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NO. 64362-2-1

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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WILLIAM F. SERRES  
and an Ancillary Class of Similarly Situated Persons,

Respondents

v.

WASHINGTON STATE  
DEPARTMENT OF RETIREMENT SYSTEMS  
and  
KING COUNTY,

Appellants

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON~~

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BRIEF OF RESPONDENT  
WILLIAM F. SERRES  
and an Ancillary Class of Similarly Situated Persons

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## I. INTRODUCTION

Respondents (collectively “Serres”) are a group of King County employees who received retroactive pay increases as a result of two previous class actions, but whose PERS retirement allowance was not adjusted to reflect the increased pay.

The primary issue presented is whether distributions to class members in the consolidated class action of *Roberts, et al v. King County* and *Duncan, et al, v. King County* (“Duncan/Roberts” or “D/R”) constituted “compensation earnable” under RCW 41.40.010(8)(a), and the regulations interpreting it. Employees’ retirement allowances are computed based on their “average final compensation,” which includes all “compensation earnable” during their final years of employment. The trial court correctly concluded that the Duncan/Roberts distributions were compensation earnable, and that the average final compensation and retirement allowances of Serres and the class he represents (“Serres”) must be adjusted to reflect them. (CP 1033-35)

WAC 415-108-457 interprets RCW 41.40.010(8)(a). It provides that a settlement payment is reportable compensation<sup>1</sup> if it is payment of additional salary for services already rendered and is made pursuant to

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<sup>1</sup> “Reportable compensation” and “earnable compensation” are interchangeable terms. WAC 415-108-010(7)

settlement of a claim for violation of an ordinance protecting employment rights.<sup>2</sup>

Both *Roberts* and *Duncan* were suits to correct past pay disparities among King County employees, and alleged violations of King County's Equal Pay for Equal Work Ordinance. (CAR 367-368, 374) The cases were resolved by a Settlement Agreement (CAR 259-292), which provided for payment of \$8 million to Duncan class members, and \$6 million to Roberts class members, to be distributed by reimbursing each class member an amount equal to the allegedly improper wage disparity for each week worked.<sup>3</sup>

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<sup>2</sup> **415-108-457. Retroactive salary increases.**

A retroactive salary payment to an employee who worked during the covered period is a payment of additional salary for services already rendered.

(1) To qualify as reportable compensation under this section, the payment must be a bona fide retroactive salary increase. To ensure that is the case, the retroactive payment must be made pursuant to:

- (a) An order or conciliation agreement of a court or administrative agency charged with enforcing federal, state, or local statutes, ordinances, or regulations protecting employment rights;
- (b) A bona fide settlement of such a claim before a court or administrative agency;
- (c) A collective bargaining agreement; or
- (d) Action by the personnel resources board which expressly states the payments are retroactive.

(2) The payments will be deemed earned in the period in which the work was done.

<sup>3</sup> As discussed at pages 8, 9, and 22 below, Roberts class members and currently-employed Duncan class members received a retroactive adjustment exactly equal to the alleged disparity in wages for each week worked, based on their actual pay records. Duncan class members who had terminated received the average adjustment paid to currently employed class members for each year they worked, beginning with the most recent, until the settlement fund was exhausted. As a result, terminated Duncan class members, including Serres, received a pro rata distribution for 2001.

DRS initially decided that the distributions were not compensation earnable, because “the intent of the agreement is to settle the lawsuit, not to provide retroactive salary payments to make the claimants whole.” (CAR 463) In response to Serres’ administrative appeal, the Presiding Officer of DRS correctly concluded that the distributions were compensation earnable, because the context of the suit and settlement determined the “nature of the payment.” (CAR 80) However, on reconsideration, the Presiding Officer held that, because the “reason for” the payments was to settle the lawsuit without an admission of liability, the distributions were not compensation earnable. (CAR 64).

The Presiding Officer’s final decision should be reversed because it is contrary to the PERS statute, and applicable regulations, all of which provide that payment for services rendered is compensation earnable.

The second and third issues in this appeal – whether Rule 19(a)(1) required that the trial court join as parties to the Petition for Review some 1,900 Duncan/Roberts class members whose retirement allowances were not affected by the distributions (“the 1,900” or “the unaffected D/R class members”), and whether RCW 41.50.130 enables DRS to collect additional contributions from King County – are interrelated.

DRS and King County initially asserted that if a Plaintiff class

were certified, joinder of the 1,900 was required under CR 19, because, pursuant to RCW 41.50.130, DRS could seek retroactive employer *and* employee contributions from King County, and King County, in turn, could seek recovery from the 1,900. King County ultimately asserted that RCW 41.50.130 did not empower DRS to collect from the County, so joinder was not required. The trial court correctly agreed.

Regardless of whether DRS can recover retroactive contributions from King County, the trial court did not abuse its discretion by refusing to order joinder of the 1,900. The only basis for joinder asserted in DRS' appeal is that under CR 19(a)(1), the trial court could not provide complete relief among the parties, because some of the 1,900 might file administrative proceedings with DRS contesting their liability for retroactive contributions. Because, under CR 19(a)(1), the possibility of future litigation between current parties and third parties does not require joinder, the trial court's denial of joinder should be affirmed, regardless of the Court's resolution of the RCW 41.50.130 issue.

The trial court's order granting common fund attorneys' fees was well within its discretion. DRS' assertion that Serres was limited to the fees available under the EAJA ignores the distinction between fee spreading and fee shifting and is directly contrary to both the purposes of

the EAJA and the policy underlying common fee awards.

## II. ISSUES FOR REVIEW

1. Are payments made to a class of King County employees as a result of the settlement of a law suit claiming back pay for violation of the County's equal pay for equal work ordinance, which were computed by a formula multiplying a specified percentage by the payroll-documented actual county earnings during specified payroll periods, "salaries or wages earned during a payroll period for personal services" within the meaning of RCW 41.40.010(8)(a) and (b)?
2. Is DRS authorized by RCW 41.30.130, or by any other statute or regulation, to recover retroactive employer and employee contributions from King County on distributions paid to current and former King County employees whose retirement allowances were not increased as a result of the D/R Settlement Agreement?
3. Did the trial court abuse its discretion by holding that joinder of *all* D/R class members is not required under CR 19(a)(1) to protect DRS against the possibility that unaffected D/R class members who are not Serres class members may contest attempts to collect retroactive employee contributions?
4. Does DRS have standing to object to Serres' attorneys' fee request

when the common fund attorneys' fees will be paid exclusively by class members?

5. Did the trial court properly grant Serres' request for common fund attorneys' fees, rather than requiring that he apply to have fees paid by DRS under the Equal Access to Justice Act?

### III. STATEMENT OF THE CASE

#### A. THE DUNCAN/ROBERTS SETTLEMENT

Most salient facts regarding the Duncan/Roberts settlement are accurately outlined in the Facts for Discussion section of the Presiding Officer's Order on Motions for Summary Judgment (On Reconsideration)<sup>4</sup> (CAR 51-65, at 53-60). The following discussion cites to that Order, except as to undisputed facts not referenced in the Order.

This case results from DRS' treatment of settlement distributions from the Roberts v. King County and Duncan v. King County class actions, which were consolidated for settlement. The Roberts plaintiff class consisted of about 350 employees who had worked 40 hours per week, but were paid the same salary as employees working 35 hours per week at the same job. (CAR 53, ¶ 2.) The Duncan litigation arose out of the class comp study conducted by King County to assure that wages

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<sup>4</sup> The full title of the document is "Order on Motions for Summary Judgment and for and Dismissal (On Reconsideration) (sic) (CP 51)"

throughout the County were consistent after the merger with Metro. As a result of the class comp study, wages were adjusted prospectively for virtually all County employees. (CAR 212, ¶¶ 6-8) Most County employees also received the same adjustment retroactive to 1998. The Duncan class consisted of about 1,500 non-represented employees who had not received a retroactive wage adjustment. (CAR 53, ¶¶ 1, 3, 4) Serres was a Duncan class member. (CAR 59, ¶31)

In each case, Plaintiffs alleged that King County had failed to comply with its Equal Pay for Equal Work ordinance. (CAR 53, ¶ 5)

The two cases were consolidated for settlement, and a settlement agreement was reached in 2003. Of the total settlement amount, \$14 million was to be distributed to class members, with \$6 million to be paid to the Roberts class and \$8 million to the Duncan class. (CAR 55, ¶ 9)

In Roberts, after incentive awards were paid, the class members, received retroactive adjustments to their wages for each week of 14.29%, or 5/35, of their wages, thus retroactively correcting the wage differential between 35 hour and 40 hour employees. (CAR 255, ¶29)

The Duncan settlement provided that current employees who had received a wage adjustment pursuant to the class comp study “were to receive an award representing their new pay rate as though it had been

paid since January 1, 1998.” (CAR 56, ¶ 12). The Settlement Agreement provided that current employees who had not been class comped, and terminated employees, would receive the same average increase in pay of 2.41% that had resulted from the class comp study. (CAR 56, ¶13). Former employees were paid based on when their employment ended, beginning with 2002 and working backwards in time. Employees who terminated in 2001, the last year for which settlement funds were available, and received pro rata distributions. (CAR 55, 56, ¶¶ 11, 15) To assure that no class member received a double recovery, any pay increases a class member had already paid in lieu of the class comp adjustment were offset against the Duncan award. (CAR 56, ¶ 15)

Class counsel prepared Findings of Fact<sup>5</sup> (CAR 209-223) for the court’s signature, which were approved for entry by counsel for the County, and were signed without material modification by the Court. (CAR 223) The Findings of Fact contained the following statements:

- \$14 million was to be paid to Duncan and Roberts subclass members as “**compensation for back pay.**” (CAR 215, ¶23)
- As a result of the settlement, “the County will have eliminated the pay disparity problem, **paying all employees an**

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<sup>5</sup> Findings of Fact, Conclusions of Law, and Order Approving Settlement Agreement, CAR 209-223

**appropriate hourly rate times the hours worked.”** (Id., ¶27)

- The Roberts settlement “**compensates the Roberts class for the majority of their pay loss.**”
- The Duncan settlement would pay currently employed class members “applying, for the most part, the same percentage increase to their pay that they received as a result of the Class Comp” times their actual pay – back to January 1998,” and paying terminated class members “2.41% times their pay, back to January 1998.” (CAR 216, ¶¶30, 31) (all emphasis added)

The Settlement Agreement and the Findings of Fact also addressed deductions and contributions. The Settlement Agreement stated:

The payments to class members under the distribution formula provided in this settlement are W-2 wage payments. . . . **King County shall withhold** the customary amount for federal income tax purposes and shall make deductions and contributions for FICA, Medicare, and **other deductions as required by law.** (CAR 269, ¶19)

*The Findings of Fact specifically contemplated PERS contributions*

– which are only payable on compensation earnable, would be made:

**The County will also pay . . . approximately \$1.4 million for employment-related expenses such as FICA and PERS . . .** (CAR 214, ¶22)

## B. DRS DECISIONS

After the Findings of Fact were entered, the King County's Office of Management and Budget contacted DRS to seek a ruling that the County was not required to make PERS contributions on the D/R distributions.<sup>6</sup> The DRS Plan Administrator responded by requesting documentation to confirm that counsel for the County and Plaintiffs agreed "that the intent of settlement was not a retroactive salary increase." (CAR 460). Counsel for the County sent a letter to DRS asserting that class counsel agreed with the County that retirement contributions are not required. (CAR 461). DRS then contacted class counsel.

Class counsel did *not* confirm that the intent of the settlement was not a retroactive salary increase. Instead, she recited that the settlement was a compromise of multiple claims, resulting in lump sum awards to each subclass. She noted that the "claims raised included interest, attorneys' fees, double damages, and incentive awards to named plaintiffs." Class counsel did not address the question of whether retirement contributions were required.<sup>7</sup> (CAR 462)

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<sup>6</sup> The County's submission includes several statements that are contrary to the Findings of Fact, including that the distributions included an interest component, and that the distributions not based on a calculation of actual wage loss. (CAR 457-59)

<sup>7</sup> Class counsel was in a conflicted position. If the distributions were treated as compensation earnable, employee contributions would be deducted from all of the approximately 2,000 class members, although only a small percentage would have their average final compensation – and therefore, their retirement allowances – increased..

On March 15, 2005, DRS, through Michelle Hardesty, concluded that the distributions were “not considered compensation earnable under RCW 41.40.010(8)” **“based on the fact that the intent of the agreement is to settle the lawsuits,** not provide retroactive salary payments to make the claimants whole.” (CAR 58, ¶26 – emphasis added)

Mr. Serres pursued administrative appeals, which culminated in cross motions for summary judgment before DRS Presiding Officer Ellen Anderson. By Order of January 29, 2008, the Presiding Officer granted Mr. Serres’ motion for summary judgment. (CAR 66-83) The Order noted that context of the suit and settlement indicated the Duncan/Roberts distributions were compensation earnable under WAC 415-108-457. (CAR 80-81, ¶15). The Order acknowledged that King County had consistently denied liability, but concluded that DRS’ assertion that the denial of liability controlled was a “narrow, constrained reading of the rule.” (CAR 81, ¶16) The Presiding Officer placed “little weight” on the “after the fact” opinions expressed by County OMB and County counsel, “which must be taken in the vein of self-interest.” (CAR 81, ¶18)

The Presiding Officer reversed her decision in response to a Motion for Reconsideration by King County, and concluded that the distributions were not compensation earnable. Her reasoning was that

WAC 415-108-445 “makes paramount the reason for the payment in determining its nature.” She stated that the County made the settlement payments “to settle [plaintiffs’] claims short of full litigation without admission of liability.” She therefore concluded: “Thus despite the many aspects of these payments in which they resembled retroactive salary, the **reason for** the payments will control and they will not be found to be retroactive salary payments.” (CAR 64, ¶9 – emphasis in original)

### C. PROCEEDINGS IN TRIAL COURT

Serres filed a timely Petition for Review in the Superior Court, and sought certification of a class consisting of all Duncan/Roberts class members whose average final compensation would be increased by inclusion of their Duncan/Roberts distributions.<sup>8</sup> (CP 62-77)

In the trial court, DRS argued that if Serres’ class certification were granted, the court should also require joinder of a class (or subclass) consisting of the 1,900 D/R class members whose retirement allowance was unaffected by the D/R distributions (“the unaffected D/R class members” or “the 1,900”).<sup>9</sup>

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<sup>8</sup> Serres later filed a Second Amended Petition for Review and Class Action Complaint for Order to DRS (CP 288-99)

<sup>9</sup> The attorney who served as co-counsel to the Plaintiff class in Duncan/Roberts submitted an amicus brief and Declaration objecting to joinder of the 1,900, clarifying the history of the Duncan/Roberts litigation, and outlining the legal and procedural obstacles to joining a class with no financial stake in the litigation. (CP 876-881, 820-825)

DRS also asserted that if Serres' motion to certify an ancillary class were granted, Rule 19 required joinder of the 1,900. (CP 466-72) The motion reasoned that, if the Petition for Review were granted, DRS would proceed, pursuant to RCW 41.50.130 and 140, to seek retroactive employer and employee contributions from King County, and King County could in turn attempt to collect employee contributions from the 1,900. Therefore, the motion asserted, various provisions of CR 19 required joinder to protect DRS, King County, and the 1,900. King County filed a comparable motion. (CP 445-454) All motions for class certification and joinder were initially denied without prejudice. (CP 675-66, 677-78)

DRS filed a renewed motion for joinder of the 1,900. (CP 719-40). King County filed a parallel motion (CP 691-94); but then filed a motion requesting that the court confirm that RCW 41.50.130 did not empower DRS to collect retroactive contributions from the County for the unaffected D/R class members, since there had been no overpayment or underpayment of benefits to that group. (CP 1-6, 742-46) King County advised the court that if its motion regarding RCW 41.50.130 were granted, there would be no need to join the 1,900. (CP 845) The trial court granted Serres motion for class certification (CP 874-75) and King County's motion regarding RCW 41.50.130 (CP 900-01), denied King

County's motion for joinder of the 1,900 (CP 902-03), and did not explicitly rule on DRS' parallel joinder motion.

Serres' Brief in Support of Petition for Review relied on the factual findings by the Presiding Officer, but asserted that the Presiding Officer had either incorrectly applied the law, as stated in RCW 41.40.010(8)(a), WAC 415-108-445, and WAC 415-108-457, or, in the alternative, that the "reason" for the payments was to settle the case, rather than pay retroactive salary adjustments, was not supported by evidence that was substantial when viewed in light of the record as a whole. RCW 35.05.570(3)(d) & (e). (CP 44-56, 1014-32)

The trial court concluded that the relevant question was not "what motivated" the County to pay the settlement, but "what were the payments based upon." (Sept. 11, 2009 transcript, p. 12:14-23) Because the distributions included only amounts that "should have been earned during the payroll period for personal services," (Id., p.20:7-11) the trial court ruled that the distributions were compensation earnable under the statute, and granted Serres' Petition for Review. (CP 1033-35)

Serres later filed a motion for award of common fund attorneys' fees of 25%. (CP 1072-1084) DRS asserted that Serres could seek fees only under the EAJA, subject to a \$25,000 maximum. (CP 1055-71) The trial court granted Serres' motion. (CP 1228-1231)

#### IV. RELEVANT STATUTES AND REGULATIONS

##### RCW 34.05.570. Judicial review

...

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

...

##### RCW 41.40.010 Definitions

...

(8)(a) "Compensation earnable" for plan 1 members, means salaries or wages earned during a payroll period for personal services and where the compensation is not all paid in money, maintenance compensation shall be included upon the basis of the schedules established by the member's employer.

...

(17)(a) "Average Final Compensation" for plan 1 members, means the annual average of the greatest compensation earnable by a member during any consecutive two year period of service credit months for which service credit is allowed; or if the member has less than two years of service credit months then the annual average compensation earnable during the total years of service for which service credit is allowed.

##### WAC 415-108-010 Public Employees' Retirement System Definitions

...

(7) **Reportable compensation** means compensation earnable as that term is defined in RCW 41.40.010(8).

##### WAC 415-108-441

##### Purpose and scope of compensation earnable rules

WAC 415-108-443 through 415-108-488 codify the

department's interpretation of statutes and administrative practice regarding classification of payments as compensation earnable in PERS Plan 1, 2, or 3. These rules will be used to determine the proper characterization of payments occurring prior to and after the effective dates of these sections.

WAC 415-108-445 What compensation can be reported?

**(1) Compensation earnable:**

(a) Compensation earnable must meet the definition in RCW 41.40.010(8) and:

(i) Be earned as a salary or wage for personal services provided during a payroll period and be paid by an employer to an employee; or

(ii) Qualify as compensation earnable under WAC 415-108-464 through 415-108-470.

(b) The department determines whether payments to an employee are compensation earnable based on the nature, not the name, of the payment. The department considers the reason for the payment and whether the reason brings the payment within the statutory definition of compensation earnable.

Example: 'Longevity pay' conditioned on retirement is not for services provided and is therefore not compensation earnable.

WAC 415-108-457 Retroactive salary increases

A retroactive salary payment to an employee who worked during the covered period is a payment of additional salary for services already rendered.

...

(1) To qualify as reportable compensation under this section, the payment must be a bona fide retroactive salary increase. To ensure that is the case, the retroactive payment must be made pursuant to:

(a) An order or conciliation agreement of a court or administrative agency charged with enforcing federal, state, or local statutes, ordinances, or regulations protecting employment rights;

(b) A bona fide settlement of such a claim before a court or administrative agency;

(c) A collective bargaining agreement; or

- (d) Action by the personnel resources board which expressly states the payments are retroactive.
- (2) The payments will be deemed earned in the period in which the work was done.

## V. ARGUMENT

### A. THE PRESIDING OFFICER'S CONCLUSION THAT DUNCAN/ROBERTS DISTRIBUTIONS WERE NOT COMPENSATION EARNABLE SHOULD BE REVERSED

The Presiding Officer's decision was based on a fundamental misinterpretation of the PERS statute and applicable regulations.<sup>10</sup> The Presiding Officer incorrectly concluded that the controlling factor was the employer's motivation in making a payment, whereas the touchstone for analysis must be whether the payment compensates the employee for providing personal services.

#### 1. This Court Conducts a *De Novo* Review of the Presiding Officer's Decision

DRS suggests that the major issue in this case is whether the decision of its Presiding Officer on reconsideration is supported by substantial evidence, and that in such an analysis the Department should be given deference by the court. However, the standard of review to be applied to the interpretation of a statute, *or its application*, is the "error of law" standard of the Washington Administrative Procedure Act (APA),

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<sup>10</sup> King County's Appellant's Brief relies primarily on the decision of the hearing officer. Because the Court must review the Presiding Officer's decision, this brief will not address separately the arguments presented by King County.

RCW 34.05.570(3)(d). Under this standard, “while the court should give substantial weight to the agency’s view of the law, it may essentially substitute its judgment for that of the administrative agency.” *Grabicki v. DRS*, 84 Wn.App. 745, 750, 916 P.2d 452, rev. den. 130 Wn.2d 1010 (1996).

In *Franklin Cy. Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982), cert. denied 459 U.S.110 (1983), the court addressed the appropriate standard of review under the APA when there is a “mixed question of law and fact,” or “law application issues,” which “involve the process of comparing, or bringing together, the correct law and the correct facts, with a view to determining the legal consequences.” *Id.* at 329. “Where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term,” the court’s role is to invoke its “inherent power to review de novo those issues.” *Id.* (citation omitted). The court continues:

De novo review in these cases refers to the inherent authority of this court to determine the correct law, independently of the agency’s decision, and apply it to the facts as found by the agency and upheld on review by this court.

This approach has continued to be applied by Washington courts. See, e.g., *Dana’s Housekeeping, Inc. v. Dep’t. of Labor and Industries*, 76 Wn.App. 600, 886 P.2d 1145, 1151, rev. denied 127 Wn.2d 1007 (1995)

“A court may . . . substitute its judgment on the statute which the agency primarily applies and interprets.”)

In addition, any argument that the Court should defer to the expertise of DRS is undercut by the fact that the Presiding Officer initially issued a decision embodying the analysis urged by Serres, but reached a contrary decision on reconsideration. (CAR 66-83, 51-65)

2. The Court Should Accord the Underlying Statute Its Plain Meaning Without Deference to Agency Interpretation

When interpreting a statute, the court should first “look to its plain language.” *Homestreet, Inc. v. State Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). As the court has said:

Where statutory language is plain and unambiguous, a court will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of a contrary interpretation by an administrative agency.

*Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1240 (2005) (citations omitted). See also *Homestreet*, at 300-301.

Although DRS correctly notes that courts may give “great weight” to an agency’s interpretation of a statute within its area of “special expertise”, “such deference is not afforded when the statute in question is unambiguous.” *Densley v. Department of Retirement Systems*, 162 Wn.2d

210, 221, 173 P.3d 885 (2007) (holding DRS incorrectly applied statutory retirement service provision).

In this case, the terms “salaries” or “wages” are not included in the definition sections of the applicable pension statute. See RCW 41.40.010. “A statutory term that is left undefined should be given its ‘usual and ordinary meaning.’ . . . . If the undefined statutory term is not technical, the court may refer to the dictionary to establish the meaning of the word.” *Burton v. Lehman*, supra, 422-23 (citation omitted). See also, e.g., *Woo v. Fireman’s Fund Ins. Co.*, 150 Wn.App. 158, 208 P.3d 557 (2009).

In Black’s Law Dictionary, 1364 (8th ed., 2004) (excerpt at CP 1610-11), “salary” is defined as “An agreed upon compensation for services—esp. professional or semiprofessional services—usu[ally] paid at regular intervals on a yearly basis, as distinguished from an hourly basis.” “Wage,” noted as “usu[ally] pl[ural],” is defined as “[p]ayment for labor or services, usu[ually] based on time worked or quantity produced; specif[ically], the compensation of an employee based on time worked or output of production.” *Id.* at 1610.<sup>11</sup>

According to the dictionary definitions, then, the key to the interpretation of the issue of whether payment can be classified as

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<sup>11</sup> See also Webster’s New Compact Dictionary, 567 and 725 (2003): salary: “a fixed payment at regular intervals for work,” and wage: “money paid for work done.”

“salaries or wages” is whether it is payment *for services or labor*, or in other words, for work done. *Cf. Hertzke v. State Department of Retirement Systems*, 104 Wn.App. 920, 932, 18 P.3d 588 (2001) (under TRS, “Payments that are not in exchange for personal services are not included in earnable compensation.”)

A “cardinal rule of statutory construction is to give effect to the legislature’s intent.” *City of Redmond v. Central Puget Sound Growth Management Board*, 136 Wn. 2d 38, 52, 959 P.2d 1091 (1998) See also *Galvis v. State, Department of Transportation*, 140 Wn.App. 693, 703, 167 P.3d 584 (2007) (“We give full effect to the intent and purpose of the legislation as expressed in the statute.”) With respect to pension legislation, the “law is well established that pension legislation must be liberally construed most strongly in favor of the beneficiaries.” *Hanson v. City of Seattle*, 80 Wn.2d 242, 247, 493 P.2d 775 (1972)

In this case, the “raw facts” found by the DRS Presiding Officer clearly establish that the payments to Serres, and therefore to class members, were “salaries or wages” as those terms are commonly understood, i.e., payment for services or work performed during the pertinent payroll periods:

- The payments were in settlement of a law suit for wages or salary owed, and statutory penalties for failure to pay those wages. (CAR 54, ¶5)
- The Settlement Agreement allocated specific totals (\$8 million and \$6 million) of the total settlement (\$18.5 million) to be distributed to the two sets of class members. (CAR 55, ¶9)
- Claimants received awards “representing their new pay rate as though it had been paid [from a prior date]” or based on an average of increased pay received by other employees. If necessary (based on inadequate funding), these percentages could be reduced. (CAR 55-56, ¶¶12,14,15)
- To receive distributions, individual class members provided the County Claims Office with payroll history forms “showing all pay periods in which they had worked during times covered by the Settlement Agreement.” (CAR 0057, ¶21)

In light of these findings, the payments to class members were “earned during a payroll period for personal services,” as contemplated by the definition of “compensation earnable” in RCW 41.40.010(8)(a) & (b).

Statutes “should be construed to effect their purpose and courts should avoid unlikely, strained, or absurd results in arriving at an interpretation.” *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794,

802, 808 P.2d 746 (1991). The legislature set forth specific items which, are “also” included in “compensation earnable,” even though they were “not paid for personal services,” including retroactive payments on reinstatement to a position or in lieu of reinstatement to a position which are “awarded or granted as the equivalent of the salary or wage which the individual would have earned during a payroll period.” RCW 41.40.010(8)(a)(i)(A). In light of this provision, the decision that retroactive pay adjustments for employees who submitted detailed records of work performed services during the period for which they received retroactive pay were not compensation earnable was an “unlikely, strained, or absurd result,” and must be reversed.

3. Even if Deference Is Given to DRS’ Interpretation of the Statute, Proper Application of the Department’s Rules Requires a Finding that Payments to Class Members Were “Compensation Earnable” Under RCW 41.40.010(8)(a) and (b)

Interpretation of agency rules should effectuate statutory purposes.

*Franklin Cy. Sheriff’s Office v. Sellers*, supra, 97 Wash.2d at 327-28.

Indeed, “administrative rules and regulations cannot amend or change statutory requirements.” *Postema v. Pollution Control Hearings Board*, 142 Wash.2d 68, 97, 11 P.3d 726 (2000). “As in statutory interpretation, where a regulation is clear and unambiguous, words in a regulation are given their plain and ordinary meaning unless a contrary intent appears.”

*Silverstreak v. Washington State Dep't. of L&I*, 159 Wn.2d 868, 881, 154 P.3d 891 (2007). The court's "primary task" is to determine the interpretation which "best reflects the intent of the legislature in enacting [the applicable statute] and to give effect to that interpretation." *Id.* at 882.

The DRS Presiding Officer relied, in her final decision on reconsideration, on WAC 115-108-445(a), which provides that:

The department determines whether payments to an employee are compensation earnable based on the nature, not the name, of the payment. The department considers the reason for the payment and whether the reason brings the payment within the statutory definition of compensation earnable.

In fact, properly interpreted, this provision supports Serres' claims and is entirely consistent with WAC 415-108-457, on which the Presiding Officer's initial decision rested.

The courts have on many occasions dealt with the issue of the "nature," as opposed to the "name" of a payment. In *Dana's Housekeeping, Inc. v. Dep't. of L&I*, 76 Wn.App.at 608, for example, the determination of whether work was personal labor focuses on "the realities of the situation," rather than the technical language of the employment contract. In two cases relied upon by DRS, the courts similarly looked to the underlying "realities" as opposed to reliance on a designation by parties to an agreement. In *Chancellor v. DRS*, 103 Wn.App. 336, 342,

12 P.3d 164 (2000), and *Grabicki v. DRS*, supra, 84 Wn.App. 745, the courts looked to the underlying statutory and regulatory schemes, and the underlying facts, rather than the characterization by the parties to determine whether payments were “basic” salary (and therefore “compensation earnable”) or “special” salary (excluded by statute from the definition). Serres has no quarrel with this approach and urges the Court to rely upon the underlying facts as found by the Presiding Officer to determine that she did not correctly apply this provision, in conjunction with WAC 415-108-457, to determine whether payments to Serres were “compensation earnable.”

The clear intent of WAC 415-108-445 is that the Department will look to the nature of the payment, and will not permit the subjective preferences of the employer to affect the outcome. By basing its analysis not on what the employee did to become entitled to payments from the employer, but on the employer’s subjective motivation to make the payment (i.e., to settle the case, rather than litigate), the Presiding Officer’s March 31 Order completely divorces the result from the activities of the employee. This is directly contrary to the intent of WAC 415-108-445.

WAC 415-108-457 specifically addresses the issue of compensation earnable in the settlement of disputes claiming, as this one

did, additional back pay. It provides that a “**retroactive salary payment to an employee who worked during a covered period is a payment of additional salary for services already rendered.**” The regulation goes on to provide that to qualify, the payment must be “a *bona fide* retroactive salary increase.” To ensure that this is the case, the regulation provides, in relevant part, that the retroactive payment must be made pursuant to: (a) an order . . . of a court . . . charged with . . . enforcing local . . . ordinances . . . protecting employment rights” or (b) “a bona fide settlement of such a claim before a court . . .” The regulation further provides (2) that such payments “will be deemed earned in the period in which the work was done.”

Applying a basic principle of statutory construction, WACs 415-108-445 and 457 should be read as “complementary, rather than in conflict with each other.” *Waste Management of Seattle, Inc., v. Util. & Tran. Comm.*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). Application of the approach taken in WAC 415-108-445 and WAC 415-108-457, is illustrated by *Alexander v. IRS*, 72 F.3d 938 (1<sup>st</sup> Cir. 1995), which was relied upon by DRS in the trial court. The Circuit Court “take[s] into consideration the well-settled rule that the classification of amounts received in settlement of litigation is to be determined by the nature and basis of the action settled, and amounts received in compromise of a claim

must be considered as having the same nature as the right compromised.” *Id.* at 942. The court upheld the determination of the Tax Court that “the damages Taxpayer received are essentially a substitute for the salary and benefits he would have received under [an] employment contract.” *Id.* at 944.<sup>12</sup>

In this case, the underlying claim was based on failure to provide equal pay for equal work. (CAR 0053, ¶¶2-5), and payments distributed to the class simply retroactively increased pay rates to correct for the 35 hour vs. 40 hour wage disparity (in Roberts), or bring them into line with pay to other workers, or with prospective adjustments class members had received, insofar as funds permitted (in Duncan). (CAR 213, ¶¶11-15). Distribution checks included deductions for “employee taxes” such as income tax, Medicare, and social security. (CAR 269, ¶19). In fact, in her analysis, the Presiding Officer sets forth in summary the many bases for determining that the payments to Serres, the named plaintiff and class

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<sup>12</sup> *Licciardi v Kropp Forge Div. Employees' Retirement Plan*, 990 F.2d 979 (1993), relied upon by DRS, is not inconsistent with *Alexander*. The *Licciardi* court, in *dictum*, applied contract interpretation to determine employee rights under a privately negotiated pension plan, and concluded that the a statement in the agreement that a severance payment of \$650,000 (which the court characterized as an “extraordinary payment”) was “earnings” for tax purposes (which resulted in tax savings), did not make it “earnings” for the purposes of a pension plan that based benefits on earnings during the employee’s last five years of service. The court noted that, under the circumstances, the payment could have been for any of a number of things, including “hurt feelings.” While the court noted that if the parties wanted the payment to qualify as earnings under the pension fund, they should have expressed their intent more clearly, the decision does not stand for the proposition that where the payments are clearly for back wages, the parties’ motivation to settle, rather than litigate, prevents them from affecting pension rights.

representative, “could be seen as retroactive salary payments,” (CAR 63-64, ¶8), but then refuses to apply the approach of WAC 415-108-445 and instead relies upon the failure of the County to admit liability in the settlement agreement, and, apparently, the failure of the parties to address the effect on retirement plans in their Settlement Agreement. (CAR 64, ¶¶9, 10)

In effect, contrary to the courts’ approach in *Chancellor* and *Grabicki*, 84 Wn.App. at 750, the Presiding Officer makes the statements of the parties (or one of them) controlling, rather than the underlying “nature” of the payments. Her decision is inconsistent with the agency’s interpretation of RCW 41.40.010(8), as expressed in WAC 415-108-457, when interpreted in light of WAC 415-108-445, and therefore should be reversed, pursuant to RCW 34.05.570(3)(d).

4. Even If the Court Determines that DRS’ Characterization of Payments to Class Members Under the Court Order as Not “Compensation Earnable” Was a Question of Fact, No Deference Should Be Accorded the Agency Decision

Factual findings by the agency are to be reviewed on the basis of “substantial evidence.” RCW 34.05.570(3)(e). This standard has been explained as “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Redmond v. Central Puget Sound Growth Management Hearing Board*, supra, 136 Wn.2d at 46. The

courts “will not defer to an agency determination which conflicts with the statute” being applied. *Waste Management of Seattle, supra*, 123 Wn.2d at 628.

In *Burton v. Lehman, supra*, 153 Wn.2d at 426 the agency had argued that its interpretation of statutory terms such as “delivery” and “transfer” should be given deference. The court responded that:

“[w]hile deference is appropriate if the interpretation reflects a plausible construction of the language of the statute, ‘the court is the final authority on statutory construction and it need not approve regulations or decisions inconsistent with a statute.’ . . . [The agency’s] interpretation is neither consistent with the plain language of [the statute] nor an official interpretation of that statute. Thus, no deference is due.” (Citation omitted.)

The same is true here, and the Court should show no deference to the agency’s decision.

In *Renton Educ. Ass’n v. PERC*, 101 Wn. 2d 435, 444, 680 P.2d 40 (1984), the court qualified the deference owed: “*So long as the record taken as a whole indicates that [the agency] has applied the statutory criteria in making its determination and has supported it with adequate findings, we will defer to its expertise.*” (Emphasis added.)

In this case, the Presiding Officer’s Analysis purported to “find,” based on the Settlement Agreement, that the “County made these payments to its employees and former employees to settle their claims

short of full litigation without admission of liability. Thus despite the many aspects of these payments in which they resembled retroactive salary, the **reason for** the payments will control and they will not be found to be retroactive salary payments.” As set forth above, this represents a misreading of the import of WAC 415-108-445, as well as RCW 41.40.010(8) as interpreted by WAC 415-108-457 in the context of a court order for increased back pay based upon a settlement agreement, where the basic question is whether payments were “for” personal services.

If the Presiding Officer’s interpretation of the regulations were allowed to stand, the purpose of the statute would be frustrated, and WAC 415-108-457 would be rendered a nullity, since presumably the avoidance of “full litigation” is always a motivation for the settlement of a lawsuit.

Further, the effect of the Presiding Officer’s ruling is to make the assertion of the County the determining factor, contravening the principle that “the parties to a contract may not decide for themselves the meaning of terms used by the Legislature.” *Chancellor, supra*, 103 Wn.App. at 346. (Citation omitted).

Indeed, even if such were the case, more persuasive are the recitations in the court’s Findings of Fact (CAR 0209 – 223) that payments to class members would be “back compensation” or “back pay,” (see e.g. CAR 214-215, ¶¶22, 23), and its finding that the “County will

have eliminated the pay disparity problem, paying all employees an appropriate hourly rate times the hours worked.”<sup>13</sup> (CAR 215, ¶27). Because the Findings of Fact were “Presented by” attorneys for the plaintiffs and the class, and “approved for entry” by the deputy prosecuting attorney representing the County. (CAR 60, ¶35; CAR 223) It reflects their carefully crafted attempt to summarize the terms of the Settlement Agreement in a multi-million dollar litigation. By contrast, the Presiding Officer correctly noted in her January 29, 2008 Order that “after-the-fact” input, “particularly by County OMB and County counsel . . . must be taken in the vein of self-interest.” (CAR 82, ¶18) Because these after-the-fact expressions of intent do not constitute evidence that is “substantial when viewed in light of the whole record before the Court,” relief is also appropriate under RCW 34.05.570(3)(e).

Relief should be granted either because the Presiding Officer did not correctly apply the statutory criteria for determining whether the settlement payments were “earnings compensable” under RCW 41.40.010(8), or because she failed to support her determination regarding

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<sup>13</sup> Because the Presiding Officer made a factual finding that the Court’s Findings of Fact were “drafted and presented by Class counsel,” (CAR 57, ¶18), and the document reflects that it was approved for entry by County counsel (CAR 223), DRS’ argument that its contents should be ignored because a court approving a settlement agreement may not make findings on disputed material issues is inapposite.

the “reason for” the payments with findings to convince a fair-minded person of the correctness of her decision. *Redmond*, 136 Wn.2d at 46

B. THE TRIAL COURT APPROPRIATELY DENIED MOTIONS TO JOIN A CLASS OF 1900 DUNCAN/ROBERTS CLASS MEMBERS, WHOSE RETIREMENT ALLOWANCES WERE NOT AFFECTED BY THE DECISION BEING REVIEWED

Because King County’s Motion Regarding RCW 41.50.130(1) was filed in response to DRS’ Motion to Join and Certify a Broad Ancillary Class, this brief will frame the CR 19(a) issue before addressing the RCW 41.50.130(1) issue.

1. The Abuse of Discretion Standard of Review Applies to the Trial Court’s CR 19 Decision

As the party asserting that joinder of additional parties was required, DRS bears the burden of proving indispensability. *Matheson v. Gregoire*, 139 Wn.App. 624, 635, 161 P.3d 486 (2007). The trial court’s determination that the unaffected D/R class members were not indispensable parties is reviewed for abuse of discretion. *Mudarri v. State*, 147 Wn.App. 590, 600, 196 P.3d 153 (2008).

The court of appeals may also affirm the trial court’s decision regarding CR 19 “on any alternative ground that the record adequately supports. *Id.*

2. Joinder of Unaffected Duncan/Roberts Class Members Is Not Required by CR 19

On appeal, DRS makes a single argument in support of compulsory joinder – that CR 19(a)(1),<sup>14</sup> which applies when, without the party to be joined, the court cannot provide complete relief among those already parties, requires joinder of the 1,900 to protect DRS.<sup>15</sup> DRS asserts that if DRS corrected its records to reflect D/R distributions as compensation earnable for unaffected D/R class members, and DRS demanded payment from King County, and King County attempted to recover from unaffected D/R class members, those members could seek administrative review of the Department’s determination. (DRS Appellant’s Brief at 43-44).

There are several reasons to reject DRS’ current argument.<sup>16</sup>

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<sup>14</sup> **CR 19. Joinder of Persons Needed for Just Adjudication**

(a) **Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties . . .

Although DRS also asserts that joinder would “promote judicial economy,” (DRS Appellant’s Brief, at 40), promotion of judicial economy is not a basis for compulsory joinder under CR 19.

<sup>15</sup> If DRS asserts in its Reply Brief that joinder is warranted based on provisions other than CR 19(a)(1), Serres will seek court permission to submit a sur-reply brief.

<sup>16</sup> Arguably, the unaffected class members could not be joined because, under RCW 34.05.530, they lack standing because they were not “aggrieved or adversely affected” by the Presiding Officer’s decision.

**a. Under CR 19(a)(1), potential litigation between current parties and third parties does not require joinder**

Regardless of how the Court interprets RCW 41.50.130 and 140, the possibility of future disputes with third parties does not prevent the court from according “complete relief . . . among those already parties” under CR 19(a)(1). The literal language of the rule contemplates resolution “**among those already parties.**” It does not contemplate consideration of future disputes with third parties, let alone contingent disputes of the type hypothesized by DRS.

The decisions cited by DRS for joinder of third parties all address situations where the court ordered joinder of an entity with a right to possession or use of real or personal property that was the subject of the action. *Nolan v. Snohomish County*, 59 Wn.App. 876, 880, 802 P.2d 792 (1990), simply noted that the landowner and the County (rather than the County Council) are indispensable parties in a review of the County Council’s land use decision. *Veradale Valley Citizens’ Planning Committee v. Bd. of County Commissioners of Spokane County*, 22 Wn.App. 229, 233-34, 588 P.2d 750 (1978) held that under CR 19(a)(1), the proponent of a sub-plat is a necessary party when third parties request review of the decision approving the sub-plat. *Republic of Phillipines v. Pimentel*, 553 U.S. 851, 856-57, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008)

concludes that CR 19(a)(1) requires joinder of all persons who assert an interest in the property that is the subject of the interpleader.<sup>17</sup>

In this case, DRS asserts that the possibility that unaffected D/R class members might request review by DRS if they are subjected to attempts to collect retroactive contributions requires that they be joined under CR 19(a)(1). The settled law is to the contrary. In considering the “completeness of the relief” under CR 19(a)(1), “what effect a decision may have on absent parties is immaterial.” *General Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 314 (3<sup>rd</sup> Cir. 2007), citing *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir.1996) (“Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought.”) and *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 405 (3<sup>rd</sup> Cir. 1993); *Pittsburgh Logistics Systems, Inc. v. C.R. England, Inc.*, 669 F.Supp.2d 613, 617 (W.D.Pa. 2009).

Even where there is a clear basis for future litigation with a third party – such as where an insured sues one insurer for its loss, and the

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<sup>17</sup> *Williams v. Poulsbo Rural Telephone Assoc.*, 87 Wn.2d 636, 555 P.2d 1173 (1976), which DRS cites in its argument regarding “Judicial Economy” (DRS App.Br. at 40), also addresses the rights of parties with conflicting claims to the same assets. In *Williams*, the plaintiff sought a declaration that a pension trust be terminated, and its assets distributed. Without citing a particular paragraph or subparagraph of CR 19, the court ruled that other beneficiaries under the pension trust, whose pension assets were the subject of the action, were necessary parties. 87 Wn.2d at 646.

insurer has a right to seek contribution from another insurer that is jointly and severally liable for the loss – CR 19(a)(1) does not warrant joinder. *General Refractories Co.*, 500 F.3d at 314 (citing cases).

The rule stated in *General Refractories Co.* is directly applicable here. DRS asserted that, under RCW 41.50.140(2), it had a right to collect its entire claim, consisting of both employer and employee contributions on all D/R class members, from King County, which in turn could collect from the class members under RCW 41.50.140(3). As discussed below, DRS' analysis of those statutes was in error. But even if DRS had correctly analyzed RCW 41.50.130 and 140, the possibility of litigation with third parties would not warrant joinder under CR 19(a)(1).

***b. Whether records are corrected is under DRS' control***

Moreover, it is within DRS' discretion to decide whether to correct the records of unaffected D/R class members, and thereby potentially impact them. At most, RCW 41.50.130 provides that DRS “may” correct its records where the correction does not result in overpayment or underpayment to members of the retirement system. Entirely apart from the question of whether DRS or King County could collect additional retirement contributions from unaffected D/R class members, the fact that DRS controls whether to initiate the process means that CR 19 does not require that the 1,900 be joined in this action. Courts routinely refuse to

order joinder under CR 19(a)(1) where the current party may elect whether to initiate an action that would implicate the a non-party. *E.g., General Refractories, Co.*, 500 F.3d at 314.

3. Unaffected Duncan/Roberts Class Members Cannot Be Required to Pay Additional Contributions

DRS' Motion to Join Indispensible Parties was premised on its assertion that unaffected Duncan/Roberts class members would be harmed "by a direct application of the Department's 'correction-of-errors' statute," RCW 41.50.130. (CR 460:8-12) DRS argued that, if Serres prevailed, DRS would correct its records pursuant to RCW 41.50.130, and, pursuant to RCW 41.50.140, demand that King County pay both the employer and employee contributions. It asserted that "King County would then be in a position to go to each class member and collect that member's mandatory employee contributions," which required that the 1,900 be joined. (CP 460-461, 467-68). In its renewed motion to join indispensable parties, DRS relied on the same hypothetical series of events to assert that joinder under CR 19(a)(1) was necessary to protect DRS from future litigation. (CP 731-33) As discussed above, even if DRS's assertions regarding the operation of RCW 41.50.130 and 140 were correct, the possibility of future litigation with third parties cannot justify joinder under CR 19(a)(1).

Serres' Response argued that RCW 41.50.130 did not empower DRS to recover contributions from either employers or members, and RCW 41.50.140 permitted recovery of contributions only where an employee is entitled to retroactive service credit (which would not apply in this case, as Duncan/Roberts class members received additional compensation for hours already credited). (CP 794-800) King County's motion sought only a declaration that RCW 41.50130(1) did not permit DRS to collect additional contributions from King County. (CP 1-6, 741-46)

By granting King County's Motion Regarding RCW 41.50.130(1), the trial court effectively ruled that, because neither DRS nor King County could require that the 1,900 contribute on their distributions, neither joinder nor certification of an ancillary class of unaffected D/R class members was necessary.

On appeal, DRS incorrectly argues that RCW 41.50.130 grants it inherent power to correct records *and* collect all contributions necessary to fund the correction, even if no statute or regulation authorizes collection from either King County or from employees. It also cites a welter of statutes which, it claims, establish the right to collect retroactive contributions from unaffected class members, without identifying a single provision in any of the cited statutes that supports its conclusion.

**a. *City of Pasco v. DRS does not authorize DRS to correct records when members' benefits have not been impacted***

The sole decision cited by DRS regarding application of RCW 41.50.130 is *City of Pasco v. DRS*, 110 Wn.App. 582, 42 P.3d 992 (2002). In fact, *City of Pasco* states only that RCW 41.50.130 empowers DRS to correct errors “that cause members or beneficiaries to receive more or fewer benefits than those to which they are entitled.” 110 Wn.App. at 589. The court’s analysis begins with the following statement:

RCW 41.50.130, the “correction of error” statute, unambiguously gives the Department Director authority to correct errors appearing in the records of any state retirement system **that cause members or beneficiaries to receive more or fewer benefits than those to which they are entitled. . . .** This statute does not limit correctable errors to reporting or other specific types of errors. *Id.*, at 589-90 (emphasis added)

As DRS’ Appellant’s Brief notes, in *City of Pasco*, the effect of reclassifying the affected employee to LEOFF Plan 1 was that his benefits were increased. Therefore, correction of DRS records under RCW 41.50.130 was warranted. The decision provides no support for DRS’ argument that it is empowered by RCW 41.50.130 to change its records, regardless of whether the change has an impact on benefit levels. More importantly, it provides no support for DRS’ claim that either DRS or King County can collect additional contributions from unaffected D/R

class members, without which no unaffected D/R class member would have a reason to initiate proceedings with DRS.

***b. No statute or regulation authorizes collection of contributions from unaffected Duncan/Roberts class members***

In fact, there is no statute or regulation that permits collection of retroactive contributions from employees under the circumstances present here. RCW 41.30.140(2) permits an employer to seek reimbursement from employees who have been granted additional service credit. However, the D/R distribution did not result in additional service credit; it simply required additional compensation for work for which service credit had already been granted. WAC 415-108-820(5)(c) authorizes DRS, in connection with an employee's retirement, to correct an employer's failure to credit compensation earnable, but says nothing about collecting additional contributions from either the employer or the employee. RCW 41.40.048 permits DRS to bill some employers for past due contributions, but does not apply to King County, because it is a political subdivision of the state. *Densley v. DRS*, 162 Wn.2d 210, 217, 173 P.3d 885 (2007). None of the other authorities cited by DRS remotely suggest DRS can collect retroactive contributions from the 1,900.<sup>18</sup>

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<sup>18</sup> RCW 41.40.330 requires that employers deduct employee contributions "for each and every payroll period." 41.45.067(3) directs that the employer deduct contributions "each pay period" and remit them to DRS within 15 days. RCW 41.45.061(4) and 41.34.040(1) establish contribution rates. RCW 41.34.020(4)(c) defines compensation. RCW

DRS, in effect, argues that it has the inherent authority to collect retroactive contributions from employers, and employers have the inherent authority to collect from employees. If DRS had the inherent authority to collect retroactive contributions, there would be no need for statutes permitting collection under specific circumstances. E.g., RCW 41.50.140, 41.40.048. More importantly, no statute empowers either DRS or King County to collect retroactive contributions from employees. Therefore, under *State v. Adams*, 107 Wn.2d 611, 619, 732 P.2d 149 (1987), if collection were possible, it could be effected only by King County or DRS initiating suit against the D/R class members. The decisions cited above establish that the possibility that current party may sue a third party in connection with the same subject matter does not warrant joinder of the third party under CR 19(a)(1).

#### C. THE TRIAL COURT CORRECTLY AWARDED COMMON FUND ATTORNEYS' FEES

DRS raises a single challenge to the award of attorneys' fees – that Plaintiffs' counsel was limited to the \$25,000 fee available under the Equal Access to Justice Act. The trial court correctly rejected DRS' novel theory.

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41.40.042 provides that contributions are required, even if they result in net compensation falling below the minimum wage. RCW 41.45.050(1) requires that employers contribute at the rates established by statute.

1. DRS Lacks Standing to Object to the Award of Attorneys' Fees

DRS financial obligation is not affected by the award of attorneys' fees. DRS' must pay the same amount in benefits, whether or not a portion is payable to counsel as a common fund attorneys' fee award. Because DRS has no proprietary, pecuniary, or personal right that is affected by the fee award, under RAP 3.1, it lacks standing to appeal the fee award. *Cooper v. City of Tacoma*, 47 Wn.App. 315, 317, 734 P.2d 541 (1987), cited with approval in *Bowles v. DRS*, 121 Wn.2d 52, 69, 847 P.2d 440 (1993) (finding that DRS had appealable interest because it was required to advance fees, subject to later reimbursement); See also, *Breda v. B.P.O. Elks Lake City 1800 SO-620*, 120 Wn.App. 351, 353, 90 P.3d 1079 (2004) (Client lacked standing to appeal attorneys' fees imposed against counsel for discovery violations).

2. The Trial Court's Award of Fees Is Reviewed for Abuse of Discretion

Trial court decisions awarding attorneys' fees, including common fund attorneys' fees, are reviewed only for abuse of discretion. *Bowles*, 121 Wn.2d at 71-72. DRS asserts that this Court must review *de novo* the trial court's rejection of its argument that fees in this case could be awarded only under the EAJA. Serres disagrees. But even if the trial court's refusal to apply the EAJA were subject to *de novo* review, the decision should be affirmed.

3. Because Serres Requested Attorneys' Fees from Class Members, Rather than a Governmental Agency, the EAJA Cannot Apply

DRS fundamentally misperceives the relationship between common fund attorneys' fees and the EAJA. RCW 4.84.350 The EAJA provides that under appropriate circumstances, Petitioners in administrative proceedings may *shift* fees to the government, subject to a maximum fee amount. Serres does not seek to shift fees to the government, but to equitably spread fees among class members.

DRS correctly notes that under the American rule, each party bears its own attorneys' fees. But it fails to note that an award of common fund attorneys' fees is consistent with the American rule, because it requires that prevailing plaintiffs equitably bear their own attorneys' fees.

“[B]ecause application of the common fund doctrine spreads the fees among the prevailing party rather than shifting them to the losing party, the common fund doctrine is entirely consistent with the American rule,” *Town of New Hartford v. Conn. Resources Recovery Authority*, 291 Conn. 511, 970 A.2d 583, 589, n.8 (2009) (“[B] citing 4 A. Conte & H. Newberg, *Newberg on Class Actions* (4<sup>th</sup> Ed. 2002) §13.76, p. 489.

*Burke v. Arizona State Retirement System*, 206 Aiz. 269, 273, 77 P.3d 444 (Ariz.App. 2003) (“The common fund doctrine differs from exceptions to the American rule in that the doctrine is a mechanism for *fee-spreading*,

not *fee-shifting*. . . Unlike statutory fees that shift burden to losing party, common fund fees are shared by all who benefitted from the litigation.”) (emphasis in original)

Because an award of common fund attorneys’ fees does not shift fees to the government, DRS’ argument based on sovereign immunity is inapposite. In each case cited by DRS, plaintiffs attempted to shift the obligation to pay attorneys’ fees to the government. *Delegrove v. Empl. Sec. Dept.*, 127 Wn.App. 596, 605, 111 P.3d 879 (2005) (Rejecting Plaintiff’s claim that ESC should pay attorneys’ fees for his workers compensation appeal, which resulted in rebate to ESC.); *Leischner v. Alldridge*, 114 Wn.2d 753, 790 P.2d 1234 (1990) (Rejecting claim by Plaintiffs in quiet title action that common fund doctrine required that IRS pay portion of attorneys’ fees because action confirmed title to land subject to an IRS lien.); *Pennsylvania Life Ins. Co. v. Emp. Sec. Dep’t*, 97 Wn.2d 412, 645 P.2d 693 (1982) (Employer who successfully challenged ESC decision granting benefits to employee not entitled to award of fees from ESC under common fund doctrine.); *Alyeska Pipeline Service Co. v. Wilderness Society*, 412 U.S. 240, 95 S.Ct. 1612, 1615, n. 39 (1975) (Common fund principles cannot be extended to require government to pay plaintiffs’ attorneys’ fees under extension of “private attorney.”<sup>19</sup>

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<sup>19</sup> The additional federal decision cited by DRS stands for the simple proposition that the

4. Prohibiting Common Fund Attorneys Fees Is Inconsistent with both *Bowles* and the Express Purpose of the EAJA

In *Bowles v. Washington Dept. of Retirement Systems*, 121 Wn.2d 52, 71, 847 P.2d 440 (1993), which was decided two years before the EAJA was passed, the Washington Supreme Court noted that an award of common fund attorneys' fees in a case that resulted in increased pension benefits "furthers important policy interests." The court noted that when attorneys' fees are available to prevailing class action plaintiffs, "plaintiffs will have less difficulty obtaining counsel and greater access to the judicial system." The court concluded, "Little good comes from a system where justice is available only to those who can afford its price."

By passing the EAJA two years after *Bowles* was decided, the Legislature did not comprehensively regulate the award of fees in administrative review procedures. It merely created a special mechanism whereby the attorneys' fees of certain petitioners with limited assets could be shifted to the agency if the agency's position was not "substantially justified." It left undisturbed the general rules articulated in *Bowles* regarding the award of common fund attorneys' fees in actions for pension benefits.

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courts will not impose fee shifting on a defendant where no statute or rule requires it. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1977) (Attorneys' fees not recoverable from defendant in trademark infringement action where Congress did not provide for fee shifting.).

Moreover, utilizing the EAJA to limit common fund attorneys' fees in a class action is directly contrary to the purpose of the EAJA, which is to further enhance the ability of citizens to vindicate their rights:

The legislature therefore adopts this equal access to justice act to ensure that these parties have a **greater opportunity** to defend themselves from inappropriate state agency actions and to protect their rights. Laws of 1995, ch. 403, §901 (Emphasis added) (codified at RCW 4.84.340-360)

By providing for fee shifting in very limited circumstances, the EAJA slightly mitigates the disparity in resources between individuals and state agencies, and thereby provides the greater opportunity to challenge agency action intended by the Legislature.

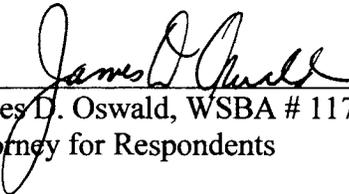
Nothing in the legislative history supports DRS' argument that, by providing this limited relief, the Legislature intended to overrule established common law principles that permit fee-spreading spreading in class actions, which are expressly contemplated in RCW 34.05.510(2). DRS suggests that limiting fees to the EAJA maximum would prevent "unnecessary" class actions. But the reality is that a draconian limit on fees would discourage all class actions, thereby reducing the ability of citizens to challenge improper agency actions, which is precisely contrary to the policy articulated in Bowles, and the purposes of the EAJA.

## VI. CONCLUSION

For the reasons stated above, Serres is entitled to relief under RCW 34.05. 570(3)(d) and/or (e). The March 31, 2008 Order of the Presiding Officer should be reversed, and the Court should direct that the retirement allowances of Serres, and the class he represents, must be adjusted to reflect their Duncan/Roberts distributions. In addition, the trial court's orders regarding RCW 41.50.130 and CR 19(a)(1), and the award of common fund attorneys' fees should be affirmed.

Respectfully submitted, this 4<sup>th</sup> day of October, 2010.

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NO. 64362-2-1

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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WILLIAM F. SERRES  
and an Ancillary Class of Similarly  
Situated Persons,

Respondents

v.

CERTIFICATE  
of  
SERVICE

WASHINGTON STATE  
DEPARTMENT OF RETIREMENT SYSTEMS  
and  
KING COUNTY,

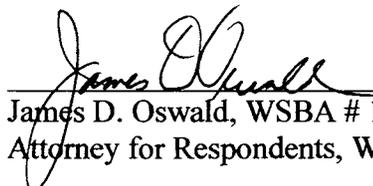
Appellants

I certify that I served a copy of the foregoing Respondents' Brief on the following counsel of record, postage pre-paid, on October 4, 2010.

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