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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
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Ellen Hahn, Appellant

v.

Department of Retirement Systems of the State of Washington,
Respondent

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR TO THE DECISION OF THE
SUPERIOR COURT

1. The Superior Court erred in entering the order dated May 26, 2006 affirming the Department of Retirement System's (DRS) findings of fact and conclusions of law contained in its final order.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR TO
THE DECISION OF THE SUPERIOR COURT

1. Is Ms. Hahn entitled to 5.67 years of service credit in Plan I of the Teachers' Retirement System for her service as a faculty member at Highline Community College (HCC) from September of 1975 through August of 1981?
2. Were the findings of fact made by the DRS supported by substantial, competent evidence?
3. Should certain conclusions of law made by the DRS be overturned under the de novo standard of review.

ASSIGNMENTS OF ERROR TO THE DECISION OF THE DRS

1. Did the DRS err in denying Ms. Hahn's request for an additional 2.34 years of service credit in Plan I of the Teachers' Retirement System and in determining that she was entitled to only 3.33 years of service credit.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR OF
THE DECISION OF THE DRS

1. Was Ms. Hahn entitled to 5.67 years of service credit in Plan I of the Teachers' Retirement System because a full-time load for a faculty member in the Developmental Studies Department at Highline Community College was 660 contact hours on an annual basis?
2. Are findings of fact 8, 9, 12, 13, 14, 15, 24, 26, 29, 32, 33, 34, and 35 in the DRS' final order supported by substantial, competent evidence?
3. Should conclusions of law 18 - 35 of DRS' final order be overturned under the de novo standard of review.
4. Were conclusions of law 26 and 27 in DRS' final order arbitrary and capricious?

INTRODUCTION AND STATEMENT OF PROCEDURE BELOW

The issue in this appeal from a decision of the DRS is whether Ellen Hahn is entitled to 5.67 years of service credit in Plan 1 of the Teacher's Retirement System (TRS) for her service as an instructor at Highline Community College (HCC) for the period of September 1975 through August of 1981. In a final order dated April 22, 2005, the DRS determined that Ms. Hahn was entitled to 3.33 years of service credit.

The primary dispute between Ms. Hahn and the DRS is what constituted a full-time load for faculty members in the Developmental Studies Department at the College from 1975 through 1981. Years of service credit for faculty members is calculated under WAC 495-112-335 on the basis of the percentage of a full-time load worked by the faculty member.

The TRS consists of three plans. Under RCW 41.32.010(38) Plan 1 applies to teachers who established membership in the TRS prior to October 1, 1977. Ms. Hahn became a member of Plan 1 in April of 2003, retroactive to September of 1975.

A teacher's eligibility for retirement and the amount of his or her retirement allowance is dependent upon the service credit he or she has accrued in Plan 1 of the TRS. Under RCW 41.32.480,

teachers may retire if they have completed thirty years of service, if they had completed less than thirty years of service and are at least sixty years old, or if they have completed at least twenty-five years of service and are at least fifty-five years old. RCW 41.32.498 provides that a teacher's retirement allowance shall consist of, "A combined pension and annuity service retirement allowance which shall be equal to two percent of his or her average earnable compensation for his or her two highest compensated consecutive years of service times the total years of creditable service established with the retirement system...."

In December of 1998, certain named plaintiffs filed a class-action lawsuit against the State Board for Community and Technical Colleges and the DRS alleging that the defendants had failed to provide them with retirement benefits. (AR 262)¹. In an order dated January 31, 2000, Judge Steven Scott of the King County Superior Court ruled, among other things, that:

(1) WAC 415-112-335 contains the method of calculating the "equivalent" days and hours worked by part-time community and technical colleges for the purpose of

¹ Pages of the administrative record filed in this appeal will be referred to as AR _____. Although Ms. Hahn designated the administrative record in her Designation of Clerk's Papers, it was not included in the Index of Clerk's Papers. Ms. Hahn notified the Clerk and it was included in "Corrected Clerk's Papers," but the Clerk did not assign page numbers. Accordingly, pages of the administrative record will be referred to as AR instead of CP.

retirement benefits for the time period of at least 1977 to the present;

- (2) The Department of Retirement Systems enacted WAC 415-112-335 to clarify the existing law because colleges were misreporting the hours worked by part-time instructors by reporting to DRS only the part-time instructors' in-class teaching hours or "contact" hours. (AR 257).

In May of 2002 the parties entered into an agreement to settle the class action. Paragraph 60 of the agreement provides:

There are also Class Members who are members of TRS but who allegedly erroneously received no service credit for work since October of 1977. These Class Members have a right to now purchase additional service credit by paying the employee contribution that they would have had to pay on the dates they worked plus interest at the rate for the particular TRS Plan at the time of the Class Member's service.

Pursuant to paragraph 59 of the agreement, DRS was required to determine the class member's service credit under the provisions of WAC 415-112-335. (AR 277).

Ms. Hahn elected to transfer to Plan 1 of the TRS in April of 2003. (AR 197). In October of 2003, the DRS gave her 3.33 years of service credit for her service at HCC from 1975-1981. (AR 201-202).

On June 25, 2003, Ms. Hahn appealed the determination of the DRS to award her only 3.33 years of service credit. In a

decision dated April 20, 2004, the DRS affirmed its decision to award her 3.33 years of service credit. (AR 56-59). This decision was appealed by her on June 11, 2004. (AR 49). After a hearing before the Presiding Officer of the DRS, the Presiding Officer denied her request for the additional service credit in a Final Order dated April 22, 2005. (AR 1-21). This decision was appealed to superior court. (CP 24)².

The Superior Court held, among other things that: 1) All findings of fact in DRS' final order were based on substantial evidence; 2) Conclusion of Law No. 6 in DRS' final order was incorrect to the extent that the term "official school year" was equated with "fiscal year"; 3) All other conclusions of law in DRS' final order were correct; 4) DRS correctly applied WAC 415-112-335 in calculating Ms. Hahn's days of service for each month from September 1975 through August of 1981; and 5) DRS' final order was not arbitrary and capricious. (CP 65-69).

STATEMENT OF THE CASE

Ellen Hahn is currently employed as a reading teacher for the White River School District. She has been in that position for

² Pages of the Clerk's Papers will be referred to as CP ____.

over ten years. (AR 439). During the period of September of 1975 through August of 1981, she was employed as a reading teacher and basic skills teacher in the Developmental Studies Department at HCC. (AR 439-440).

Section 602.1 of faculty salary program and collective bargaining agreement for HCC for the period of 1981-83 provided that the faculty load for full time instructors employed by HCC in the Developmental Studies Department was 660-990 contact hours on an annual basis. (AR 373). During the hearing before the Presiding Officer, Ms. Hahn testified that for the period of September of 1975 to August of 1981, the full-time load for a faculty member in the Developmental Studies Department was about 660 contact hours per year. (AR 444). She also stated that if the full-time load for faculty members in the Developmental Studies Department had been 330 contact hours per quarter, the faculty member would have been required to teach between 7 and 8 classes per day. (AR 441-442).

Section 404.2 of the 1981-83 collective bargaining agreement defines a contact hour as, "The actual hours a part-time instructor meets with students in a classroom lecture or laboratory setting...." (AR 354). During the time Ms. Hahn was employed by

the College, it was also the practice of the College to define contact hours as the actual hours an instructor meets with students in a classroom lecture or laboratory setting. (AR 441).

When Ms. Hahn was employed in the Developmental Studies Department, the College had designated only one person as full-time. The employee designated as full-time taught only four classes per day, the same number of classes usually taught by Ms. Hahn. Therefore, the full time instructor in the Developmental Studies Department taught about 528 contact hours per year. (AR 442-445).

Exhibit 6, which was admitted at the hearing before the Presiding Officer, is a packet of Ms. Hahn's written contracts of employment for the period of September 1975 through the summer of 1981. (AR 150-177). Exhibit 30, also admitted at the hearing, is also a packet of Ms. Hahn's employment contracts for the same period. (AR 309-340). The contracts in Exhibit 6 have a figure written on every contract under the designation, "FTE-F". However, the contracts in Exhibit 30 do not always have a figure listed under the designation, "FTE-F". When Ms. Hahn received her employment contracts from the College, there were usually no

figures listed under the FTE-F designation. (AR 446-447). The FTE designation refers to full time equivalency. (AR 448).

Each contract in Exhibit 6 and 30 has a column that lists the lecture hours Ms. Hahn was required to teach in a particular quarter. The lecture hours listed were contact hours because those were the number of hours the class met. (AR 451). Some of the contracts also listed laboratory hours. The laboratory hours were also considered to be contact hours because those were the hours Ms. Hahn had contact with students in the reading lab. (AR 452).

During the time Ms. Hahn was employed by the College, no one ever told her she was eligible to become a member of the TRS. (AR 456).

Denise Kledzik is the payroll and benefits manager for the College. (AR 141). She began working at HCC in 1982 in a position as a teacher's aide. In 1985 she transferred to the Education Department to work as a temporary office assistant. In 1987, she became an office assistant in the personnel department. In 1990, she became a human resources assistant. (AR 141-142). She stated at the hearing before the Presiding Officer that she had no personnel knowledge of why there was a range of 660-990 for

instructors in the Developmental Studies Department as set forth in the 1981-83 collective bargaining agreement. (AR 630-631).

Exhibit 1, which was drafted by Ms. Kledzik, is a document that purports to represent the number of days worked by Ms. Hahn during the period of September of 1975 through August of 1981. (AR 131-133). In calculating the percentage figures under the column labeled FTE-F, Ms. Kledzik assumed that the full-time load during the period of 1975 through 1981 was 330 contact hours per quarter. (AR 634). She admitted that because she was not employed by the College from 1975 through 1981, she had no personal knowledge of what a full-time load was for a faculty member in the Developmental Studies Department. (AR 635). Further, she stated that she was not aware of how many contact hours a full-time faculty member worked in the Developmental Studies Department during the period of 1975-1981. (AR 636). Moreover, she made no effort to determine what a full-time load was for a faculty member in the Developmental Studies Department other than assuming that the information on Exhibit 8, admitted at the hearing over the objection of counsel for Ms. Hahn, was correct. (AR 636).

ARGUMENT

1. Pension legislation should be construed in favor of the beneficiaries.

In Chancellor v. Department of Retirement Systems, 103 Wn.App. 336, 342, 12 P.3d 164 (2000), the court held that, “we liberally construe pension legislation to favor beneficiaries.”

This principle of liberal construction is also set forth in RCW 41.50.005. That statute provides the following:

The legislature sets forth as retirement policy and intent:

- (1) The retirement systems of the state shall provide similar benefits whenever possible.
- (2) Persons hired into eligible positions shall accrue service credit for all service rendered.
- (3) The calculation of benefits shall be done in such a manner as to prevent the arithmetic lowering of benefits.
- (4) Liberalization of the granting of service credit shall not jeopardize part-time employment of retirees in ineligible positions.

In this case, the DRS failed to grant to Ms. Hahn service credit for all service rendered and failed to calculate her benefits in a manner to prevent the arithmetic lowering of her benefits.

Moreover, the DRS violated the principle of liberal construction and

the provisions of chapter 34.05 RCW by relying entirely on hearsay evidence and summarily dismissing Ms. Hahn's testimony.

2. Standard of Review.

In reviewing administrative action, the Court of Appeals sits in the same position as the Superior Court and applies the standards set forth in chapter 34.05 RCW directly to the record before the agency. Aponte v. State Department of Social and Health Services, 92 Wn.App. 604, 615, 965 P.2d 626 (1998) , review denied, 137 Wn.2d 1028, 980 P. 2d 1280 (1999).

RCW 34.05.570 provides, in part, the following:

- (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;
 - (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency;
or
 - (i) The order is arbitrary and capricious.

Under the error of law standard set forth in RCW 34.05.570(d), conclusions of law in an agency's final order are reviewed de novo. Stuewe v. State Department of Revenue, 98 Wn.App. 947, 949, 991 P.2d 634, *review denied* 141 W.2d 1015, 10 P.3d 1072 (2000). The de novo standard of review allows the court to substitute its judgment on legal issues for those of the administrative tribunal. St. Martin's College v. Department of Revenue, 68 Wn.App. 12, 841 P.2d 803 (1992).

Findings of fact are reviewed under the substantial evidence standard in RCW 34.05.570(e). The test for substantial evidence is whether there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings, 113 Wn.App. 615, 623, 53 P.2d 1011 (2002), *review denied*, 148 Wn.2d 1017, 64 P.3d 649 (2003).

An order is arbitrary and capricious if it is the result of willful and unreasoning action in disregard of the facts and circumstances. Bellevue Farm Owners Association v. State of Washington Shoreline Hearings Board, 100 Wn.App. 341, 363, 997 P.2d 380, *review denied*, 142 Wn.2d 1014, 16 P.3d 1265 (2000).

3. Ms. Hahn is entitled to 5.67 years of service credit in Plan 1 of the Teachers' Retirement System (TRS).

WAC 415-112-335 provides the following:

Most community and technical colleges employ academic employees under contracts expressed in terms of a certain number of contact hours, which are usually limited to actual time spent in the classroom. Most academic positions require more time to be spent providing services to the college than are reflected in the contact hours. However, actual hours worked are not submitted by the academic employees nor recorded by the college. This subsection adopts a method for estimating hours of work in order to determine membership eligibility and service credit in plan I and plan II. This estimate is to be used solely for that purpose. The estimate is not a representation by the department of actual hours worked and is not to be used as a basis for calculating other benefits or salary for technical college and community college academic employees.

- (1) Plan I. In order to estimate the number of days worked by a TRS I technical college or community college faculty academic employee for a particular month, the college will:
 - (a) Determine the number of working days in the month as defined by the college's adopted academic calendar;
 - (b) Determine the part-time workload for the employee. The part-time workload is the percentage of the part-time employee's weekly in-class teaching hours to the weekly in-class teaching hours required of a full-time instructor in the employee's discipline at the college; and
 - (c) Multiply the number of working days in the month by the academic employee's part-time workload. The resulting number is an estimate of days worked by the academic employee during the

month. The college will report this estimate to the department for the sole purpose of determining plan I service credit and/or membership eligibility.

- (2) Definitions. "In-class teaching hours" means contact classroom and lab hours in which full-time or part-time academic employees are performing contractually assigned teaching duties. The in-class teaching hours shall not include any duties performed in support of, or in addition to, those contractually assigned in-class teaching hours.

It is apparent from the terms of WAC 415-112-335 that an individual designated as a "part-time" faculty member by a community college is entitled to receive that portion of service credit that represents the percentage of the part-time employee's full-time workload. Once the percentage of a full-time load is determined, all that is required in order to determine service credit in a particular month is to multiply the workload percentage by the number of days in the month.

State statutes also provide that benefits for part-time faculty will be computed on the basis of the percentage of the part-time employee's full-time workload. RCW 28B.50.4891 provides the following:

For the purpose of determining eligibility for state-mandated insurance, retirement benefits under RCW 28B.10.400, and sick leave for part-time academic

employees in community and technical colleges, the following definitions shall be used:

- (1) "Full-time academic workload" means the number of in-class teaching hours that a full-time instructor must teach to fulfill his or her employment obligations in a given discipline in a given college. If full-time academic workload is defined in a contract adopted through the collective bargaining process, that definition shall prevail. If the full-time workload bargained in a contract includes more than in-class teaching hours, only that portion that is in-class teaching hours may be considered academic workload.
- (2) "In-class teaching hours" means contact classroom and lab hours in which full or part-time academic employees are performing contractually assigned teaching duties. The in-class teaching hours shall not include any duties performed in support of, or in addition to, those contractually assigned in-class teaching hours.
- (3) "Academic employee" in a community or technical college means any teacher, counselor, librarian, or department head who is employed by a college district, whether full or part-time, with the exception of the chief administrative officer of, and any administrator in, each college district.
- (4) "Part-time academic workload" means any percentage of a full-time academic workload for which the part-time academic employee is not paid on the full-time academic salary schedule.

RCW 28B.50.489 also provides the following:

For the purposes of determining eligibility for receipt of state-mandated benefits for part-time academic employees of community and technical colleges, each institution shall report to the appropriate agencies the names of eligible part-time academic employees who qualify for benefits based on calculating the hours worked by part-time academic employees as a percentage of the part-time academic

workload to the full-time academic workload in a given discipline in a given institution.

The only witness with personal knowledge regarding the full time load of a faculty member who testified at the hearing in this matter was Ellen Hahn. Denise Kledzik, who calculated Ms. Hahn's service credit, testified that she had no personal knowledge of why there was a range of 660-990 contact hours for full-time faculty in the Developmental Studies Department. She also admitted that because she was not employed by the College from 1975 through 1981, she had no personal knowledge of what a full-time load was for faculty members in the Developmental Studies Department during that period of time. She also stated she was not aware of how many contact hours a full-time faculty member worked in the Developmental Studies Department during the relevant period of time.

Ms. Hahn testified that the full-time load for faculty members working in the Developmental Studies Department from 1975-1981 was about 660 contact hours per year and that the only full-time instructor employed in the Developmental Studies Department worked 528 contact hours per year.

For the period of September of August of 1981, Ms. Hahn worked the following number of contact hours as set forth in her contracts of employment in Exhibits 6 and 30:

<u>1975-76</u>		<u>1978-79</u>	
Fall	264	Fall	92
Winter	176	Winter	176
Spring	132	Spring	132
Summer	<u>88</u>	Summer	<u>132</u>
	660		532
 <u>1976-77</u>		 <u>1979-80</u>	
Fall	220	Fall	220
Winter	176	Winter	220
Spring	180	Spring	185
Summer	<u>88</u>	Summer	<u>88</u>
	664		713
 <u>1977-78</u>		 <u>1980-81</u>	
Fall	132	Fall	220
Winter	132	Winter	220
Spring	88	Spring	176
Summer	<u>88</u>	Summer	<u>88</u>
	440		704

From the forgoing it is apparent that Ms. Hahn is entitled to a full year of service credit for the 1975-76, 1976-77, 1978-79, 1979-80, and 1980-81 years based on a full-time load of 660 contact hours per year. In each of those years, she worked over 660 contact hours per year except during the 1978-79 year. In that year, she worked 80% of a full time load (532 divided by 660 = 80%). Under RCW 41.32.240, "A teacher shall be considered as

employed full-time if serving regularly for four-fifths or more of a school day or if assigned to duties which are the equivalent of four-fifths or more of a full-time assignment.” Because Ms. Hahn worked 80% or four fifths of a full-time load in the 1978-79 year, she is entitled to one year of service credit for that year.

During the 1977-78 year, Ms. Hahn worked .67 of a full time load. Accordingly, she is entitled to .67 year of service credit for that year. Therefore, she is entitled to 5.67 years of service credit for her service from September of 1975 through August of 1981.

The Presiding Officer found that Ms. Kledzik correctly calculated the amount of service credit for the years in question. However, as stated previously, Ms. Kledzik admitted that she had no personal knowledge of what a full-time load was for faculty members in the Developmental Studies Department from 1975-1981. Moreover, she admitted that when she calculated Ms. Hahn’s service credit, she assumed a full-time load was 330 contact hours per quarter. This inflated full-time load resulted in a lower amount of service credit for Ms. Hahn.

In this case, rather than follow the explicit terms of RCW 41.50.005, the DRS approved a calculation of Ms. Hahn’s retirement benefits that resulted in the arithmetic lowering of her

benefits and prevented her from accruing service credit for all of her service rendered. Although the evidence supports a finding that a full-time load was 660 contact hours per year, the DRS chose to use the figure of 330 contact hours per quarter as the basis for the calculation it adopted, in violation of RCW 41.50.005.

4. Certain findings of fact made by the Presiding Officer in the final order are not supported by substantial, competent evidence.

It is apparent from the record in this case that certain findings of fact are not supported by substantial evidence.

In finding of fact number 8 of the Final Order (AR 3), it is stated that Ms. Hahn is a former “part-time” community college instructor. The issue in this case is whether Ms. Hahn worked part-time or full-time at HCC. This determination involves an application of the law, including WAC 451-112-335, to the facts. Accordingly, this finding of fact is actually a conclusion of law subject to de novo review by the court.

Ms. Hahn objects to finding of fact number 9 (AR 3-4) to the extent the DRS maintains that Ms. Hahn is entitled to only 3.33 years of service credit for her service at HCC. Moreover, because the amount of service credit Ms. Hahn is entitled to is a legal

conclusion involving the application of the facts to the law, this “finding of fact” is subject to de novo review.

In finding of fact number 12 (AR 4), it is stated that each quarter comprises 11 weeks of instruction. Although each quarter is usually 11 weeks long, the summer quarter consists of five, six, eight, ten or twelve week sessions. (AR 297-308).

The Presiding Officer states in finding of fact number 13 (AR 4) that the work load of full-time instructors is set forth in Exhibit 7. (AR 178-179). It is also stated in finding of fact number 14 (AR 5) that Exhibit 8 (AR 180-181) is a, “reference document for determining what constituted full-time faculty employment with HCC”. These documents were objected to on the grounds of authenticity and hearsay.

In Exhibit 7, it is stated that full-time High School Completion and Adult Basic Education instruction required 330 to 440 contact hours per quarter for a full-time assignment. (AR 178) Ms. Hahn, however, taught reading and basic skills. (AR 339-440). There is no evidence that Ms. Hahn taught high school completion or adult basic education. In Exhibit 8, it is stated that Developmental Studies requires contact hours of 330 per quarter for a full-time assignment. (AR 181). Ms. Hahn testified that during the time she

was employed in the Developmental Studies Department, a full time assignment required less than 660 contact hours on an annual basis. (AR 442-445).

RCW 34.05.461(4) provides the following:

Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

In the final order in this case, the Presiding Officer relies exclusively on Exhibits 7 and 8 in finding that Ms. Hahn did not work full time and is therefore entitled to only 3.33 years of service credit. However, because these documents are hearsay and would be inadmissible in a civil trial, the DRS violated the provisions of RCW 34.05.461(4).

Moreover, it has been held that agencies may not rely solely on documents that conflict with testimonial evidence in making findings of fact. In McDaniel v. Department of Social and Health

Services, 51 Wn.App. 893, 756 P.2d 143 (1988), Ms. McDaniel received various forms of aid based on a four-person household. The Department of Social and Health Services (DSHS) was subsequently made aware that Ms. McDaniel's ex-husband, Mr. McDaniel, was possibly residing at her home. DSHS then informed her by letter that her husband's presence made her ineligible for her receipt of benefits. Ms. McDaniel appealed this determination and an administrative hearing was held. At the hearing, DSHS sought to establish that Mr. McDaniel lived with his ex-wife solely by the use of documentary evidence. This evidence included; 1) evidence that Mr. McDaniel used his wife's address on credit applications and bank statements; 2) a statement of a postal carrier who observed a man at the residence and 3) summaries and findings of a quality control reviewer. Ms. McDaniel testified that Mr. McDaniel did not live in her home. The administrative law judge found that Mr. McDaniel lived with his family. The ALJ also entered a finding that Ms. McDaniel was not a credible witness and that her testimony was both unreliable and self serving. Accordingly, the ALJ found Ms. McDaniel had willfully and intentionally received an overpayment of public assistance funds.

In finding that the ALJ improperly relied exclusively on documentary evidence, the court held the following:

DSHS relied solely on documentation evidence in lieu of any direct testimony. We are not satisfied that DSHS has met its burden of proving Mr. McDaniel resided in the family home. Although RCW 34.04.100 permits the use of relevant hearsay in contested administrative cases, as concerns this hearing DSHS' repeated and sole use and reliance on double and triple hearsay requires us to remand for a 'second look'. At such proceedings, some testimonial evidence should be presented corroborating the investigative reports in order to avoid reliance solely on hearsay and conjecture.

In this case, the Presiding Officer relies solely on Exhibits 7 and 8 in finding that a full-time load for instructors in the Developmental Studies Department was 330 contact hours per quarter. Like the ALJ in *McDaniel*, the Presiding Office also dismissed Ms. Hahn's testimony as unreliable. Therefore, under the holding in *McDaniel*, even assuming for the purposes of argument that Exhibits 7 and 8 would be admissible in a civil trial, an agency should not rely solely on documentary evidence to decide a central issue in a case where testimonial evidence conflicts with the documentary evidence. Accordingly, it was improper for the Presiding Officer to rely solely on exhibits 7 and 8

in finding that Ms. Hahn was entitled to only 3.33 years of service credit for her service at HCC.

Even assuming for the purposes of argument only it was proper for the Presiding Officer to consider exhibit 7 and 8 in making her finding regarding a full-time load, Ms. Hahn testified that the actual practice in the Developmental Studies Department was for full time instructors to work 528 contact hours per year. This testimony was not rebutted by the DRS. Although there is no evidence that any full-time instructor ever worked 330 contact hours per quarter at any time in any department at HCC, the DRS uses this inflated figure to deny Ms. Hahn benefits, in violation of the statutory mandate of RCW 41.50.005. If a community college could draft a document and set an arbitrarily high figure as a full-time load, instructors would be denied the benefits due them, in violation of the statutory mandate. This is precisely what happened in this case.

For the above reasons, Ms. Hahn objects to findings of fact 13 and 14 because the findings rely only on exhibits 7 and 8 regarding a full-time load.

In finding of fact 15 (AR 5), the Presiding Officer states that HCC expected full-time instructors to work an average of 7 hours

per day or 35 hours per week but only 15 contact hours per week and that the 20 hour difference represented time for non-instructional duties such as student advising, office work and committee work. Assuming that a quarter is 11 weeks long, an instructor would have been required to work 165 contact hours per quarter, not 30 contact hours per week or 330 contact hours per eleven-week quarter.

In finding of fact number 24 (AR 8), the Presiding Officer again describes Ms. Hahn as a part-time instructor. Because this is a legal conclusion subject to de novo review and because Ms. Hahn was a full-time instructor during most of the time she worked at HCC, Ms. Hahn objects to this finding of fact.

With regard to finding of fact number 26 (AR 9), Ms. Hahn's hours are grouped by each academic year with the underlying assumption that an academic year begins in the summer quarter and ends in the spring quarter. However, Ms. Hahn's contracts of employment indicate otherwise. Exhibit 6 (AR 150-177) is a compilation of Ms. Hahn's contracts of employment with HCC. At the top right hand corner of each contract the quarters for each academic year are listed. This listing begins with the fall quarter and ends with the summer quarter. Therefore, it is apparent that

HCC had considered the school year to begin in the fall quarter. Eighty-eight lecture hours are also listed for the summer of 1979 in finding of fact number 26. Ms. Hahn actually had two contracts for this quarter; one for 44 lecture hours (AR 328) and one for 88 lecture hours (AR 167). Therefore, she was contracted for 132 lecture hours in the summer of 1979, not 88.

Ms. Hahn objects to finding of fact number 29 (AR 10) to the extent that the DRS relies on the FTE-F figures on her contracts to conclude that she was not a full-time employee because the FTE-F figures were not calculated on the basis of full-time load of 660 contact hours per year. Also, WAC 415-112-335 was enacted after Ms. Hahn worked at HCC. Therefore, none of the FTE-F figures were calculated under the provisions of that regulation. Further, as mentioned before, any determination of the percentage of a full-time load worked by Ms. Hahn would be a conclusion of law, subject to de novo review.

Ms. Hahn objects to finding of fact number 32 (AR 10) for the same reasons that she objects to finding of fact number 29. Additionally, there is no evidence in support of the assertion in this finding that Ms. Kledzik worked with Mary Anderson. Also, Ms. Kledzik did not become involved with contract writing until 1990.

(AR 566). Therefore, she has no personal knowledge of what the FTE-F figures on Ms. Hahn's contracts represented.

Objection is taken to finding of fact number 33 (AR 11) to the extent that the DRS asserts that the proper figure to use in calculating a full-time load was 330 contact hours per quarter. As previously mentioned, this figure was based on hearsay evidence and contradicted Ms. Hahn's testimony regarding the actual load of instructors designated as full-time in the Developmental Studies Department.

Ms. Hahn objects to finding of fact number 34 and 35 (AR 11) for the same reasons as set forth above. Additionally, finding of fact 35 contains a statement of the amount of service credit Ms. Hahn earned from 1975 until 1981. Because this calculation involves a legal conclusion, the application of the facts to the terms of WAC 415-112-335, it is subject to de novo review.

5. Some of the conclusions of law of the Presiding Officer should be overturned under the de novo standard of review.

In conclusion of law number 6 (AR 13), it is stated that in RCW 41.32.270, fiscal year and school year mean the same thing. The Superior Court held, however, that the "official school year" and "fiscal year" are not the same. (CP 65-69). Therefore, the

official school year does not necessarily coincide with the fiscal year as stated in this conclusion of law. As stated previously, the quarters on the upper right hand corner of each contract of employment began with the fall quarter and ended with the summer. Accordingly, for the purposes of issuing contracts of employment and grouping quarters into a school year, the school year began in the fall quarter and ended in the summer quarter. Therefore, it was proper, for the purposes of determining the number of contact hours Ms. Hahn worked in a school year, to calculate the hours based on the year beginning in the fall quarter and ending in the summer quarter.

In conclusion of law number 18 (AR 16), it is stated that it is Ms. Hahn's position that a full-time load is 220 contact hours per quarter. It has been her position that a full-time load is 660 contact hours per year. In section 602.1 of the 1981-83 collective bargaining agreement, it is stated that the contact hour range of 660-990 per year for the Developmental Studies Department is the load expected of full-time instructors "on an annual basis". (AR 373). Ms. Hahn also testified that the full-time load was closer to 660 contact hours on an annual basis. (AR 440-444).

In conclusion of law 19, it is stated that the DRS relies on the 1975-77 guidelines maintained in the office of the Dean of Instruction in determining the in-class teaching hours required of full-time instructors in the Developmental Studies Department. (Exhibit 7 and 8). The DRS then dismisses Ms. Hahn's testimony because she relies on her own memory of circumstances in the Developmental Studies Department. Ms. Hahn was a full-time instructor at the college for over five years. It is not plausible to assume that an individual cannot remember something that happened for a period of five years. Further, for the reasons set forth above, the evidence the DRS cites in support of its position is unreliable. Moreover, the DRS offered no evidence to dispute Ms. Hahn's testimony that the only instructor designated as "full-time" in the Developmental Studies Department had a full time load of 528 contact hours per year.

In conclusion of law number 20 (AR 16-17), it is stated that the estimate information produced by the community college will withstand challenge unless, "there is a convincing showing" it is incorrect. The Presiding Officer here suggests that the burden of proof for an appellant in a proceeding before the DRS is "clear and convincing". However, the DRS' own regulation states that the

appellant only has the “burden of proof”. WAC 415-08-420(2). In this case, Ms. Hahn has satisfied her burden of proof for the reasons set forth in the preceding paragraph. It is also stated in this conclusion that the appellant has the burden of showing error such as proof that the college used unsupportable underlying data. Ms. Hahn has shown that the unsupportable data used by the college in determining a full-time load was the hearsay contained in exhibits 7 and 8. In spite of the fact that the only testimonial evidence concerning a full-time load was provided by Ms. Hahn, the DRS adopted the guidelines contained in exhibits 7 and 8. Further, the data in exhibits 7 and 8 cannot be verified. The evidence shows that during the time Ms. Hahn worked at HCC, the college never required instructors designated as full-time to work 330 contact hours per quarter.

Ms. Hahn disputes and objects to the statements made in conclusion of law number 21 (AR 17) for the same reasons as set forth above.

Ms. Hahn also objects to conclusion of law 22 (AR 17) for the above stated reasons. The DRS relies entirely on hearsay and documentary evidence in support of its conclusion that 330 contact hours was a full-time load. Under RCW 41.50.005 and cases

interpreting retirement statutes, it is clear that pension legislation is to be liberally construed in favor of beneficiaries and all doubts should be resolved in favor of beneficiaries. It is stated in conclusion of law number 19 that, "The evidence is less than conclusive regarding what were the in-class teaching hours required of a full-time instructor in the Developmental Studies Department during the years at issue." The DRS then goes on to hold that all doubts should be resolved against Ms. Hahn.

RCW 28B.50.4891 provides the following:

For the purposes of determining eligibility for receipt of state-mandated benefits for part-time academic employees at community and technical colleges, each institution shall report to the appropriate agencies the names of eligible part-time academic employees who qualify for benefits based on calculating the hours worked by part-time academic employees as a percentage of the part-time academic workload to the full-time academic workload in a given discipline in a given institution.

RCW 28B.50.4891 does not give colleges the prerogative to deny full benefits to academic employees designated as part time by arbitrarily declaring a full-time load to be in excess of the practice actually followed at the college. Although the DRS relies exclusively on exhibits 7 and 8 in determining what a full-time load

was, there was no evidence that the college ever followed the “guidelines” stated in those exhibits.

It is also stated in conclusion of law 22 that:

Exhibit 7, states in its Special Considerations and Exceptions at paragraphs e., f. and i. that High School Completion requires contact hours of 330 per quarter for each FTE-F, Adult Basic Education requires 440 contact hours per quarter for each FTE-F, and for learning laboratory assignments, 30 hours per week (for 11 weeks, this is 330 hours) constitutes “the scheduled assignment”.

First, there is no evidence in the record that Ms. Hahn ever taught high school completion courses, adult basic education or was involved in learning laboratory assignments. She did testify that she taught reading and basic skills and that she worked in the Developmental Studies Department. (AR 440). Exhibit 7 provides that the contact hour range for reading courses is 15-18 hours. Assuming an 11 week quarter, this amounts to 495-594 contact hours per year.

Ms. Hahn objects to conclusion of law 23 (AR 17) for the same reasons that have been stated. It is also stated in conclusion of law 23 that, “The HCC 1975 and 1977 guidelines specified that all DSD teaching hours have the same value, for FTE purposes, as laboratory hours....” However, exhibit 7 does not contain any

guidelines for the contact hours of instructors working in the Developmental Studies Department.

Objection is taken to conclusion of law number 24 and 25 for the reasons stated previously. (AR 17-18).

Ms. Hahn also objects to conclusion of law number 26 (AR 18). In this conclusion, the Presiding Officer makes the circular argument that because a full-time load in the Developmental Studies Department was 330 hours per quarter, Ms. Hahn offered no evidence to explain why the only instructor designated as full-time taught less than a full-time load. However, Ms. Hahn testified that the instructors designated as “full-time” never taught 330 hours per quarter.

In conclusion of law number 28 (AR 19), it is stated that the estimates of the hours worked by a “part-time” instructor made by a college should not be overturned unless there is a “convincing showing of error”. First, as stated previously, the burden of proof in the appeal before the DRS was not clear and convincing. Secondly, Ms. Hahn has shown it was never the practice of HCC to require full-time instructors to work 330 contact hours per quarter.

Objection is also taken to conclusions of law 29-35 as well as the Order on page 21 of the Final Order for the reasons stated in this brief. (AR 19-21).

6. The conclusions of law set forth in conclusion of law 26 and 27 were not based on the evidence and were arbitrary and capricious.

In conclusion of laws 26 and 27 (AR 18), the DRS states that the Developmental Studies Department head worked less than the 330 contact-hour-per-quarter load because the College was exercising discretion with regard to the assignment for a faculty member that was designated “full-time”. This conclusion is based entirely on speculation, without support in the record. Under RCW 34.05.570(3)(i), an agency order can be overturned if it is arbitrary and capricious. An agency acts arbitrarily and capriciously when its conduct constitutes willful and unreasoning action in disregard of the facts and circumstances. Skold v. Johnson, 29 Wn.App. 541, 556, 630 P.2d 456, *review denied*, 96 Wn.2d 1003 (1981). In conclusions of law 26 and 27, the DRS, in finding that there must have been some other reason for the full-time instructor to work less than 330 contact hours per quarter, has acted arbitrary and capriciously, in disregard of the evidence. The un rebutted evidence shows that the full-time instructor worked at the lower end of the

660-990 hour range. There is no evidence in the record in support of DRS' conclusion that this was so because the college was exercising its discretion in the assignment of hours. DRS also ignores the undisputed evidence in this case regarding the fact that no one in the Developmental Studies Department ever worked 330 contact hours per quarter during the time Ms. Hahn worked at HCC. Accordingly, the DRS' findings and conclusions in paragraphs 26 and 27 are in disregard of the facts and circumstances and arbitrary and capricious.

CONCLUSION

For the reasons set forth in this brief, Ms. Hahn should be granted 5.67 years of service credit in Plan I of the TRS for her service at the College for the period of September 1975 through August of 1981.

DATED this 10th day of August, 2006.

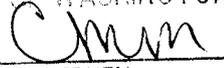


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Brief of Appellant in the above captioned matter upon the persons named below, or his/her authorized agent, by personal service, of ABC/Legal Messenger Service:

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DATED in Federal Way, Washington, this 9th day of August, 2006.



JENIFER PETERSEN