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NO. 67763-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

GERALD B. ADAMS, ROGER H. AMUNDSON, KENNETH W.
CROW, LARRY FARRAR, JERRY W. GERMEAU, JAMES R.
"BOB" GILLESPIE, RON HAVILAND, WILLIAM E. HERBERT,
DAVID F. HORTON, GENE C. HUNT, NORMAN D. JAMES, MARK
E. KATZER, EMETT H. KELSIE, TOMMY B. KNIGHT, E.J. "NEIL"
LOW, GARY J. McNULTY, LARRY NOLTING, DEAN QUAIL,
DAVID C. RITTER, MICHAEL G. SEVERANCE, STEVEN R.
SUNDSTROM, GORDON L. VANROOY, individuals, their spouses,
and their marital communities, as applicable,

Appellants,

PHILIP R. FORSELL, STEPHEN M. MACOMBER, DALE A.
MATSON, individuals, their spouses, and their marital communities,
as applicable,

Plaintiffs,

v.

THE CITY OF SEATTLE

Defendant,

THE DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent.

REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON

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INTRODUCTION

The parties agree on the facts underlying this appeal. All appellants are current or retired Seattle police officers and all are members of LEOFF I. Appellants all had CERS contributions for unsworn service before they became commissioned Officers. Through various legislative enactments and amendments, appellants were permitted to transfer their CERS contributions into PRPF memberships and were required to transfer their PRPF memberships into LEOFF. They all did so.

The Department nonetheless refuses to include appellants' CERS contributions for unsworn service in their LEOFF benefits calculations. This is plainly at odds with the Department's acknowledgment that the Legislature could not reduce established retirement benefits by moving Officers from PRPF into LEOFF. BR 4. Thus, while the Department attempts to portray appellants as wanting more than they are entitled to, the reality is that the Department wants to avoid fully compensating appellants.

This Court should reverse, grant summary judgment to appellants, and remand for further proceedings.

REPLY STATEMENT OF THE CASE

Despite agreeing that there are no genuine issues or material fact and that the statute at issue is unambiguous, Respondent Department of Retirement Services provides a long and confusing statement of facts. BA 3 (citing CP 457, 462, 481, 482, 575); BR 1-12. Appellants here refocus on the material facts and statutes.

A. The parties agree that no genuine issues of material fact exist here.

Appellants are current or retired commissioned (or “sworn”) Seattle police officers whose more than 30 years of service includes some period of unsworn service. CP 134-35, 457-58 & nn. 5 & 6, 587. All appellants made City Employees’ Retirement System (“CERS”) contributions during their unsworn service. BA 4. All appellants transferred their CERS contributions into the Police Relief and Pension Fund (“PRPF”) in 1973 (or thereafter), after the Legislature enacted RCW 41.20.170.

The Legislature adopted the Law Enforcement Officers’ and Fire Fighters’ Retirement System (“LEOFF”) in 1969, requiring all Officers to transfer PRPF memberships into LEOFF. BA 4; RCW 41.26. The Legislature amended LEOFF in 1973, allowing Officers

to transfer their CERS contributions to the PRPF. BA 4; Laws of 1973, ch. 143 § 2, amending RCW 41.20.170. All appellants did so and all are members of LEOFF I. CP 457 & 459 n.8. In sum:

- ◆ Appellants all made CERS contributions for unsworn service;
- ◆ Appellants were all required to and did transfer their PRPF memberships into LEOFF;
- ◆ Appellants all transferred their CERS contributions – including for unsworn service – into PRPF;
- ◆ The Department refuses to include appellants’ CERS contributions for unsworn service in the LEOFF benefits calculation, effectively ignoring the CERS transfer into PRPF.

B. The parties agree that the statute at issue is unambiguous.

The parties also agree that the “crux” of this case is whether the mandatory transfer of PRPF memberships into LEOFF includes the CERS contributions for unsworn time previously transferred into PRPF. BA 11, BR 6. This turns on the definition of “service” in LEOFF 1, and specifically whether “service” includes unsworn time “then creditable” under CERS and transferred into PRPF:

(28)(a) “Service” for plan 1 members, means all periods of employment for an employer as a firefighter or law enforcement officer, for which compensation is paid

(i) For members retiring after May 21, 1971 who were employed under the coverage of a prior pension act before March 1, 1970, “service” shall also include (A) such military service not exceeding five years as was creditable to the member as of March 1, 1970, under the member’s particular prior pension act, and (B) **such other periods of service as**

were then creditable to a particular member under the provisions of RCW 41.18.165, 41.20.160, or 41.20.170.

RCW 41.26.030(28). The parties agree that this and the other statutes at issue are unambiguous. BA 9, 12, 13; BR 14-15, 22.

Addressing the LEOFF statutes, the City makes a crucial admission: “the Legislature cannot change the retirement benefits that it has established for public employees to the detriment of the employees.” BR 4 (citing *Mullholland v. City of Tacoma*, 83 Wn.2d 782, 522 P.2d 1157 (1974); *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956)). In other words, by moving police officers from PRPF into LEOFF, the Legislature could not – and did not – reduce their benefits.

ARGUMENT

A. The standard of review is *de novo*.

This Court reviews *de novo* the trial court's order granting summary judgment and the trial court's ruling therein on the meaning of RCW 41.26.030(28). *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009); *Safeco Ins. Co. of Ill. v. Country Mut. Ins. Co.*, 165 Wn. App. 1, 4, 267 P.3d 540 (2011); *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 163 Wn. App. 298, 306, 259 P.3d 338 (2011) (citing *Dot Foods, Inc. v. Dep't of*

Revenue, 166 Wn.2d 912, 919, 215 P.3d 185 (2009)), *rev. denied*, 173 Wn.2d 1021 (2012). Since the parties agree that the statute is unambiguous, this Court neither construes nor interprets the statute, but derives the statute's meaning from its plain language. **Olympic**, 163 Wn. App. at 306-07 & n.4; **Locke v. City of Seattle**, 133 Wn. App. 696, 137 P.3d 52 (2006), *aff'd*, 162 Wn.2d 474 (2007). Thus, the Court does not liberally construe the statute or defer to the Department's interpretation of the statute. BA 7-8; BR 14-15, 22; **Olympic**, 163 Wn. App. at 307 n.4.¹

This is not to say, however, that the Court should not read the statute with an eye on protecting the Officers' retirement. BA 7-8. LEOFF's "fundamental objective . . . is to provide benefits to police officers and fire fighters" and their families. **Hunter v. Dep't of Labor & Indus.**, 19 Wn. App. 473, 475, 576 P.2d 69 (1978); *see also* RCW 41.26.020.

¹ The Department agrees that the Court would defer to its administrative construction only if the statutes were ambiguous. BR 22.

B. The unambiguous statutes plainly require the Department to include in LEOFF all CERS contributions, including for unsworn service.

1. It is undisputed that all CERS contributions – including for unsworn service – transferred into PRPF.

When enacting PRPF, the Legislature permitted Seattle employees who later became Seattle police officers to transfer their CERS contributions into their PRPF memberships. Laws of 1973, ch. 143, § 2 (codified as RCW 41.20.170). RCW 41.20.170 plainly provides that the transfers included “all accumulated contributions”:

[T]he transfer of membership to [PRPF] . . . shall be made, together with a transfer of **all accumulated contributions** credited to such member. The board of administration of [CERS] . . . shall transmit to the board of trustees of the . . . [PRPF] system a record of service credited to such member **which shall be computed and credited to such member as a part of his period of employment in [PRPF]**

Id. (emphases added). As the Department succinctly put it (BR 6):

In practical terms, the effect of this provision was that police officers who had prior service in non-commissioned positions could have their service in such positions counted toward the service credit years used to determine their retirement allowance under the [PRPF].

2. Since CERS contributions were “then creditable” under PRPF, they must be included in LEOFF.

LEOFF limits contributions to “periods of employment for an employer as a . . . law enforcement officer,” and as relevant here,

“other periods of service . . . then creditable . . . under the provisions of RCW . . . 41.20.170”:

(i) For members retiring after May 21, 1971 who were employed under the coverage of a prior pension act before March 1, 1970, “service” shall also include (A) such military service not exceeding five years as was creditable to the member as of March 1, 1970, under the member's particular prior pension act, and (B) such other periods of service **as were then creditable** to a particular member under the provisions of RCW . . . 41.20.170. . . .

RCW 41.26.030(28)(a)(i)(B) (emphasis added). As discussed immediately above, the Department agrees that RCW 41.20.170 made all CERS contributions “then creditable” under PRPF. *Supra*, Argument § B 1. Thus, it is axiomatic that CERS contributions transferred into PRPF would transfer into LEOFF with the required PRPF membership transfer. BA 11-13. Any other conclusion would mean that LEOFF impermissibly reduced Officers’ accrued benefits. *Id.*

The Department does not address this – the only issue on appeal – until page 19 of its Response, arguing that the “then” in “then creditable” refers to March 1, 1970, the date LEOFF was adopted, not the date a member retires. BR 19-20. As explained in the opening brief, this argument is simply unreasonable. BA 11-12. It was not until 1973 that police officers could transfer CERS

contributions into PRPF. Laws of 1973, ch. 143 § 2. Thus, “periods of service as were then creditable . . . under . . . [RCW] 41.20.170” cannot refer to a period before the relevant portion of RCW 41.20.170 was adopted. BA 12. Rather, “then creditable” must refer to an Officer’s post-May 21, 1971 retirement. *Id.*

The Department relies on RCW 41.26.030(28)(a)(i), claiming that “[a]s with the military service in subsection (A) of this section, the other ‘then creditable’ periods of service in subsection (B) refers to service creditable under the prior pension acts *as of March 1, 1970.*” BR 20 (emphasis added). This argument ignores a crucial distinction between subsections (A) and (B): subsection (A) expressly includes only that military service “creditable to the member *as of March 1, 1970,*” but subsection (B) contains no such language. RCW 41.26.030(28)(a)(i). Thus, subsection (B) is not limited to services “creditable to the member as of March 1, 1970.” *Id.* Rather, it includes all service “[f]or members retiring after May 21, 1971 . . . then creditable to a particular member under . . . RCW 41.20.170.” *Id.*

When the Legislature intended to limit “then creditable” to services “creditable as of March 1, 1970,” it plainly did so. *Compare* BR 20 *with* RCW 41.20.170. This Court must presume

that the Legislature did not intend to so limit subsection (B). **State v. Anderson**, 151 Wn. App. 396, 404-05, 212 P.3d 591 (2009) (citing **State v. Delgado**, 148 Wn. 2d 723, 727, 63 P.3d 792 (2003)). Any other conclusion fails to harmonize subsections (A) and (B) and reads language into (B) or out of (A). **Olympic**, 163 Wn. App. at 306.

The Department's argument is also entirely inconsistent with its prior admission that the Legislature cannot reduce accumulated retirement benefits by enacting a new pension plan. BR 4. Again, it is uncontested that appellants' PRPF memberships included unsworn CERS contributions and that they had to transfer their PRPF memberships into LEOFF. *Supra*, Statement of the Case § A. The Department's refusal to count CERS contributions plainly reduces Officer-retirement contributions. Despite its admission that such a reduction is impermissible, the Department has no answer for this obvious wrong.

3. The department cannot simply point at the City – and deny that it is doing so.

Despite protesting that it has "never pointed at the City, 'simply' or otherwise," the Department repeats precisely the same arguments addressed in this section of the appellants' opening brief. **Compare** BA 13-14 **with** BR 25 n.27, 24-27. The

Department accuses the appellants of “trying to combine” favorable provisions of PRPF and LEOFF to avoid the 30-year cap in PRPF. BA 13; BR 24-27; CP 577. Again, the cap is irrelevant. BA 13. LEOFF does not have a cap, so it is irrelevant that PRPF had a cap, particularly where it is undisputed that all CERS contributions transferred into PRPF. Cap or no cap, the Department cannot square its position that LEOFF does not include CERS contributions transferred into PRPF with its position that LEOFF cannot reduce retirement benefits. *Compare* BR 4 *with* BR 24-27.

Indeed, if anything, it is the Department that is trying to “cherry pick” the best of both statutes. The Department is trying to enforce the PRPF cap under LEOFF, arguing that the CERS contributions don’t count under LEOFF because PRPF has a cap. There is no cap in LEOFF so these officers are entitled to have their PRPF contributions fairly credited, including their CERS contributions that are properly credited and counted as PRPF contributions. RCW 41.20.170.

Similarly, the Department’s rehash of LEOFF’s coordination-of-benefits provisions is unavailing. BA 14; BR 24-25. Again, the coordination of benefits statute, RCW 41.26.040, is irrelevant. No coordination of benefits is necessary here. BA 14.

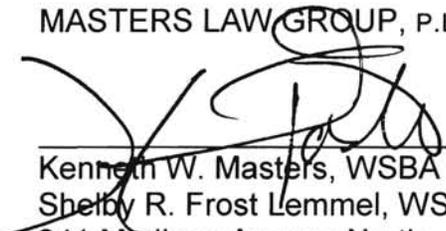
In sum, the only reasonable reading of RCW 41.20.170 is that since PRPF includes "all accumulated contributions," including CERS contributions for unsworn service, LEOFF also includes the unsworn contributions previously transferred into PRPF. BA 12-13. Any other reading impermissibly reduces accrued retirement benefits.

CONCLUSION

For the reasons stated, this Court should reverse, grant summary judgment to the Officers, and remand to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 19th day of July, 2012.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 19th day of July 2012, to the following counsel of record at the following addresses:

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