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No. 95918-8
Court of Appeals, Division II No. 49876-6

SUPREME COURT OF THE STATE OF WASHINGTON

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs,

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Respondent,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor-Appellant.

DEFENDANT/RESPONDENT KING COUNTY'S OPPOSITION TO DEPARTMENT OF RETIREMENT SYSTEMS' PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

The Department of Retirement Systems ("DRS") misleadingly paints the Court of Appeals' unpublished decision as a dangerous precedent allowing PERS employers to reach clandestine settlement agreements imposing liability on public employees statewide. Not so. The trial court conducted an evidentiary hearing, in which DRS participated as a full party, to resolve the question for which DRS seeks review: whether and how much King County should be required to pay in interest on retroactive contributions for public defenders who were enrolled in PERS pursuant to the court's injunction. No settlement agreement is at issue.

The Court of Appeals (in the third appellate decision in this case) affirmed the trial court's jurisdiction and its careful weighing of the evidence and the equities in shaping the final remedy needed to implement an injunction entered in 2009. DRS's belated attempt to avoid the court's original jurisdiction over the remedies phase of this case fails under the priority of action rule. The trial court did not err by not applying the discretionary rule of primary jurisdiction, for DRS never raised it below and, in any event, the trial court ruled with the benefit of DRS's evidence.

DRS has provided no reason warranting this Court's discretionary review, King County is not seeking review of any issues, and this case should come to an end.

II. RESTATEMENT OF THE ISSUES

(1) Has DRS shown a basis for this Court to consider review of the Court of Appeals' decision under RAP 13.4(b) when the case involves straightforward application of well-established legal principles regarding Superior Court jurisdiction and discretion in shaping equitable remedies?

(2) Should this Court review the Court of Appeals' ruling that the trial court had original jurisdiction to determine the remedies issues necessary to implement its injunction?

(3) Should this Court review the Court of Appeals' ruling that the trial court acted within the broad scope of its discretion in adopting an equitable remedy necessary to implement an injunction when the trial court had an extensive and fully developed record that included evidence and testimony from DRS as a full party?

III. SUPPLEMENTAL STATEMENT OF THE CASE

A. The *Dolan* Class Sought Injunctive Relief And Implementing Remedies – Including Interest – When They Sued In 2006.

Mr. Dolan sued King County in Pierce County Superior Court in January 2006 on behalf of employees of non-profit corporations that provided public defender services to King County. CP 715-18. He alleged the class members should have been treated as county employees for purposes of enrollment in the Public Employees Retirement System ("PERS"). CP 715-18. The complaint sought an order requiring King

County to report class members to DRS for enrollment in PERS and pay "all omitted contributions needed to properly fund" the class members' pension benefits, including "the omitted employer's payments plus interest" and "the employee's portion of the defined contribution plan, plus interest." CP 5.[1]

B. In *Dolan I,* This Court Affirmed The Trial Court's Injunction And Remanded To The Trial Court To Adopt Remedies.

The trial court divided the case into two phases: liability and remedies. Following a bench trial on liability, the trial court determined that King County was an employer of the public defense organizations' employees for purposes of PERS membership and entered an injunction requiring King County to enroll the class members in PERS. CP 767, 786.

King County, with amicus support from the Attorney General representing the interests of DRS, sought direct review. CP 828-29. The Supreme Court affirmed the trial court's injunction and remanded the case to the trial court "for further proceedings regarding remedies." *Dolan v. King Cnty.*, 172 Wn.2d 299, 301, 258 P.3d 20 (2011) ("*Dolan I*").

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[1] Before filing this lawsuit, class counsel approached the Attorney General's office division that represents DRS and requested assistance in addressing the Class's claims. CP 515-16. DRS declined class counsel's request and said that if DRS "discover[ed] some error in reporting," then it would take "action to correct such error through its administrative process." CP 187. DRS never initiated any investigation or "administrative process" and has never determined that King County erred by failing to enroll the class in PERS. 2RP 231:24-233:7. The Reports of Proceedings are identified as follows: June 5, 2015 ("1RP"); May 20, 2016 ("2RP"); June 10, 2016 ("3RP").

C. DRS Intervened In The Remedies Phase To Require King County To Pay Interest On Retroactive Contributions.

Immediately after remand from the Supreme Court, DRS sent a letter to the trial court asking it to "consider appointing the Department, through its attorneys, to serve as *amicus curiae* to the court on pension-related issues throughout the resolution of the remaining issues in this case." CP 2354. DRS recognized that the trial court would be resolving (among other things) "who pays for lost investment earnings[.]" CP 2355.

DRS later moved to intervene in the trial court proceedings in April 2013, after King County and the class presented a class action settlement agreement to the trial court for preliminary approval. CP 167-80. DRS argued it was entitled to intervene as a matter of right because, among other things, the proposed settlement did not require King County to pay interest on the retroactive contributions. CP 171-73. The trial court allowed DRS to intervene to object to the settlement, and then considered and overruled DRS's objections. CP 260-62, 378-80, 383.

D. In *Dolan II*, The Court Of Appeals Ordered That DRS Be A "Full Party" To Litigate The Remedies Issues On Remand.

DRS appealed the settlement approval and partial intervention order. The Court of Appeals rejected DRS's assertion that the trial court lacked jurisdiction over "PERS administration" issues based on the Administrative Procedures Act ("APA") because the case did not then

involve an agency action. *Dolan v. King Cnty.*, 184 Wn. App. 1038, 2014 WL 6466710, *6 (2014) ("*Dolan II*") (unpublished). The Court of Appeals directed the trial court to conduct "further proceedings" with DRS as a "full party" intervenor to advocate for PERS's interests during the "trial on remedy, *how* to enroll the public defenders in PERS and make retroactive PERS payments . . . ." *Id.* at *1, 8 (emphasis in original).

E. DRS Agreed To The June 5 Order That Established The Amount Of Retroactive Service Credit And The Trial Court Set A Hearing To Decide The Interest Issue.

After remand in *Dolan II*, and following a motion by the Class, the trial court issued an Order Modifying Permanent Injunction dated June 5, 2015 ("June 5 Order"). The June 5 Order established the amount of service credit that class members would receive and approved a release of certain claims. CP 426, 429. DRS, the Class, and King County all agreed to the June 5 Order, with DRS having initially opposed it. CP 425. King County paid $32 million in retroactive contributions. 2RP 17:11-17.

When it entered the June 5 Order, the trial specially set a hearing for October 30, 2015 to decide "whether DRS is owed, may assess or should be permitted to collect any additional charges beyond employer and pick-up or employee contributions ... including, without limitation, interest on such contributions." CP 428; 1RP 17:6-19:18. The trial court

confirmed that it was "retain[ing] jurisdiction for all other remaining issues as between DRS and King County," CP 445.

F. Months *After* the Trial Court Set A Hearing To Decide The Interest Issue, DRS Announced A Decision About Interest.

On September 17, 2015, more than three months after the trial court had scheduled a hearing to decide the interest issue, DRS sent King County a letter decision on the exact same issue. CP 594-96. King County responded promptly, explaining King County's position that DRS lacked authority to make or enforce any "decisions" on remedies issues then-pending before the trial court. CP 1546-47.

G. King County And DRS Presented Evidence, Expert Testimony And Argument Before The Trial Court On The Interest Issue.

After written discovery and depositions (*see, e.g.*, CP 673-81, 700-10, 1351, 1569) and after submitting pre-hearing briefs and exhibits (CP 481-511, 1616-48), King County and DRS participated in a two-day evidentiary hearing before the trial court on the interest issue. The trial court rejected DRS's jurisdiction argument. 2RP 8:20-9:18.

King County's Budget Director and an actuarial expert testified for King County. DRS called two witnesses: an actuary from the Office of the State Actuary and the Director of DRS. Each party submitted two post-hearing briefs. CP 1679-1703, 2098-2155.

The trial court ordered King County to pay up to $10.5 million in interest on the retroactive contributions. CP 2175. The court determined it would be appropriate for the remainder to be "socialized" through increased contribution rates paid by all PERS Plan 2 employers and employees, consistent with normal practice for handling increased costs in multi-employer pension plans like PERS. CP 2168-69. King County made the $10.5 million interest payment.

DRS appealed the trial court's order. The Court of Appeals affirmed the trial court on jurisdiction and the remedy it adopted. *Dolan v. King Cnty.*, 2018 WL 2027258, *1 (May 1, 2018) ("*Dolan III*") (unpublished).

IV. ARGUMENT

A. DRS Has Not Shown A Basis For Discretionary Review.

This Court's review of Court of Appeals decisions is discretionary. RAP 13.1. Petitions for review are granted "only in certain circumscribed cases." *Shumway v. Payne*, 136 Wn.2d 383, 392, 964 P.2d 349 (1998). DRS does not cite the rule, RAP 13.4(b), specifying the grounds that must exist before this Court even considers review. *See In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011) ("court will take review only if we are satisfied that review is warranted under RAP 13.4(b)").

DRS apparently relies solely on RAP 13.4(b)(4),[2] claiming that *Dolan III* presents an issue of "pressing public interest" because it might lead to an onslaught of pension-benefits lawsuits that impose settlement costs on members of PERS. Petition for Discretionary Review ("Pet.") at 12-13. This is a bright red herring.

First, as explained in Section IV.C below, no settlement agreement is at issue here. The question of whether and how much King County should pay in interest was decided after an evidentiary hearing with full participation by DRS. *Dolan II* made clear that DRS is not bound to settlements to which it is not a party, eliminating any concern about the resolution of future pension-benefits claims. 2014 WL 6466710, at *1.

Second, DRS provides no facts that support its claimed fear of a tsunami of pension benefits lawsuits circumventing DRS' administrative process. Pet. at 12-13. DRS points to one existing lawsuit. Pet. at 13 (citing *Merritt v. King Cnty.*, No. 18-2-05070-7). But DRS does not reveal that the *Merritt* plaintiffs first asserted their claims in administrative proceedings in front of DRS ***before*** filing suit. *See* Exhibit A.[3]

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[2] DRS does not claim that *Dolan III* conflicts with a decision of the Supreme Court or a published decision of another division of the Court of Appeals (RAP 13.4(b)(1)-(2)) or that it poses a significant state or federal constitutional issue (RAP 13.4(b)(3)).
[3] Exhibit A is a petition decision from DRS and may be considered under ER 201(b). *State v. Hodgson*, 60 Wn. App. 12, 17 n.5, 802 P.2d 129 (1990).

Third, the Legislature addressed the public interest arising from the *Dolan* litigation promptly after the *Dolan I* decision. At King County's urging and with support from DRS, the Legislature passed EHB 2771 to clarify that it never intended employees of government contractors to be enrolled in PERS. Laws of 2012, ch. 236 § 1; 2RP 25:9-28:20.

Finally, DRS is fully equipped to represent the interests of PERS even if DRS is not included as a party. DRS can seek appointment as an amicus or intervene if necessary to litigate pension administration issues.

B. The *Dolan III* Decision Followed Longstanding Rules On The Broad Original Jurisdiction Of Superior Courts.

Dolan III is rooted in the principle that Washington's superior courts have broad original jurisdiction "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court[.]" Wash. Const. Art. IV § 6.

The trial court obtained this broad and comprehensive jurisdiction over the remedies issues at the outset of this case in 2006 and retained it throughout the case. The remedies sought by the Class included interest on "omitted contributions." CP 5. After affirming the injunction, this Court remanded to the trial court "for further proceedings regarding remedies." *Dolan I*, 172 Wn.2d at 301. DRS recognized that interest was an issue pending before the trial court when it sought to be an *amicus* after remand

in *Dolan I.* CP 2355. DRS later intervened to contest that same issue. CP 171-72. *Dolan II* granted DRS full party status on intervention so that it could participate while ***the trial court decided*** remedies issues, including interest. The trial court at all times had jurisdiction on this issue.

Straightforward application of the long-standing priority of action rule barred DRS from requiring new and wasteful administrative proceedings when the interest issue was already pending before the trial court. *Dolan III*, 2018 WL 2027258, at *8-9.

1. The Priority Of Action Doctrine Placed Exclusive Authority Over Remedies With The Trial Court.

Under the priority of action doctrine, the forum that first gains jurisdiction over a matter retains ***exclusive*** authority over it. *See City of Yakima v. Int'l Ass'n of Firefighters, Local 469*, 117 Wn.2d 655, 675, 818 P.2d 1335 (1991) (priority of action applies as between courts and administrative agencies). This prevents dangerous conflicts of jurisdiction and process when identical issues, parties and relief are in play. *Id.*

After DRS became a full party, the trial court specially set a hearing to decide whether King County would pay interest on the retroactive contributions (1RP 17:6-19:18), the exact subject of DRS's later-in-time decision (CP 594-96). King County and DRS were both parties in the trial court, and DRS's interest "decision" was directed solely

to King County. *Dolan III*, 2018 WL 2027258, at*8. The only relief was whether King County would pay interest and, if so, in what amount. *Id.*

The trial court unquestionably had jurisdiction first. At the very latest, DRS brought the issue of whether King County would be required to pay interest before the trial court when it intervened to object to the proposed settlement in 2013. CP 172. After *Dolan II*, the trial court signed the June 5 Order (which DRS agreed to), under which the Court would resolve the interest issue. Only after all of those events did DRS issue the letter decision that it now claims deprived the trial court of its broad original jurisdiction. The trial court had exclusive authority to resolve King County's interest obligation, and this barred DRS from initiating belated and duplicative administrative and judicial review proceedings.

DRS incorrectly contends that the Court of Appeals' application of the priority of action rule somehow conflicts with or imperils the doctrine of primary jurisdiction. Pet. at 17. There is no conflict between priority of action and primary jurisdiction, because (1) the interest issue was one over which the trial court had original jurisdiction and (2) as discussed in Section IV.D below, whether to refer the issue to DRS was always squarely within the trial court's discretion.

2. Neither the APA Nor The Pension Statute On Interest Removed The Trial Court's Jurisdiction.

Washington's superior courts have subject matter jurisdiction "over all claims which are not within the exclusive jurisdiction of another court." *Orwick v. City of Seattle*, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). To remove original jurisdiction from the trial court and assign it to an administrative agency, the Legislature must explicitly give the agency exclusive jurisdiction. *See, e.g.*, *Davis v. Wash. Dep't of Labor & Indus.*, 159 Wn. App. 437, 441-42, 245 P.3d 253 (2011) (statute must be one that "abolishes the state courts' original jurisdiction").

DRS's assertion that King County "requested a superior court hearing to challenge the DRS order," Pet. at 7, is false and is plainly rebutted by the undisputed timeline of events. The trial court scheduled the hearing on interest *three months before* DRS sent the letter purporting to convey its "decision" on interest. 1RP 17:6-19:18. King County did not ask the Court to set that hearing in reaction to, or to challenge, DRS's letter decision. 1RP 17:6-18. The APA did not apply here because DRS's decision involved an issue over which the trial court had long ago obtained exclusive authority. *Dolan III*, 2018 WL 2027258, at *9.

Moreover, the statute that DRS identified as the sole basis for its "decision" – RCW 41.50.125 – neither gives DRS *exclusive* authority to

determine interest nor purports to divest superior courts of jurisdiction. Accordingly, the trial court retained authority to address the interest issue. *Dolan III*, 2018 WL 2027258, at *11; *see also City of Yakima*, 117 Wn.2d at 674-75 (statute that empowered and directed agency to prevent any unfair labor practice and issue appropriate remedial orders did not preclude superior courts from resolving unfair labor practice complaints).

C. Review Of The Trial Court's Fact-Based Decision On Equitable Remedies Is Not Appropriate Under RAP 13.4(b).

After presiding over this case for more than a decade, the trial court was uniquely situated to decide the last remaining remedies issue – the question of interest. The trial court acted with the benefit of a fully developed record, including all of DRS's evidence, testimony and arguments on behalf of PERS. The Court of Appeals found the record supported the trial court's ruling that King County should pay $10.5 million, with the remaining cost of lost investment income being socialized across PERS. The Court of Appeals held the trial court did not abuse its discretion. *Dolan III*, 2018 WL 2027258, at *12-14. Nothing in RAP 13.4(b) supports review of that decision by this Court.

With directives from the Supreme Court and the Court of Appeals to implement the injunction, the trial court presided over proceedings to resolve a number of remedies issues. The trial court effectively

implemented the injunction: class members were enrolled in PERS (CP 20) and received service credit for prior work (CP 426). King County paid roughly $32 million in retroactive contributions (2RP 17:11-17) and the court determined a method for paying class counsel's fees. CP 433-61.

The trial court approached the last remaining remedies question – whether and how much interest King County should pay – with the same diligence that it used to resolve the other remedies issues in order to base its decision on a fully-developed record. After giving both DRS and King County ample opportunity to present evidence and argument, the trial court engaged in a balancing process in an effort to "recognize the equities presented by both parties in a difficult case." CP 2161.

Based on the facts in the record, the trial court ruled that it would be inappropriate to require King County to pay the full amount of interest that DRS sought. CP 2161. However, to reduce the amount of projected contribution rate increases in PERS the court decided that King County should assume some greater burden by paying $10.5 million in addition to the $32 million retroactive contributions it had already paid. CP 2161-62.

"The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit particular facts, circumstances, and equities of the case before it." *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). "Upon the granting or continuing of an injunction, the

court may impose such terms and conditions as may be deemed equitable." 15 Wash. Prac., Civ. P. § 44:27 (2d ed.). A trial court's discretionary power is designed to "do substantial justice to the parties and put an end to the litigation." *Buck Mountain Owners' Ass'n v. Prestwich*, 174 Wn. App. 702, 715 n.14, 308 P.3d 644 (2013).

The trial court made well-supported factual findings that underpin this remedy, CP 2160-61, including that socializing unexpected pension costs is a normal outcome for multi-employer plans like PERS. Testimony from the actuary witnesses for both sides established that PERS, like all multi-employer plans, is designed to share risk by spreading costs equally across participants without regard to the source of the costs. *E.g.*, 2RP 94:21-95:21, 103:13-104:6; 3RP 302:23-303:9.

Despite the solid foundation for the trial court's decision, DRS rehashes its lament from the appeal in *Dolan II*, claiming the trial court's decision requires non-consenting third parties to finance a "settlement" between King County and the Class. Pet. at 10-11. This inaccurate description ignores three critical facts.

First, DRS voluntarily subjected itself to the trial court's "complete adjudication of the issues" in the case by intervening in the remedies phase. *See* 59 Am. Jur. 2d *Parties* § 144; *Wash. Rest. Ass'n v. Liquor Control Bd.*, 200 Wn. App. 119, 134, 401 P.3d 428 (2017).

Second, unlike the settlement agreement in *Dolan II* (to which DRS was not a party), DRS agreed to the June 5 Order that awarded the retroactive service credit. The Order recognizes: "DRS initially opposed [the plaintiff's motion to modify the permanent injunction], but now has agreed to the entry of this Order in the interests of partially settling this long dispute and obtaining a workable structure for the complexities of establishing the extensive retroactive service credit involved in this litigation." CP 425. The June 5 Order explicitly recognized and did not resolve the ongoing dispute over interest. CP 428. The trial court immediately set a hearing to resolve that exact issue. 1RP 17:6-19:18.

Finally, DRS fully participated in the trial court proceedings, repeatedly asserting that it was representing the interests of the PERS plans and their members and availing itself of every opportunity to advocate on the issues of interest. CP 2108-2118, 2126-30. Though DRS may be dissatisfied with the trial court's decision, it cannot claim that PERS members' perspective was unrepresented or that the DRS had no input into the process that resulted in the order.

D. DRS's Primary Jurisdiction Argument, Raised For The First Time In The Petition, Does Not Merit Review By This Court.

DRS's argues for the first time in its Petition that the trial court should have deferred the interest question to DRS under the primary

jurisdiction doctrine. DRS waived this argument by failing to raise the issue below. Even if DRS properly preserved this issue, the court would not have erred by declining to apply the primary jurisdiction doctrine.

1. DRS Waived Its Primary Jurisdiction Argument By Failing To Raise It In A Timely Manner.

Courts generally will not entertain arguments made for the first time on appeal. RAP 2.5(a) ("appellate court may refuse to review any claim of error which was not raised in the trial court"); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) ("appellate courts will not sanction a party's failure to point out at trial an error which the trial court . . . might have been able to correct"). In addition, this Court does not generally address issues raised for the first time in a petition for review. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998).

DRS did not raise the primary jurisdiction argument articulated in the Petition before the trial court. DRS asserted that the trial court had only appellate jurisdiction under the APA. CP 1624. In contrast, the doctrine of primary jurisdiction "applies where a claim is originally cognizable in the courts." *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 302, 622 P.2d 1185 (1980) (quoting *Schmidt v. Old Union Stockyards Co.*, 58 Wn.2d 478, 484, 364 P.2d 23 (1961)). DRS also did not refer to "primary jurisdiction" in either the opening brief or its reply

brief submitted to the Court of Appeals in *Dolan III.* DRS's Assignments of Error and Issues Pertaining to Assignments of Error simply do not relate to the doctrine of primary jurisdiction. Br. of Appellant DRS at 3-4.

As a prudential doctrine, primary jurisdiction may be waived by failing to raise it in a timely fashion. 2 Richard J. Pierce, *Administrative Law Treatise* § 14.1, 1171 (5th ed. 2010) ("the parties to a dispute can waive primary jurisdiction by not raising the issue in a timely manner").[4] Rather than arguing the doctrine of primary jurisdiction required the trial court to refer the interest issue to the agency, DRS agreed to entry of the June 5 Order and participated in the evidentiary hearing on interest.

2. The Trial Court Would Have Been Well Within Its Discretion To Decline Referring The Matter To DRS.

DRS contends that under the doctrine of primary jurisdiction, any issue within the competence of an administrative agency *must* be referred to that agency. Pet. at 17-20. This is wrong. Primary jurisdiction is a prudential doctrine, and does not relate to a court's subject matter jurisdiction. "The application of the doctrine of primary jurisdiction is not mandatory in any given case, but rather is within the sound discretion of

[4] *See also GCB Communs., Inc. v. U.S. S. Communs., Inc.*, 650 F.3d 1257, 1264 (9th Cir. 2011) (declining to conclude district court abused its discretion by refusing to refer matter to FCC where "U.S. South waited until shortly before trial to raise the issue at all."); *Kendra Oil & Gas v. Homco, Ltd.*, 879 F.2d 240, 242 (7th Cir. 1989) (because primary jurisdiction "involves questions of timing, not of judicial competence," doctrine "may be waived or forfeited").

the court; it is predicated on an attitude of judicial self-restraint." *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d at 305 (internal citation and quotation omitted).[5]

Given that DRS never raised the argument, the trial court did not err in failing to grant the relief. Had DRS raised the argument, the trial court, which was intimately familiar with the case, certainly could reasonably have concluded that it was at least as well-positioned (or better positioned) to decide this last remedies issue as the administrative agency.

Finally, the entire point of the primary jurisdiction doctrine is to give courts the benefit of an agency's specialized knowledge. Thus, a court may request amicus briefing, or that agency's participation as a party, in lieu of referring that matter to an agency for a formal order or rulemaking. 2 Richard J. Pierce, *Administrative Law Treatise* § 14.6, 1215 (5th ed. 2010) (as an alternative to referring a matter to an agency for a formal order, "a court can obtain the agency's analysis of an issue before the court through a less formal means" including an amicus brief).[6] An agency's participation in court proceedings is an *alternative* to referring

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[5] *See also Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 201, 293 P.3d 413 (2013) ("sound discretion of the court."); *Rabon v. City of Seattle*, 107 Wn. App. 734, 741, 34 P.3d 821 (2001) (whether to "suspend the judicial process pending referral to the administrative body" is "discretionary with the court").

[6] *United States v. Rohm & Haas Co.*, 500 F.2d 167, 175 (5th Cir. 1974) (declining to apply primary jurisdiction doctrine where agency "was very much a part of this litigation," and its experts testified).

the case to that agency under the primary jurisdiction doctrine. DRS did exactly that in this case.

The trial court had DRS's input in reaching the decision on interest. DRS presented expert witness testimony and testimony from its Director explaining why DRS sought to charge interest. 2RP 174:5-23. It also submitted pre- and post-hearing briefing. CP 1616-48, 2098-2137. No interest of efficiency or expertise would have been served by commencing a separate administrative proceeding or by requiring separate judicial review proceedings before the trial court.

V. CONCLUSION

King County respectfully requests that DRS's Petition for discretionary review of the decision in *Dolan III* be denied.

Respectfully submitted this 29th day of June, 2018.

s/Tim J. Filer
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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I served a true and correct copy of the foregoing document via electronic mail upon the following:

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DATED this 29th day of June 2018, at Seattle, Washington.

Jan D. Howell

EXHIBIT A

See attached.

Rec'd @ 2/15/18 Mtg.

WASHINGTON STATE
DEPARTMENT OF RETIREMENT SYSTEMS

PETITION DECISION

DATE: October 9, 2017
PETITIONER: Jason Guy
SYSTEM: Public Employees' Retirement System Plan 2 (PERS 2)
ISSUE: Position Eligibility

ISSUE

Whether the paramedic trainee position in the King County Medic One (KCM1) paramedic training program was eligible for membership in PERS 2 for the years 1976-2001.

SCOPE

This petition was submitted by Jason Guy, on his behalf as well as on behalf of members of the International Association of Firefighters (IAFF) Local 2595 who completed the King County Medic One paramedic training program between the years of 1976-2001. In 2002, trainees began receiving PERS service credit for their participation in this program. In 2005, emergency medical technicians became eligible for membership in the Law Enforcement and Firefighters' Retirement System, Plan 2 (LEOFF 2).[1] In 2007, trainees began receiving LEOFF 2 service credit for their participation in this program.

In this petition, the participants of the training program are referred to as "trainees." They have been referred to as "interns" by King County (the County) and Mr. Guy. The terms "trainee(s)" and "intern(s)" are used interchangeably in this decision to refer to the same group of people: individuals who participated in the KCM1 paramedic training program.

Finally, King County is considered to have an interest in the outcome of this petition and has been treated as a party to this process.

LAW

RCW 41.40.010 Definitions.

...

(11) "Eligible position" means:

(a) Any position that, as defined by the employer, normally requires five or more months of service a year for which regular compensation for at least seventy hours is earned by the occupant thereof. For purposes of this chapter an employer shall not define "position" in such a manner that an employee's monthly work for that employer is divided into more than one position;

(b) Any position occupied by an elected official or person appointed directly by the governor, or appointed by the chief justice of the supreme court under RCW 2.04.240(2) or 2.06.150(2), for which compensation is paid.

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[1] SHB 1936; *see* RCW 41.26.030 and RCW 41.26.547.

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fill an existing position, the employer must continue to use the July 1 through June 30 period to define a year for the position.

Example: If the same employer in the above example hires a person to work in a project position beginning in November, the employer will use the twelve-month period beginning in November to evaluate the eligibility of the new position. The employer must consistently apply this twelve-month period to evaluate the eligibility of this position.

WAC 415-108-680 Am I eligible for membership?

(1) **You are eligible for membership if you are employed in an eligible position.** Your position is eligible under RCW 41.40.010 if the position, as defined by your employer, normally requires at least five months of seventy or more hours of compensated service per month during each year…

(2) **If you leave an eligible position to serve in a project position, you may retain eligibility.**

…

(3) **Defined terms used.** Definitions for the following terms used in this section may be found in the sections listed.

(a) "Eligible position" - RCW 41.40.010.

(b) "Employer" - RCW 41.40.010.

(c) "Member" - RCW 41.40.010.

(d) "Membership" - RCW 41.40.023.

(e) "Normally" - WAC 415-108-010.

(f) "Project position" - WAC 415-108-010.

(g) "Year" - WAC 415-108-010.

WAC 415-108-690 How is my membership eligibility evaluated?

(1) **Your eligibility to participate as a member of PERS is based on your position.** In evaluating whether your position is eligible for membership, your employer will determine only whether the position meets the criteria of an eligible position under RCW 41.40.010[(11)] and WAC 415-108-680(1). Your employer will not consider your membership status or individual circumstances unless you:

(a) Leave employment in an eligible position to serve in a project position (See WAC 415-108-680(2)); or

(b) Work in both a PERS and TRS position during the same school year (See WAC 415-108-728).

(2) **Your employer will evaluate your position's eligibility for a particular year at the beginning of the year.** This is normally a calendar year unless your employer has determined and supports a different twelve-month period for its year.

(3) **Your employer or the department may reclassify your position's eligibility based upon your actual work history.** If your employer declares your position to be ineligible at the beginning of

(d) "Membership" - RCW 41.40.023.

(e) "Project position" - WAC 415-108-010.

(f) "Report" - WAC 415-108-010.

(g) "Year" - WAC 415-108-010.

WAC 415-04-035 How much information do I need to provide in support of my petition? You bear the burden of convincing the petition examiner that you are entitled to the relief requested. You must provide sufficient information to outweigh the information that the plan administrator used in making the administrative determination that is being reviewed.

FACTS

1. King County Medic One (KCM1) was founded in 1976 and offers a paramedic training program (program) through the University of Washington, Harborview Medical Center, and the Seattle Fire Department.[2] The program lasts 10 months and includes classroom instruction, clinical rotations, and field practicums.[3] Trainees spend approximately 2,500 hours in classes, rotations, and practicums and must maintain a passing level of 80% in all courses to pass the program.[4]

2. The 1995 position description for the program described the training opportunity as follows:

    a. The County sought applicants "willing to contract with King County to enter a 10 to 12-month training program to become certified…as a Paramedic." Training included "lectures, medical labs, medical/surgical rounds, emergency room and ICU/CCU experience."

    b. "The selected candidate will be required to sign a contract with King County. Upon satisfactory completion of training and certification, applicant must accept permanent employment as a Paramedic with King County as offered or be subject to reimbursement [to the County] of training costs."

    c. Minimum qualifications included emergency medical technician certification and work experience, and a valid driver's license.

    d. Applicants who met the minimum qualifications would be invited to take a multiple choice exam. Candidates who passed that exam would continue to a practical skills evaluation and physical ability test, and oral exam. Candidates who successfully completed all parts of the examination process would be ranked and placed on an eligibility list. The eligibility list remained in effect for one year or until a new series of exams took place.

    e. Selected candidates would be required to pass a physical exam and possibly a background check.

3. Mr. Guy began training in the KCM1 program on October 14, 1998. He signed a contract with King County known as a "training agreement" which described the relationship and mutual agreements between the parties. Although Mr. Guy was unable to provide a copy of the agreement he signed in 1998, he provided copies of training agreements signed in October 1995 and December 2000. With

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[2] *See* King County Medic One website – http://www.kingcounty.gov/depts/health/emergency-medical-services/medic-one.aspx
[3] *See* University of Washington Paramedic Training website – http://uwpmt.org/node/18
[4] *Id.*

5. In 2002, during a regular review of ineligible positions, the County determined the trainee positions for the KCM1 program met eligibility requirements for membership in PERS. Trainees in the 2002, 2003, 2004, and 2005 programs received PERS service credit for their participation. Mr. Guy asserts the County had difficulty contracting with trainees for the KCM1 program based on the terms of the agreement. Therefore, according to Mr. Guy, the County began offering PERS service credit in 2002 to attract more applicants to the program.

6. On January 1, 2007, King County and IAFF Local 2595 entered into a new collective bargaining agreement (CBA) that continued through December 31, 2009. This agreement (#280C0108) covered the employment rights and relationship for paramedics and paramedic supervisors, as members of IAFF Local 2595, with the County. In this agreement, among other articles, the County and IAFF Local 2595 agreed to implement and administer a new classification for trainees in the program, identified as the "Paramedic Intern (Classification Code 3304200)." Among other benefits, trainees were now considered employees rather than independent contractors and would receive service credit.

7. On January 13, 2016, Mr. Guy submitted a letter to DRS requesting review of the PERS-eligibility of the trainee position. Specifically, he asked that trainees who completed the KCM1 paramedic training program but did not receive service credit for their participation be granted 10 months of service credit. In support of his request for service credit, Mr. Guy asserted that the program participants, as trainees, met the IRS definition of full-time employees. He additionally asserted that, beginning in 2007, the trainees subject to the collective bargaining agreements between King County and IAFF Local 2595 received service credit for their participation in the program. Finally, Mr. Guy stated that, in order to be accepted into the program, trainees were required to have three years of experience as emergency medical technicians. This meant program participants received service credit for their previous public employment, but would not continue to earn service credit while participating in the KCM1 program.

8. On May 11, 2016, Seth Miller, DRS Assistant Director, Retirement Services Division, responded to Mr. Guy's request. Mr. Miller determined the trainee position in question did not meet PERS eligibility requirements and, therefore, trainees would not be able to earn PERS service credit for their participation in the program. Mr. Miller stated:

> WAC 415-108-690 lays out the guidelines for how an employer will evaluate position eligibility and how DRS may reclassify position eligibility if necessary. WAC 415-108-690(4)(a) states "If your employer has declared your position ineligible, the department will not reclassify your position as eligible until history of the position shows a period of two consecutive years of at least five months of seventy or more hours of compensated employment each month."
>
> King County determined these positions to be ineligible for retirement and I agree with this determination. The positions as constructed did not meet the required five months of seventy hours for two consecutive years that would have been necessary for DRS to reclassify the position. The contract offered to these employees clearly stated these positions were only in existence during the time of the training program and did not constitute an agreement for future employment. Therefore, King County created a new position each time a new paramedic trainee was hired and that position was ineligible for PERS because it would not require seventy hours for five months over two consecutive years.

9. On August 8, 2016, DRS received Mr. Guy's petition request for reconsideration of Mr. Miller's administrative decision. Mr. Guy stated the trainees met PERS eligibility requirements and should

DECISION

King County determined the KCM1 paramedic trainee position from 1976-2001 was ineligible for PERS membership. DRS correctly determined these positions were ineligible for PERS service credit. Mr. Guy's petition is denied.

Sarah White
Petition Examiner
Department of Retirement Systems

YOU HAVE THE RIGHT TO APPEAL THIS DECISION

If you disagree with this petition decision, you may file an appeal with the DRS Presiding Officer within 60 days of the date of this decision. DRS must receive your notice of appeal within that 60-day timeframe. The DRS appeal rules can be found in Chapter 415-08 WAC. For questions about the appeal process, contact the DRS Appeals Unit at (360) 664-7294.

Send your notice of appeal ATTN: DRS APPEALS COORDINATOR using one of the following methods:
Mail: **Department of Retirement Systems / PO Box 48380 / Olympia, WA 98504-8380**
Delivery: **Department of Retirement Systems / 6835 Capitol Blvd / Tumwater, WA 98504**
Fax (follow up with a hard copy): **Department of Retirement Systems / (360) 586-4225**

FOSTER PEPPER PLLC

June 29, 2018 - 2:00 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95918-8
Appellate Court Case Title:	Kevin Dolan, et al. v. Department of Retirement Systems
Superior Court Case Number:	06-2-04611-6

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