calculation of Mr. Swanson's retirement benefit, a correction that the correction of errors statute specifically requires the Department to make. Rather than support Mr. Swanson's claims, the *Bowles* opinion actually supports the Department's decision to include in his AFC for 1990-92 only his annual leave that accrued during 1990-92 and that remains unused.

In *Bowles*, PERS Plan 1 members and beneficiaries sued the Department, alleging that *all* leave cashouts earned over the course of their employment must be included in retirement benefit calculations, regardless of whether or not the leave accrued during the two-year AFC period. *Bowles*, 121 Wn.2d at 58. The *Bowles* court held, consistent with decades of prior legal authority, that all leave earned during the course of employment is not to be included in AFC, but only that leave accruing during an employee's two-year AFC period is to included in AFC. *Id.* at 64. Mr. Swanson has not challenged this holding. Appellant's Amend. Opening Br. at 1 – 16.

In other words, as applied to Mr. Swanson, this first holding of *Bowles* mandates that the Department include in his retirement benefits calculation only the leave accrued during his two-year AFC period from 1990-1992 rather than automatically include the entirety of the leave that

he accumulated over the course of his career and cashed out at retirement in 1999.

The *Bowles* plaintiffs also alleged that a change in the Department's administrative practice with regard to employer lids on leave cashouts violated vested pension rights and, accordingly, were impermissible. *Id.* at 59-60. They based their claim on case law holding that an employee who accepts a job to which a pension plan is applicable has a quasi-contractual right to receive generally the same pension at retirement. *Id.* at 59, 65 (*citing Bakenhus v. City of Seattle,* 48 Wn.2d 695, 296 P.2d 536 (1956)). The *Bowles* court held, based on such caselaw, that the Department could not formally change a consistent administrative practice of ignoring such employer caps on leave cashouts. *Id.* at 68. The court looked at the "duration and nature of the administrative practice" in question, holding that because the Department had "consistently and routinely refused to take into account employers' [leave cashout lids] for a period of four to ten years after learning of the existence of these limitations," the Department could not formally change its "established policy." *Id.* This holding was grounded in the fact that public employees' pension rights are "a vested, contractual right based on a promise made by the State at the time an employee commences service." *Id.* at 65 (*citing*

Wash. Fed'n of State Employees v. State, 98 Wn.2d 677, 683, 658 P.2d 634 (1983)).

This second holding in *Bowles* provides no support for Mr. Swanson's challenge to the Department's 2010 correction of its mistake in calculating Mr. Swanson's retirement benefit. Although in its first holding, the *Bowles* court held – and Mr. Swanson does not dispute – that only leave accruing during an employee's two-year AFC period is includable in the calculation of his or her retirement benefit, the *Bowles* court did not address the significant question of how the Department is to determine what leave accrued during an employee's AFC and what portion of that leave remains unused. As described above, in order to make this determination, the Department applies a FIFO principle – and now its FIFO rule. As the *Bowles* court noted, the Department had applied a FIFO methodology to a variety of types of pension calculations since before 1984. *Id.* at 68. Mr. Swanson does not challenge this FIFO principle, or offer an alternative method of determining what portion of annual leave in a retiree's AFC remains unused.

All Mr. Swanson argues is that the Department's application of the FIFO rule to him in 2010 violated some long-standing, established policy that pre-dated his 1969 hire date. In other words, Mr. Swanson speculates that prior to 1969 there was a long-standing, established policy to apply a

methodology other than FIFO to determine what portion of annual leave accruing during a retiree's AFC remains unused at retirement. Mr. Swanson bases his speculation on only two facts: the promulgation date of the FIFO rule in 1987 and the fact that the Department calculated Mr. Swanson's AFC incorrectly in 1999. Appellant's Amend. Opening Br. 8. These statements, while true, are not material evidence concerning the two things Mr. Swanson must prove under *Bowles*: the "consistently and routinely" applied "established policies" *in 1969* that applied some principle *other than FIFO* and a subsequent *change* in those established policies.

The Department did not exist when Mr. Swanson was hired in 1969[34] but as explained above – and Mr. Swanson does not dispute – the promulgation of the FIFO rule in 1987 did not change Department policy, but rather acknowledged and implemented *long-standing, pre-existing* Department policy and constitutional principles of law. Mr. Swanson offers no evidence about the established policies that were in place in 1969 or any subsequent change to those policies. He offers nothing to rebut the Department's testimony that "longstanding practice has been to calculate retirees' AFC and, when required, to apply the FIFO rule, as it did in 2010

[34] RCW 41.50.020 ("[t]here is created . . . a department of retirement systems . . . .") (*see* Code Reviser's parenthetical at the end stating that RCW 41.50.020 was enacted in Laws of 1975-76).

when it corrected Mr. Swanson's retirement benefit." CP at 419, ¶ 6. Mr. Swanson offers nothing to rebut the Department's testimony that "the inclusion of Mr. Swanson's annual leave cashout in his AFC in 1999 was a mistake and that inclusion of annual leave cashouts in circumstances such as Mr. Swanson's was not, and is not, Department policy or practice." *Id.*, ¶ 7. He offers nothing to rebut the Department's testimony that at the time Mr. Swanson retired the Department correctly calculated the AFC of other, similarly situated retirees using the FIFO rule. CP at 409, ¶ 12. He offers nothing to rebut the fact that the correction of errors statute required the Department to correct its error and that that statute was first enacted in 1947 (i.e. 22 years before Mr. Swanson was hired). RCW 41.50.130 (preceded by RCW 41.50.390 (enacted in Laws of 1947, ch. 274, § 40)). He offers nothing to counter the fact that his vested pension rights include and are subject to the correction of errors statute, the application of which he is not challenging. CP at 367-373.

Because the Department, as the moving party in its motion for summary judgment, met its initial burden of showing the absence of an issue of material fact, CP at 545-548, the burden then shifted to Mr. Swanson to make a showing sufficient to establish the existence of the elements essential to his case and for which he bears the burden of proof at trial. *Young*, 112 Wn.2d at 225. In making this required responsive

showing of a change in "consistently and routinely" applied "established policies," Mr. Swanson cannot merely rely on allegations, *Id.*, or on speculation or argumentative assertions, *Seven Gables Corp.,* 106 Wn.2d at 13. He must "by affidavits or as otherwise provided in this rule . . . set forth specific facts showing that there is a genuine issue for trial." *Young,* 112 Wn.2d at 225-226 (*citing* CR 56(e)).

He has not done so. Mr. Swanson has failed to proffer specific, non-speculative facts demonstrating that any established policy other than FIFO that has ever applied to the calculation of retirees' AFC or that the Department's 2010 correction of its 1999 error was an unconstitutional violation of vested pension rights under *Bowles.* Therefore, even if the court were to look beyond the numerous jurisdictional and procedural barriers to substantive review, it should grant the Department's motion for summary judgment.

V. CONCLUSION

This court should affirm the superior court's orders dismissing Mr. Swanson's claim because the court lacked subject matter jurisdiction. In the alternative, the court should either dismiss Mr. Swanson's claim because he failed to exhaust his administrative remedies or grant summary judgment for the Department because Mr. Swanson's claims are legally and factually unsupported.

RESPECTFULLY SUBMITTED this 27th day of June, 2012.

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PROOF OF SERVICE

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of June, 2012, at Olympia, WA.

KEELY TAFOYA, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

June 29, 2012 - 2:47 PM

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