

NO. 35402-1- II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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DONALD E. HOBSON,

Appellant

v.

DEPARTMENT OF RETIREMENT SYSTEMS,  
STATE OF WASHINGTON,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
OCT 7 11 12 AM '12  
BY [Signature]

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**BRIEF OF RESPONDENT**

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 **ORIGINAL**

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**Appendix**

APPENDIX A.....Department's Final Order  
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## I. PRELIMINARY STATEMENT<sup>1</sup>

Donald E. Hobson (Mr. Hobson) seeks judicial review pursuant to RCW 34.05, the Administrative Procedure Act (APA), of the Final Order<sup>2</sup> of the Department of Retirement Systems (Department) denying his request for a duty disability retirement benefit from the Public Employees' Retirement System Plan 1.<sup>3</sup>

## II. COUNTER STATEMENT OF ISSUES

The issues in this case are:

1. Should the Department's Final Order be affirmed?
2. Did the Department's Final Order reach the correct legal conclusion that Mr. Hobson was not entitled to a PERS 1 duty disability retirement benefit because he was not totally incapacitated for his employment?
3. Did the Department's Final Order reach the correct legal conclusion that Mr. Hobson was not entitled to a PERS 1 duty disability retirement benefit because he was not totally incapacitated for any other employment for which he is qualified?

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<sup>1</sup> Throughout this brief, the following conventions will be used: "CP" refers to the clerks papers filed by the superior court, "AR" refers to the administrative record filed with this Court; "FOF 2" is Finding of Fact No. 2 in the Department's Final Order; and "COL 3" is Conclusion of Law No. 3 in the Department's Final Order.

<sup>2</sup> AR 001-033 (CP 009-041). For convenience, a copy of the Department's Final Order has also been attached to this brief at Appendix A.

<sup>3</sup> Public Employees' Retirement System Plan 1 will be referred to as "PERS 1" throughout this brief. Members of the Public Employees' Retirement System are typically employed by the state or by a county, city, town, public utility district or local government entity. PERS 1 is for employees who established membership before October 1, 1977.

### III. STANDARD OF REVIEW

Judicial review of a Final Order by the Department is governed by the Washington Administrative Procedure Act (APA), RCW 34.05. Under the APA the burden of proving the agency's action is invalid is on the party asserting the invalidity, so Mr. Hobson has the burden of demonstrating that the Department's Final Order is invalid.<sup>4</sup>

Review conducted by the Court of Appeals is limited to the administrative record.<sup>5</sup> Specifically, review of administrative decisions is done on the record of the administrative tribunal itself, not of the superior court.<sup>6</sup>

Mr. Hobson does not assign error to any specific Finding of Fact in the Department's Final Order. The sole assignment of error is to the Superior Court decision below.<sup>7</sup> Failure to assign error to an administrative agency's findings makes them verities on appeal.<sup>8</sup> Therefore, the Findings of Fact in the Department's Final Order should be accepted as verities.<sup>9</sup> Administrative tribunals have the discretion to evaluate the evidence presented; this evaluation will not be reconsidered

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<sup>4</sup> RCW 34.05.570(1)(a).

<sup>5</sup> *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 323, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983).

<sup>6</sup> *Id.* at 323-24.

<sup>7</sup> See Appellant's brief, p. 1, Section A.

<sup>8</sup> RAP 10.3(g) and RAP 10.4(c); *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

<sup>9</sup> See RAP 10.3(g) and RAP 10.4(c); See *Fuller v. Employment Sec. Dept. of State of Wash.*, 52 Wn. App. 603, 605-06, 762 P.2d 367 (1988).

on appeal.<sup>10</sup> Credibility determinations are for the trier of fact, not the appellate court, and they will not be reversed on appeal.<sup>11</sup> Thus, the Court should limit any review of the facts to determining whether the facts, as found by the Presiding Officer in the Department's Final Order, support the Conclusions of Law.<sup>12</sup>

This appeal presents a question of law. The Department's conclusions of law are reviewed de novo by this court.<sup>13</sup> However, "where an agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review."<sup>14</sup>

As set forth below, the Department did not make an error of law. The Department's Final Order should be affirmed.

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<sup>10</sup> *Inland Empire Distribution Systems, Inc. v. Utilities & Transp. Com'n*, 112 Wn.2d 278, 286, 770 P.2d 624 (1989).

<sup>11</sup> *Russell v. Department of Human Rights*, 70 Wn. App. 408, 421, 854 P.2d 1087 (1993).

<sup>12</sup> *Fuller*, 52 Wn. App. at 606.

<sup>13</sup> *Franklin Cy. Sheriffs' Office*, 97 Wn.2d at 325.

<sup>14</sup> *Id.*; See also *Renton Educ. Ass'n v. Public Employment Relations Com'n*, 101 Wn.2d 435, 443, 680 P.2d 40 (1984); See also *Grabicki v. Department of Retirement Systems*, 81 Wn. App. 745, 752, 916 P.2d 452 (1996). (Department's interpretation entitled to considerable weight).

#### IV. COUNTER-STATEMENT OF THE CASE

Duty disability retirement cases are intensely fact-driven. Mr. Hobson has not challenged the facts in this case.<sup>15</sup> The following are the uncontested facts from the Final Order and are supported by substantial evidence in the record.

##### A. Employment/Educational/Injury History

Donald E. Hobson is a member of the Public Employees' Retirement System (PERS), whose most recent PERS-covered employment began in August 1995, when the Child Study and Treatment Center (CSTC) hired him as a Psychiatric Child Care Counselor.<sup>16</sup> On April 21, 2000, Mr. Hobson became involved in an altercation with one of the students at CSTC, was injured, and has not returned to work since that date.<sup>17</sup>

Prior to being hired by CSTC in 1995, Mr. Hobson held positions as a counselor, an ambulance driver/emergency medical technician, and a fuel systems operator.<sup>18</sup> He was also employed by the U.S Department of the Navy at its shipyard in Bremerton, Washington from 1978 until 1987, when he was injured at work.<sup>19</sup> His injuries from his Navy employment

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<sup>15</sup> See Appellant's brief, p. 1, Section A.

<sup>16</sup> AR 002 (FOF 1).

<sup>17</sup> AR 002 (FOF 2).

<sup>18</sup> AR 002-003 (FOF 5, 6, 8).

<sup>19</sup> AR 003 (FOF 9).

required spinal surgery and two surgeries on one of his knees.<sup>20</sup> He received time loss compensation and coverage of his medical treatment through the Washington Department of Labor and Industries (L&I), the entity that administers worker's compensation in Washington State.<sup>21</sup> Mr. Hobson accepted a disability retirement from the Navy in 1990.

Mr. Hobson went on to earn an Associate of Arts degree in Social Services from Olympic Community College in 1992 and a Bachelor of Arts (B.A.) degree in Law and Justice, with a minor in Psychology, from Central Washington University in June 1995.<sup>22</sup> He began his work at the CSTC, a few months after receiving his B.A., in 1995.

In 1997, Mr. Hobson was promoted to a Psychiatric Child Care Counselor 3, a supervisor, where he supervised a team of 16-18 interdisciplinary staff members.<sup>23</sup> Mr. Hobson was employed at this position when, on April 21, 2000, he was called to assist CSTC staff with restraining a student and was injured in doing so.<sup>24</sup>

During this effort to restrain the student, an object was thrown at Mr. Hobson, breaking one of his teeth, and he was thrown "sideways" causing sprains to his neck, right shoulder, low back, right leg, and

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<sup>20</sup> *Id.*

<sup>21</sup> AR 003 (FOF 9).

<sup>22</sup> AR 003 (FOF 10).

<sup>23</sup> AR 004 (FOF 13).

<sup>24</sup> AR 004 (FOF 13, 18).

buttock.<sup>25</sup> This incident aggravated previous injuries to his neck, low back, left knee and caused new injuries to his tooth and right arm.<sup>26</sup> Dr. Stump, a neurologist and Mr. Hobson's physician since 1987, had Mr. Hobson undergo an MRI on May 11, 2000. Dr. Stump reported to L&I that he had been unable to detect increased abnormalities in Mr. Hobson's neck and back but noted that the incident in April 2000 had aggravated existing abnormalities and increased Mr. Hobson's "symptomatology."<sup>27</sup> As a result of his injuries, Mr. Hobson had surgery on his right shoulder and left knee.<sup>28</sup> As of February 21, 2001, Dr. Stump reported that the medical condition of Mr. Hobson's neck and back was stable, with no further planned treatment.<sup>29</sup>

**B. Worker's Compensation Claim, Medical Evaluations And Vocational Evaluations**

Mr. Hobson filed a claim for Worker's Compensation benefits with the Department of Labor and Industries (L&I) after the April 2000 injury incident.<sup>30</sup> Mr. Hobson received benefits through L&I, as he has for on-the-job injuries in the past.<sup>31</sup>

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<sup>25</sup> AR 004 (FOF 18).

<sup>26</sup> AR 005 (FOF 20).

<sup>27</sup> AR 004, 005 (FOF 14, 20).

<sup>28</sup> AR 005 (FOF 21, 24).

<sup>29</sup> AR 005 (FOF 23).

<sup>30</sup> AR 004, 005 (FOF 19).

<sup>31</sup> *Id.*

On August 24, 2000, Dr. Stump responded to L&I inquiries regarding Mr. Hobson by stating that Mr. Hobson would be able to work in a light-duty position with some limitations (no long commute to work and no physical “take-down” involvement).<sup>32</sup> Additionally, as of January 12, 2001, Dr. Stump noted in Mr. Hobson’s medical chart that Mr. Hobson is “fixed and stable from a neurological standpoint and he is capable of returning to work at this point but will require restrictions.”<sup>33</sup> Further, as of July 21, 2001, Dr. Stump continued to report Mr. Hobson’s neurological condition as fixed and stable.<sup>34</sup>

L&I sent Mr. Hobson to two Independent Medical Examinations (IME), one on August 7, 2001, with two doctors at Corvel IME Services, and a second on June 4, 2002, with two doctors at Objective Medical Assessments Corporation (OMAC), to determine whether his injuries were fixed and stable, permanent and if so, whether he had any disability that would be an impediment to his returning to work.<sup>35</sup> In addition, L&I referred Mr. Hobson to a Vocational Rehabilitation Counselor (Vocational

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<sup>32</sup> AR 006 (FOF 28).

<sup>33</sup> AR 007 (FOF 29).

<sup>34</sup> AR 006 (FOF 27).

<sup>35</sup> AR 015-020 (FOF 45, 59); AR 340-357 (Exhibit 14); and AR 392-407 (Exhibit 32).

Counselor), Bruce Johnson of Concentra Managed Care Inc. (CMC), to assess his ability to return to work.<sup>36</sup>

The August 7, 2001, IME found that Mr. Hobson was fixed and stable, that he did not need any further curative treatment, and that he had some permanent partial disability which the medical panel rated.<sup>37</sup> The August 7, 2001, IME also determined that Mr. Hobson should be permanently restricted from being exposed to further assault.<sup>38</sup> However, the IME doctors found Mr. Hobson capable of light duty work at that time.<sup>39</sup> The physicians involved with Mr. Hobson's care (Dr. Van Buecken, Dr. Ciani and Dr. Stump, Mr. Hobson's attending physician) concurred with the findings of the August 7, 2001, IME.<sup>40</sup>

CSTC agreed to a modified job analysis for Mr. Hobson's position. That modified job analysis included the specification that "employer stated that the job has been modified so as not required or permitted the worker to participate in physical interventions, containment, transporting

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<sup>36</sup> AR 008 (FOF 30); AR 819-823.

<sup>37</sup> AR 015, 016 (FOF 45) – Part of the L&I process involves an applicant's impairments being "rated." For example, "the right shoulder has eight percent permanent partial disability due to loss of motion and residual weakness . . . he has no ratable impairment regarding aggravating injury to left knee . . ." This "rating" of the impairment is only for L&I benefits, it is not used by the Department of Retirement Systems.

<sup>38</sup> AR 016 (FOF 46).

<sup>39</sup> AR 016 (FOF 45); AR 340-357 (Exhibit 14).

<sup>40</sup> AR 016 (FOF 47); AR 360 (Exhibit 16); AR 361 (Exhibit 17); and AR 362 (Exhibit 18).

or restraining of patients (emphasis added).”<sup>41</sup> On July 27, 2001, Dr. Stump checked the box signifying that Mr. Hobson could perform all the modified job functions of his Counselor’s position, except Mr. Hobson could not “monitor the children’s lunch time, participate in counseling, supervise play and daily activities and only verbally intervene when necessary.”<sup>42</sup> Dr. Stump offered no explanation, medical or otherwise, for this restriction even though it satisfied his previous limitation of no physical “take-down involvement.”<sup>43</sup> Because of Dr. Stump’s restriction, DSHS determined that it had no work options for Mr. Hobson at CSTC.<sup>44</sup>

DSHS then referred Mr. Hobson to the Return to Work Program offered by the Department of Personnel.<sup>45</sup> Mr. Hobson initially participated in this program and was found to have many transferable skills, especially in the areas of training, supervision and management.<sup>46</sup> However, Mr. Hobson, who lives in Kitsap County, refused to drive to Lacey, Washington, to participate in testing sessions offered by the Department of Personnel.<sup>47</sup> These tests are for the purpose of qualifying

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<sup>41</sup> AR 012 (FOF 43).

<sup>42</sup> AR 015 (FOF 44); AR 302-303 (Exhibit 5); AR 304-305 (Exhibit 6); AR 330-336 (Exhibit 12); AR 826-831.

<sup>43</sup> AR 006 (FOF 28).

<sup>44</sup> AR 016 (FOF 49); AR 358-359 (Exhibit 15); AR 363-364 (Exhibit 19); AR 379-380 (Exhibit 28); AR 831-832.

<sup>45</sup> AR 017 (FOF 51).

<sup>46</sup> AR 017 (FOF 51); AR 370-371 (Exhibit 23); AR 372 (Exhibit 24); AR 833-834.

<sup>47</sup> AR 018 (FOF 56).

job applicants for hiring registers from which jobs in state government are filled.<sup>48</sup>

Meanwhile, Mr. Hobson's Vocational Counselor, Bruce Johnson, performed a Transferable Skills Analysis that was based on Mr. Hobson's physical limitations, his education, work experience and the labor market of the area in which Mr. Hobson lived. Mr. Johnson presented several Job Analyses to Dr. Stump for his medical opinion, however, Dr. Stump disapproved those Job Analyses.<sup>49</sup> Dr. Stump provided absolutely no objective medical findings for his disapprovals.<sup>50</sup>

Mr. Johnson also scheduled a Physical Capacity Evaluation (PCE) for Mr. Hobson to determine what he could or could not do by way of physical activities in any kind of employment. This action was thought to be helpful because Dr. Stump had previously stated that Mr. Hobson could participate in a PCE.<sup>51</sup> However, Mr. Hobson did not keep the appointment for the PCE.<sup>52</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> AR 017, 018 (FOF 52, 55); AR 367-368 (Exhibit 21); AR 373-378 (Exhibit 27); AR 383-390 (Exhibit 30); AR 411-423 (Exhibit 34); AR 834-840.

<sup>50</sup> AR 016, 017, 018 (FOF 50, 52, 55); AR 367-368 (Exhibit 21); AR 373-378 (Exhibit 27); AR 383-390 (Exhibit 30); AR 411-423 (Exhibit 34); AR 834-840.

<sup>51</sup> AR 018 (FOF 55); AR 847-851.

<sup>52</sup> AR 019 (FOF 58); AR 337-339 (Exhibit 13); AR 408-410 (Exhibit 33); AR 726-727.

In March 2002, Mr. Hobson applied to the Department for a PERS Plan I duty disability retirement from PERS Plan 1.<sup>53</sup> A portion of the application for that benefit required Dr. Stump to state whether or not Mr. Hobson was totally incapacitated for further duty. Dr. Stump stated that Mr. Hobson was capable of working with restrictions.<sup>54</sup> It was only after DRS denied Mr. Hobson a duty disability retirement that Dr. Stump, on May 14, 2002, wrote a letter to the Department, at Mr. Hobson's request, stating that Mr. Hobson was totally incapacitated for further duty.<sup>55</sup>

Mr. Johnson, the Vocational Counselor, recommended that Vocational Services be canceled due to Mr. Hobson's non-cooperation/non-participation, not because he thought that Mr. Hobson would not benefit from them.<sup>56</sup> It is his professional opinion that Mr. Hobson's skills and experience qualify him for a wide range of jobs, and that there are jobs available in Mr. Hobson's labor market for which his skills would qualify him, and which either are within the medical restrictions on physical activity or could be modified to fit within them.<sup>57</sup>

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<sup>53</sup> AR 728.

<sup>54</sup> AR 018 (FOF 54); AR 728.

<sup>55</sup> AR 018-019 (FOF 57); AR 391 (Exhibit 31).

<sup>56</sup> AR 020 (FOF 61); AR 411-423 (Exhibit 34); AR 851-853.

<sup>57</sup> AR 020 (FOF 61).

On June 4, 2002, the second L&I IME took place at Objective Medical Assessments Corporation (OMAC) with a neurologist and orthopedist. The IME again found that Mr. Hobson was fixed and stable, that no further curative treatment was necessary, that there was some partial permanent disability but that Mr. Hobson was capable of gainful employment without restrictions.<sup>58</sup> The IME also stated with regard to that employability assessment: “however, due to his significant pain behavior and recurrent injuries, we would concur with prior assessments that sedentary to light duty work logistically would be the best option.”<sup>59</sup> At that time, the evaluating doctors at OMAC reviewed and approved job analyses for Financial Aid Counselor, General Clerk, and Family Support Assistant, with allowances for frequent changes of physical position and avoidance of repetitive bending and stooping.<sup>60</sup>

On June 11, 2003, Mr. Hobson, distrustful of the medical examination arrangements being made by L&I, arranged for his own Physical Capacity Evaluation (PCE), which was performed by Ann L. Armstrong, a Physical Therapist with Armstrong Physical Therapy, who performs PCE’s as an approved provider for L&I.<sup>61</sup> During this PCE, Ms. Armstrong relied on Mr. Hobson’s self-reporting that he was in pain or

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<sup>58</sup> AR 019-020 (FOF 59).

<sup>59</sup> AR 019-020 (FOF 59); AR 401 (Exhibit 32).

<sup>60</sup> AR 020 (FOF 59).

<sup>61</sup> AR 020 (FOF 62); AR 426-428 (Exhibit 36); AR 727-728.

unable to continue when she made determinations as to where to stop a particular task being tested.<sup>62</sup> Ms. Armstrong reported that Mr. Hobson couldn't work an eight-hour day, and that it would be difficult for him to return to work in any capacity.<sup>63</sup>

In July 2002, L&I again contracted with CMC requesting labor market surveys be completed.<sup>64</sup> Those surveys determined that Mr. Hobson was employable as a General Clerk.<sup>65</sup> That determination was based on Mr. Hobson's transferable skills, was consistent with the physical restrictions as determined by the June 4, 2002 IME, and the fact that there was a positive labor market for a General Clerk in Kitsap County, where Mr. Hobson resides.<sup>66</sup>

For purposes of Mr. Hobson's L&I claim, L&I would not consider positions offering less than full-time work because L&I's rule is that the employment must fit Mr. Hobson's work pattern at the time of injury, which was full-time employment.<sup>67</sup> Further, the Social Security Administration (SSA) determined that Mr. Hobson had met the medical requirements for disability benefits based on a report dated May 14, 2002,

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<sup>62</sup> AR 021 (FOF 62).

<sup>63</sup> AR 021 (FOF 63).

<sup>64</sup> AR 022 (FOF 66).

<sup>65</sup> *Id.*

<sup>66</sup> This fact is found in FOF 66 (AR 022), which is supported in the record at AR 429-445 (Exhibit 37), AR 856-859 (Testimony), and AR 897-900.

<sup>67</sup> AR 022 (FOF 66); *See also* AR 863-864 (Cross-examination of Department's witness in which L&I standard is discussed).

from Dr. Stump, and a report dated June 27, 2002, from Ann Armstrong, the PCE provider arranged by Mr. Hobson.<sup>68</sup> Both L&I and SSA have different standards for disability than does PERS 1 duty disability retirement.

After the administrative hearing on PERS 1 duty disability benefits in August 2003, L&I continued to process Mr. Hobson's claim.<sup>69</sup> L&I contracted with Whittall Management Group Ltd. for an Ability to Work Assessment.<sup>70</sup> Jennifer Kabacy coordinated the response and recommendation to L&I. Ms. Kabacy identified four jobs Mr. Hobson would be able to perform.<sup>71</sup> Further, in response to the new medical questionnaire that Ms. Kabacy's sent him, Dr. Stump responded with a Physician's Estimate of Physical Capacities indicating that Mr. Hobson could sit, stand and walk up to four hours in an eight hour day.<sup>72</sup>

Ms. Kabacy also ordered a PCE from Capen and Associates and forwarded the four job analyses she had produced.<sup>73</sup> Christina Casady, an occupational therapist, performed the PCE on December 5, 2003, and determined, presumably per L&I standards, that Mr. Hobson was unable to perform any of the four jobs on a reasonably continuous basis, meaning,

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<sup>68</sup> AR 023 (FOF 67).

<sup>69</sup> AR 024 (FOF 74).

<sup>70</sup> *Id.*

<sup>71</sup> AR 024 (FOF 75).

<sup>72</sup> AR 024 (FOF 77).

<sup>73</sup> AR 024 (FOF 78).

an eight-hour day or a forty-hour week.<sup>74</sup> Her report was based only on her observations, and Mr. Hobson's self-reporting.<sup>75</sup> Dr. Stump reviewed this PCE and concurred with Ms. Casady's estimate that Mr. Hobson retained the capacity for sedentary-level work activities up to six and one-half hours per day, but could not maintain full-time employment because of his physical limitations.<sup>76</sup> Six and one-half hours per day amounts to thirty two and one-half hours of work per week in a standard five-day work-week.

After reviewing this additional information from the L&I claim, the Department issued a Final Order denying Mr. Hobson's request for a PERS 1 duty disability retirement benefit.<sup>77</sup> Mr. Hobson sought judicial review of the Department of Retirement Systems' denial in the superior court.<sup>78</sup> The superior court affirmed the Department's Final Order,<sup>79</sup> and Mr. Hobson appealed to this court.<sup>80</sup>

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<sup>74</sup> AR 025 (FOF 78).

<sup>75</sup> *Id.*

<sup>76</sup> AR 025 (FOF 79).

<sup>77</sup> AR 001-033 (CP 009-0041), as noted in FN 2, a copy of the Department's Final Order has also been attached to this brief at Appendix A.

<sup>78</sup> CP 005-008 (Petition for Review).

<sup>79</sup> CP 226-228 (Judgment Affirming the Decision of the Department of Retirement Systems).

<sup>80</sup> CP 229 (Notice of Appeal to Court of Appeals, Division II).

## V. ARGUMENT

### A. Summary Of Argument

Mr. Hobson is not entitled to a duty disability benefit from PERS 1 because he does not meet the statutory requirements. To qualify for a PERS 1 duty disability retirement benefit, Mr. Hobson must be totally incapacitated for duty, which means (1) he must be totally unable to perform the duties of his employment, and (2) he must be totally unable to perform the duties of any other work for which he is qualified by training or experience (emphasis added).<sup>81</sup> While Mr. Hobson may have limitations on his ability to perform his employment or other employment for which he is qualified, he is not “totally incapacitated.” Because he can work, he does not qualify for a PERS 1 duty disability retirement benefit.

### B. **To Qualify For A PERS 1 Duty Disability Retirement, Mr. Hobson Must Show That He Is Totally Unable To Perform The Duties Of His Employment And Totally Unable To Perform The Duties Of Any Other Work For Which He Is Qualified By Training Or Experience**

The requirements for a PERS 1 duty disability benefit are found in RCW 41.40.200. That statute provides:

(1) Subject to the provisions of RCW 41.40.310 and RCW 41.40.320, upon application of a member, or his or her employer, a member who becomes totally incapacitated for duty as the natural and proximate result of an accident occurring in the actual performance of duty . . . while in the

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<sup>81</sup> RCW 41.40.010(28); RCW 41.40.200.

service of an employer, without willful negligence on his or her part, shall be retired subject to the following conditions:

(a) That the medical adviser, after a medical examination of such member made by or under the direction of the medical adviser, shall certify in writing that the member is mentally or physically totally incapacitated for the further performance of his or her duty and that such member should be retired....

(Emphasis added)

RCW 41.40.010(28) defines “totally incapacitated for duty” as:

. . . total inability to perform the duties of a member’s employment or office or any other work for which the member is qualified by training or experience.

(Emphasis added)

This means that Mr. Hobson must demonstrate that he has a condition arising from an accident that occurred in the course of his duties, which has rendered him totally unable to perform the duties of his position, and totally unable to perform the duties of any other employment for which his training or experience would qualify him.

This Court can affirm the Department’s Final Order based on either of the prongs of totally incapacitated. If this Court agrees as to either prong, it doesn’t need to reach the other prong. In other words, this court can affirm either because Mr. Hobson is able to perform the duties of his employment or because Mr. Hobson is able to perform the duties of any other work for which he is qualified by training or experience.

The Department's Presiding Officer correctly concluded that Mr. Hobson was not totally incapacitated and, therefore, was not entitled to duty-disability retirement. In her legal conclusions, the Presiding Officer concluded that Mr. Hobson's injuries limit the kinds of physical tasks he can perform; however, Mr. Hobson is still able to work.<sup>82</sup> All the medical and vocational reports submitted in this case find that Mr. Hobson is able to work. None of the credible evidence states that Mr. Hobson is totally unable to perform the duties of his employment or totally unable to perform the duties of any other work for which he is qualified by training or experience. Mr. Hobson must meet both prongs. This Court can affirm the Department's Final Order if Mr. Hobson fails to meet either prong of the test.

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<sup>82</sup> AR 027 (COL 8)

**C. Mr. Hobson Is Not Totally Unable To Perform The Duties Of His Employment**<sup>83</sup>

Mr. Hobson had the burden to prove that he is unable to perform the duties of his employment. He did not meet that burden. While Mr. Hobson was recovering from his injury, CSTC modified his job duties to reduce his contact with children to the extent that he would not be required or even permitted to participate in any physical interventions, containment, transporting or restraining. These new job duties met Dr. Stump's previously stated concerns about no physical "take-down involvement."<sup>84</sup> Dr. Stump believed that Mr. Hobson was capable of performing the duties of his modified position at CSTC.<sup>85</sup> In other words, Dr. Stump did not say that Mr. Hobson was not able to perform the duties of direct student counseling and supervision.<sup>86</sup> Rather, he said that the risk

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<sup>83</sup> In Footnote 35 of Appellant's Brief, dated November 30, 2006, p. 14, Mr. Hobson indicates a belief that the Department must "cross-appeal" the "trial court's decision." In this statement, Mr. Hobson appears to be referring to the judicial review conducted by the superior court which upheld the Department's Final Order. The Department need not cross-appeal anything done at the superior court judicial review level because, as was stated earlier in this brief, "review of administrative decisions is done on the record of the administrative tribunal itself, not of the superior court." *Franklin Cy. Sheriffs' Office v. Sellers*, 97 Wn.2d 317, 323-24, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106 (1983) In addition, the Department is not seeking to obtain any affirmative relief from this court beyond affirmance of its Final Order denying Mr. Hobson a PERS 1 duty disability retirement. See *Peterson v. Hagan*, 56 Wn.2d 48, 52, 351 P.2d 127 (1960).

<sup>84</sup> AR 006 (FOF 28).

<sup>85</sup> AR 028 (COL 14).

<sup>86</sup> AR 028 (COL 14).

of assault from patient contact had to be minimized or eliminated,<sup>87</sup> which it was.

Therefore, Mr. Hobson was not barred from returning to his employment “because of any perceived inability to perform the modified duties of that position based on medically verifiable impairments.”<sup>88</sup> The record shows that Mr. Hobson was capable of performing virtually all of the duties of his employment as a Psychiatric Child Care Counselor with CSTC once they were modified.<sup>89</sup> The only reason he could not return to his employment was because of his doctor’s concern for future safety.<sup>90</sup> This concern does not amount to a total inability to perform the duties of the employment.<sup>91</sup>

Mr. Hobson argues in his brief<sup>92</sup> that, as a Psychiatric Child Care Counselor or Supervisor, he would essentially be “at great risk of being involved in restraining others or protecting himself or others,” but he offers no evidentiary support for that argument. Mr. Hobson attempts to liken the modified job description’s child patient contact provision to a person with 50 pound weight lifting limitations being asked to

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<sup>87</sup> AR 028 (COL 14).

<sup>88</sup> AR 028 (COL 14).

<sup>89</sup> AR 029 (COL 14).

<sup>90</sup> AR 029 (COL 14).

<sup>91</sup> AR 029 (COL 14).

<sup>92</sup> Appellant’s Brief dated November 30, 2006, pp. 13.

occasionally lift 100 pounds at serious risk to his health.<sup>93</sup> Mr. Hobson's analogy is not appropriate. The modified position description only asks for some child interaction and verbal intervention, if needed. It removes any physical obligation entirely. The modified position description agreed to by the employer had Mr. Hobson in contact with children only to monitor their lunch time, participate in counseling, supervise play and daily activities and verbally intervene when necessary. The modified position description met Mr. Hobson's need for non-confrontational contact with the children. Mr. Hobson was entirely capable of working under these new conditions. There is no evidence to the contrary.

For these reasons and having considered the entire record, the Presiding Officer concluded that Mr. Hobson is not totally unable to perform the duties of his employment. Mr. Hobson was able to perform his employment duties at CSTC. Mr. Hobson did not satisfy the legal standard for totally incapacitated for duty, and therefore was not entitled to a duty disability retirement. The Presiding Officer did not err in her legal conclusions. Accordingly, this Court must affirm the Department's Final Order.

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<sup>93</sup> *Id.* at p.13-14.

**D. Mr. Hobson Is Not Totally Unable To Perform Any Other Work For Which He Is Qualified By Training Or Experience**

**1. Mr. Hobson Can Work Part-Time**

The Findings of Facts in the Department's Final Order support the legal conclusion that Mr. Hobson retains the capacity to work in available light duty positions for which he is qualified.<sup>94</sup> The record contains the opinion of five physicians who, since Mr. Hobson's injury in April 2000, have all said that Mr. Hobson is capable of light or sedentary employment.<sup>95</sup> This evidence is uncontroverted except for Dr. Stump's May 14, 2002, letter which contains a conclusory assertion that, after he "reviewed the RCW's," he believed that Mr. Hobson did meet the requirements for total disability.<sup>96</sup> The Presiding Officer found this letter to carry little weight because Dr. Stump's letter (1) was inconsistent with the opinions of the other doctors who have treated/evaluated Mr. Hobson; (2) was inconsistent with Dr. Stump's own opinions from his treatment of Mr. Hobson, from August 2000 to 2002, that Mr. Hobson is capable of light duty employment with some restrictions; (3) made no reference to a specific RCW (vital because the statutory standards for worker's compensation and PERS 1 duty disability retirement are different); (4) failed to identify how Mr. Hobson's medical conditions stem from the

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<sup>94</sup> AR 029 (COL 15).

<sup>95</sup> AR 029 (COL 16).

<sup>96</sup> AR 018, 019 (FOF 57); *See* AR 029, 030 (COL 17).

April 2000 accident and failed to explain how those conditions interfere with work activities to such an extent that Mr. Hobson is totally unable to perform the duties proposed; and (5) failed to mention any change in Mr. Hobson's condition and capacities that occurred since Dr. Stump's repeated previous statements that Mr. Hobson is capable of light duty employment with some restrictions.<sup>97</sup> Further, Dr. Stump was not available to be examined at the hearing about the basis for his apparently inconsistent statements and change in position.<sup>98</sup> Finally, Dr. Stump's May 14, 2002 letter, is inconsistent with the fact that, over a year after that letter, Dr. Stump concurred with Ms. Casady's December 5, 2003, PCE estimate that Mr. Hobson retained the capacity for sedentary-level work activities up to six and one-half hours per day.<sup>99</sup>

The duty disability retirement statute requires that Mr. Hobson be totally unable to perform any other work for which he is qualified by training or experience, not totally unable to perform work for forty hours a week or totally unable to perform work at a certain pay. Here, other than Dr. Stump's conclusory letter issued at the request of Mr. Hobson (after Mr. Hobson was denied PERS 1 duty disability retirement), there is not a single witness and not a single item in the entire administrative record that

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<sup>97</sup> AR 029-030 (COL 17).

<sup>98</sup> AR 030 (COL 17).

<sup>99</sup> AR 025 (FOF 79).

says that Mr. Hobson can't work. Instead, the record shows that Mr. Hobson is an educated and experienced man who, just prior to his injury, supervised a team of 16-18 interdisciplinary staff members. The evidence is that Mr. Hobson is qualified for a host of other positions in the workforce. Two separate IME's and four separate medical doctors found Mr. Hobson physically capable of working. Vocational experts said that Mr. Hobson had transferable skills, that there were jobs he was qualified to do that could be modified to accommodate his physical restrictions, and that those jobs were available in Mr. Hobson's labor market. Even if Mr. Hobson can't work a full forty hour week, even his own physician, Dr. Stump, agreed, in his most recent analysis, that Mr. Hobson can do sedentary work at a maximum of six and one half hours per day (thirty two and one half hours per week).

**2. An Individual Who Can Work Part-Time Is Not Totally Incapacitated For Duty Under The PERS 1 Duty Disability Retirement Statute**

**a. The PERS 1 Duty Disability Retirement Statute Uses The Term "Totally"**

In *Grabicki v. Department of Retirement Systems*, the court was met with the challenge of determining the type of pay category that a certain income fell into and decided that it needed to turn to legislative

intent for some direction.<sup>100</sup> Because the statute did not define the words “basic” or “special,” the court gave those terms their ordinary meaning and looked to the dictionary for a definition.<sup>101</sup>

Here, according to *Webster’s II New Riverside University Dictionary*,<sup>102</sup> the definition of “total” includes “entire . . . complete . . . absolute.” A person who is able to work on a part-time basis is not entirely, completely, and absolutely unable to perform the duties of any other work for which the member is qualified by training or experience. The Department’s denial of Mr. Hobson’s application for duty disability retirement is correct in that, on the administrative record, Mr. Hobson was determined to be able to work at least four hours to six and one-half hours per day. It is clear in the record that, at bare minimum, Mr. Hobson is absolutely able to engage in partial income-producing employment to earn the service credit that he wants the Department to give to him.

**b. Standards From Other Statutory Schemes And From Private Insurance Do Not Control The Meaning Of The PERS 1 Duty Disability Retirement Statute**

Mr. Hobson attempts to persuade this Court to adopt legal principles for Department of Retirement System duty disability retirement based fundamentally on L&I disability standards, private

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<sup>100</sup> *Grabicki*, 81 Wn. App. at 751.

<sup>101</sup> *Id.*

<sup>102</sup> *Webster’s II New Riverside University Dictionary* 1220 (1988).

corporate/insurance standards, and federal social security standards.<sup>103</sup> The bottom line is that the legal standard for disability in the retirement arena is different from the standard in L&I and again from the standards in the private insurance and social security arenas. These legal standards are based on entirely different principles, not the least of which, in L&I, is that disability should be based on whether Mr. Hobson can be employed in full-time, forty hour per week position. PERS 1 duty disability retirement is governed by an exclusive statute. That statute offers retirement benefits only to those who cannot work, who are totally incapacitated.

**(1) The PERS 1 Duty Disability Benefit Serves A Different Purpose From L&I And Other Benefits**

The PERS 1 duty disability retirement non-employability standard is high.<sup>104</sup> In establishing the standard, the Legislature implicitly acknowledged that PERS is a retirement benefit, not an industrial insurance benefit.<sup>105</sup> The PERS duty disability retirement benefit was not intended as a disability insurance policy.<sup>106</sup> It is not a supplement to the job-related disability compensation provisions of the state workers' compensation laws.<sup>107</sup> PERS 1 duty disability retirement was designed as

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<sup>103</sup> Appellant's Brief dated November 30, 2006, p. 18-21.

<sup>104</sup> AR 027 (COL 10).

<sup>105</sup> AR 027 (COL 10).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

a limited benefit, primarily to maintain a member's ability to continue to earn service credit toward a service retirement when that member has been forced to resign from the productive workforce due to a job-related disability.<sup>108</sup> PERS 1 duty disability retirement is not intended, as L&I payments are, to make up for the individual's lost earning capacity.<sup>109</sup>

A PERS 1 duty disability recipient receives \$350 per month in income and earns a full month's service credit each month until he or she reaches age sixty, at which time the recipient will receive a service retirement.<sup>110</sup> In calculating that service retirement, those months of service credit earned on duty disability retirement can be substantial. Since Mr. Hobson is also receiving an L&I pension, any amount he would receive from the Department of Retirement Systems would be offset.<sup>111</sup> So, even if Mr. Hobson were to be granted a duty disability retirement from the Department, he wouldn't receive additional money in his pocket from the Department. The fact is that the real benefit to Mr. Hobson would be the accumulation of service credit until he reaches age sixty.<sup>112</sup> That service credit would continue to build towards an ultimate retirement.

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<sup>108</sup> *Id.*

<sup>109</sup> See *Fochtman v. Department of Labor and Industries*, 7 Wn. App. 286, 292, 499 P.2d 255 (1972).

<sup>110</sup> RCW 41.40.220.

<sup>111</sup> RCW 41.40.300.

<sup>112</sup> RCW 41.40.220.

Mr. Hobson does not need to work full-time to earn PERS 1 service credit. In PERS 1, a person who works 70 hours or more per calendar month<sup>113</sup> earns one service credit for that month.<sup>114</sup> Here, the record reflects that Mr. Hobson is capable of working anywhere from one-half to three-quarters of a standard eight-hour work-day.<sup>115</sup> If Mr. Hobson works just four hours per day, in a single calendar month he would have worked eighty hours. That is more than enough to earn him one service credit for his work that month.

With this in the background, it is much easier to see why the Legislature intended to limit PERS 1 duty disability retirement recipients to persons who are totally unable to work. These recipients are accumulating service credit towards a service retirement because there is no other way for them to earn service credit. To give duty disability retirement to a person like Mr. Hobson, who, the record clearly reflects, is able to earn that service credit, is contrary to the statute's purpose and language.

**(2) This Court Has Recognized That The PERS 1 Duty Disability Benefit Is Not Controlled By The Standards For Worker's Compensation**

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<sup>113</sup> RCW 41.40.010(9)(a).

<sup>114</sup> A person who works less than seventy hours per calendar month earns one quarter of a service credit for that month. *See* RCW 41.40.010(9)(a).

<sup>115</sup> AR 32 (COL 28).

In *Marler v. Department of Retirement Systems*,<sup>116</sup> the court states that “PERS 1 was not intended as a disability insurance policy or as a supplement to the job-related disability compensation provisions of the State workers’ compensation laws, RCW Title 51.” In *Marler*, the appellant contended that the PERS 1 disability retirement statute and the L&I workers’ compensation statute must be read in harmony and must not produce inconsistent effects.<sup>117</sup> The appellant asserted that “to be totally incapacitated” under PERS 1 is equivalent to being “permanently totally disabled” under workers’ compensation. The *Marler* court rejected this argument and wrote that “these statutes show that PERS 1 and L&I workers’ compensation have different standards and different requirements for workers who are injured in an accident in the course of employment (emphasis added).”<sup>118</sup>

Moreover, where the Legislature has intended public retirement plans to follow L&I standards, it has said so.<sup>119</sup>

**(3) The PERS 1 Duty Disability Cases  
Mr. Hobson Relies On Do Not Address  
What Constitutes Being “Totally  
Incapacitated”**

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<sup>116</sup> *Marler v. Department of Retirement Systems*, 100 Wn. App. 494, 498, 997 P.2d 966 (2000).

<sup>117</sup> *Id.* at 502.

<sup>118</sup> *Id.*

<sup>119</sup> See RCW 41.24.150(3).

In his brief,<sup>120</sup> Mr. Hobson cites *Marler v. Dep't of Retirement Systems*<sup>121</sup> and *Dillard v. Washington Public Employees Retirement System*,<sup>122</sup> to try to bolster his case, but neither *Marler* nor *Dillard* discuss the issues raised here. *Dillard* dealt only with the definition of “accident,” and not whether less than full-time work is “totally incapacitated” under the PERS 1 duty disability retirement statute. *Dillard* stated that “all parties to this appeal accept the fact that Mrs. Dillard became totally incapacitated for duty as a result of her work efforts;” therefore, the only issue on appeal was whether this constituted an “accident” within the meaning of the statute.<sup>123</sup> *Marler* dealt with a statute of limitations issue, so the court had no reason to even discuss whether Mr. Marler was or was not “totally incapacitated” within the meaning of the Department’s duty disability retirement statute, much less indicate whether his claim should or should not have been denied. Thus, both the lack of discussion by the court in *Dillard* as to whether Mrs. Dillard was totally incapacitated and lack of discussion by the court in *Marler* as to whether Mr. Marler was totally incapacitated means absolutely nothing, contrary to Mr. Hobson’s argument.

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<sup>120</sup> Appellant’s Brief dated November 30, 2006, p. 16.

<sup>121</sup> *Marler*, 100 Wn. App. at 494.

<sup>122</sup> *Dillard v. Washington Public Emp. Retirement System*, 23 Wn. App. 461, 597 P.2d 428 (1979).

<sup>123</sup> *Id.* at 462.

**(4) The Out Of State Cases Mr. Hobson Relies On Involve Different Types Of Benefits Under Other Statutory Schemes Or Under Private Insurance Policies And Do Not Control Here**

Mr. Hobson seems to suggest that somehow he should receive this Court's consideration for a duty disability retirement benefit from the Department because he found cases that addressed completely different schemes, including private insurance policies, where the litigants have obtained benefits using those other standards.

*Helms v. Monsanto Co., Inc.*<sup>124</sup> addressed a private company's disability plan. Benefits were denied to Mr. Helms, a man going blind from a hereditary, incurable eye disease.<sup>125</sup> An arbitrator had interpreted permanent total disability to mean a state of existence incompatible with conscious life (near comatose) and denied benefits accordingly.<sup>126</sup> On appeal, the federal district court stated that it would not deny benefits to a person engaged in a minimal occupation which would yield a mere pittance (like performing some task – selling peanuts or pencils).<sup>127</sup> The federal district court further stated that “permanent disability is a question of facts that depends upon all the circumstances of a particular case”<sup>128</sup>

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<sup>124</sup> *Helms v. Monsanto Co., Inc.*, 728 F.2d 1416 (11<sup>th</sup> Cir. 1984).

<sup>125</sup> *Id.* at 1417-18.

<sup>126</sup> *Id.* at 1419.

<sup>127</sup> *Id.* at 1421.

<sup>128</sup> *Id.* at 1420.

and held that Mr. Helms was required to show physical inability to follow any occupation from which he could earn a reasonably substantial income rising to the dignity of an income or livelihood, even though the income is not as much as he earned before the disability.<sup>129</sup> The standard applied to the private insurance system in that case is not controlling here. Even if it were, Mr. Hobson's ability to work one-half to three-quarters of a standard eight-hour work-day in a position is hardly a mere task, like selling peanuts or pencils per the *Helms* court, and certainly more than a mere pittance. Further, as the *Helms* court stated,<sup>130</sup> Mr. Hobson's income need not be as much as he earned before.

*Chapman v. IRS*,<sup>131</sup> is a tax case in which the tax court was asked to determine whether the petitioner was entitled to a disability income exclusion.<sup>132</sup> This case is totally irrelevant to Mr. Hobson's legal question. In fact, Mr. Hobson declares that the legal standard applied by the tax court, an ability to engage in "substantial gainful activity" (emphasis added), is consistent with yet another statutory structure, the

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<sup>129</sup> *Id.* at 1421.

<sup>130</sup> *Id.*

<sup>131</sup> *Chapman v. CIR, T.C. Memo. 1982-415, 1982 WL 10708, 44 T.C.M. (CCH) 554, T.C.M. (PH) P 82,415 (U.S. Tax Ct., 1982).*

<sup>132</sup> *Id.*

social security total disability requirement.<sup>133</sup> Therefore, *Chapman* lends nothing to Mr. Hobson's argument.

In *Brasher v. Prudential Insurance Co.*,<sup>134</sup> a widow attempted to recover death benefits, not disability benefits, under a private insurance policy issued to her deceased husband. The policy had three different definitions of "total disability;" the definition for one type of benefit is not helpful to determine eligibility for the other benefits.<sup>135</sup> In denying the defendant's motion for summary judgment, the *Brasher* court, reviewing the applicable private insurance policy definition of total disability,<sup>136</sup> determined that there was sufficient evidence to submit this case to a jury, noting "it is the province of the jury to decide which of these experts are the most credible and to what extent [the decedent's] illness in fact impaired his ability to engage in gainful employment."<sup>137</sup> Here, as was articulated in *Brasher*, a fact-finder decided which experts were most credible and, thereby, determined that Mr. Hobson was not impaired such that he is "totally incapacitated" under the PERS 1 duty disability retirement statute.

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<sup>133</sup> Appellant's Brief dated November 30, 2006, p. 21.

<sup>134</sup> *Brasher v. Prudential Ins. Co. of America*, 771 F.Supp. 280 (W.D. Ark., 1991).

<sup>135</sup> *Id.* at 281.

<sup>136</sup> *Id.* at 281.

<sup>137</sup> *Id.* at 283-84.

*Madden v. ITT Long Term Disability Plan*<sup>138</sup> addresses a private insurance policy for long-term disability benefits. Although *Madden* does not address the Department's statutory definition of "totally incapacitated," like in Mr. Hobson's administrative record, the record in *Madden* reflects medical and other evidence that resulted in a determination that the *Madden* employee, too, failed to meet the private insurer's definition of "totally disabled."<sup>139</sup> When the *Madden* employee argued that he should receive the subject disability benefits because he had received a social security disability award, the court, rejecting that argument, stated "if [the employee's] argument were correct, ERISA fiduciaries would be stripped of all administrative discretion, as they would be required to follow the Department of Health and Human Services' decisions regarding social security benefits, even where the Plan determines benefits under different standards or the medical evidence presented is to the contrary."<sup>140</sup> Just as here, the *Madden* court recognized that different plans/benefits/statutory schemes must not be lumped together.

The PERS 1 standard for duty disability retirement mandates a total inability to perform the duties of a member's employment or office

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<sup>138</sup> *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279 (9<sup>th</sup> Cir., 1990).

<sup>139</sup> *Id.* at 1285.

<sup>140</sup> *Id.* at 1286.

and a total inability to perform any other work for which the member is qualified by training or experience. The PERS 1 duty disability retirement statute does not recognize partial inability to perform employment duties or difficulty in performing employment duties. The statute mandates total inability to perform any qualified employment duties at all.<sup>141</sup>

Having considered the entire record, the Presiding Officer concluded that Mr. Hobson is not totally unable to perform any other work for which he is qualified by training or experience. Mr. Hobson did not satisfy the legal standard for being totally incapacitated for duty under the PERS 1 statutes, and therefore was not entitled to a duty disability retirement. The Presiding Officer did not err in her legal conclusions. Accordingly, this Court must affirm the Department's Final Order.

**E. Legislative History Shows That An Individual Who Can Work Part-Time Is Not "Totally Incapacitated" Under The PERS 1 Duty Disability Statutes**

Legislative history research into the statutory definition of "totally incapacitated for duty" in RCW 41.40.010(28) sheds light on what the Legislature intended "totally" to mean.

The Department has fully researched legislative history on the meaning of "totally incapacitated for duty" including, but not limited to

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<sup>141</sup> See AR 032 (COL 26), RCW 41.40.010(28), RCW 41.40.200.

(1) SB 16,<sup>142</sup> which enacted the current RCW 41.40.200, including the “totally incapacitated” language, and (2) SB 223,<sup>143</sup> which added the definition of “totally incapacitated” to RCW 41.40.010 (this definition has remained textually unchanged to present day).

The Department found no guiding legislative history on SB 16 (1947), which enacted RCW 41.40.200. As for SB 223 (1965), this bill was quite expansive in scope. In addition to adding the definition of “totally incapacitated” (SB 223, section 1), it also included a myriad of other substantive changes to the Act. After a thorough review of all available materials, the Department concludes that a Memorandum from Department Director Lloyd Baker<sup>144</sup> addressed to the Sponsors of SB 223 and Members of the Legislature (found at the State Archives in Governor Evans’ legislative file on SB 223<sup>145</sup>), offers explanation for the section adding the definition of “totally incapacitated.” In that January 26, 1965, Memorandum, no.1, Director Baker wrote:

A new subsection is added, defining “totally incapacitated for duty” to mean total inability to perform the duties of a member’s employment of office or any other work for which the member is qualified by training or experience. The definition clarifies the Act and assists the Board in handling

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<sup>142</sup> SB 16, 30<sup>th</sup> Leg., 1947 Laws of Wash., Ch. 274, § 21, *See* CP 105-119.

<sup>143</sup> SB 223, 39<sup>th</sup> Leg., 1965 Laws of Wash., Ch. 155, § 1, *See* CP 158-168.

<sup>144</sup> CP 186-188.

<sup>145</sup> CP 184-215. For convenience, a copy of Governor Evans’ Legislative File on SB 223 (which includes Director Baker’s Memorandum to the Legislature at CP 186-188) has also been attached to this brief at Appendix B.

the disabled member's benefit upon rehabilitation, partial entry into gainful employment, or suspension of the benefit upon return to employment.<sup>146</sup>

In his second sentence above, Director Baker is discussing how this definition will assist in another section of SB 223 (section 7), amending RCW 41.40.310, which relates to what is to be done if, after a member has been granted a disability retirement, that member is “no longer totally incapacitated for duty as the result of the injury or illness for which the disability was granted, or that he is engaged in a gainful occupation.”<sup>147</sup> This is further evidenced where, on the second page, No. 5, of Director Baker's Memorandum, he uses the same language in his discussion of RCW 41.40.310 when he says:

RCW 41.40.310 is amended to provide clarification where a disability beneficiary resumes gainful employment. The amendment provides clarification and guidelines for the Retirement Board in determining future payments to a disability beneficiary if he becomes rehabilitated or resumes full or **partial** employment . . . (emphasis added).<sup>148</sup>

All Director Baker is really saying in No. 1 of his Memorandum is that the definition would be helpful in generally clarifying the Act and also in helping the Board handle cases where, after a disability retirement has been granted, the member's circumstances change, per RCW 41.40.310.

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<sup>146</sup> CP 186 (Director Baker's Memorandum to the Legislature).

<sup>147</sup> RCW 41.40.310.

<sup>148</sup> CP 187 (Director Baker's Memorandum to the Legislature).

There is no support for any other interpretation. The reference to “gainful” employment is in the context of RCW 41.40.310. Director Baker is simply telling his reader that adding the definition of “totally incapacitated” would be of particular assistance in instances where the “totally incapacitated” language is used in statute.

However, what Director Baker’s Memorandum does reflect, which is very much in support of the Department’s position with regard to Mr. Hobson’s duty disability retirement application denial, is that when the Department asked the Legislature to add the definition of totally incapacitated, it did so recognizing that a partial ability to work is a change of circumstances from the “totally incapacitated” standard that a member is required to satisfy when the member first applies for duty disability retirement. Basically, if a member is partially able to work at some future point after being granted duty disability retirement, then that member’s status is subject to review under RCW 41.40.310. Therefore, “totally incapacitated” cannot possibly apply to a member who is partially able to work at the time the member makes application for duty disability retirement. The Legislature must have meant exactly what it plainly said when it enacted the “totally incapacitated” definition. Any other interpretation would render the statutory scheme meaningless.

The significance of Director Baker's Memorandum is once again evidenced in a memorandum to Governor Evans from his legal staff dated March 19, 1965,<sup>149</sup> which included a mention that a new subsection was included which defined totally incapacitated for duty as an inability to perform a member's work. On page 2 of that Memorandum, it is stated that Director Baker's explanatory letter ("Memorandum") dated January 26, 1965<sup>150</sup> was attached. By instructing the Governor to also refer to that Memorandum, the Governor was provided with the opportunity to understand far greater detail about the sections of SB 223, including those at issue in this case (substantially more than a two line mention) discussed above.

In his brief,<sup>151</sup> Mr. Hobson asserts that the Legislature intended a person precluded from "gainful employment" to qualify as "totally incapacitated for duty," but even if this argument had merit, the argument supports the Department's Final Order because the evidence in the administrative record reflects that Mr. Hobson is capable of gainful employment.

Mr. Hobson offers the dictionary definition of "gainful" as "productive of gain: profitable," and proceeds to declare himself to be

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<sup>149</sup> CP 189-190.

<sup>150</sup> CP 186-188.

<sup>151</sup> Appellant's brief dated November 30, 2006, p. 26.

“disabled in terms of performing any gainful employment.”<sup>152</sup> First, in the face of overwhelming evidence in the administrative record that he is able to work, Mr. Hobson’s self-declaration should be taken for what it is, self-serving. Second, even if this court is persuaded by this argument, the bottom line is that the administrative record reflects that Mr. Hobson is able to engage in income-producing work. Even the superior court judge on judicial review stated “the record supports a finding that [Mr. Hobson] is capable of some gainful employment . . . .”<sup>153</sup> When Mr. Hobson works for that pay, that pay will be income, and that income will be gainful; maybe not gainful under the L&I statute, but we are discussing the Department of Retirement Systems, not industrial insurance. Either way, when Mr. Hobson works, it is certainly “gainful” in terms of the dictionary definition Mr. Hobson cites. More to the point, the legislative history indicates that an individual who can work part-time is not “totally incapacitated” under the PERS 1 duty disability statute.

**F. The Court Does Not Need To Determine In This Case Whether An Individual Who Can Work Only A Couple Of Hours A Day Is “Totally Incapacitated”**

Contrary to his assertions, the facts of Mr. Hobson’s case do not require the Court to make a precise determination of exactly how long a person must work each day to satisfy the “totally incapacitated” standard

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<sup>152</sup> *Id.*

<sup>153</sup> CP 225 (superior court judicial review letter opinion).

in PERS 1 duty disability retirement. While Mr. Hobson may demand answers as to what happens if a person can only work a minute or an hour,<sup>154</sup> the facts in the administrative record of this case reflect that Mr. Hobson is able to work at least one-half to three-quarters of a workday. Other facts are not present. The Court need not reach a decision based on hypothetical facts when it has Mr. Hobson's actual facts before it.

## VI. CONCLUSION

The Department correctly concluded that Mr. Hobson was not entitled to a duty disability retirement. Because he is not "totally incapacitated for duty" as a result of injuries that he received while performing his duties as a Psychiatric Child Care Counselor 3, Mr. Hobson does not meet the qualifications for a PERS 1 duty disability retirement. Therefore, Mr. Hobson is not entitled to a PERS 1 duty disability retirement.

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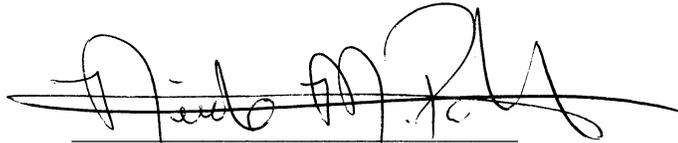
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<sup>154</sup> Appellant's brief dated November 30, 2006, p. 22.

The Department asks this court to affirm the Final Order of the Department which denied Mr. Hobson's application for duty disability retirement.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of February, 2007.

ROBERT M. McKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Nicole M. Potebnya", written over a horizontal line.

NICOLE M. POTEBNYA  
WSBA #36740  
Assistant Attorney General  
(360) 586-3633

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid via Consolidated Mail Service to *Ed Younglove*
- ABC/Legal Messenger to
- State Campus Delivery
- Hand delivered

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

DATED this *2nd* day of February, 2007, at *Olympia*, WA.

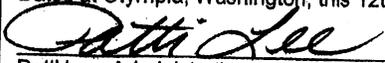
  
KRISTINE HARPER  
Legal Assistant

  
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STATE OF WASHINGTON  
BY  
FEDERAL APPEALS  
COURT OF APPEALS  
DIVISION II

**CERTIFICATION OF MAILING:**

I hereby certify that I have this day served a copy of this document upon the parties of record in this proceeding by mailing each of them a copy thereof, properly addressed and postage prepaid.

Dated at Olympia, Washington, this 12th day of July, 2005.



Patti Lee, Administrative Assistant  
Department of Retirement Systems  
Olympia, Washington

WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS  
BEFORE THE PRESIDING OFFICER

In re the Appeal of	)	Docket No. 03-P-005
	)	
DONALD E. HOBSON	)	
	)	
	)	<b>FINAL ORDER</b>
	)	<b>AFTER FURTHER</b>
<u>for PERS Plan 1 duty-related disability</u>	)	<b>HEARING</b>

**STATEMENT OF THE CASE**

Donald E. Hobson, a member of Plan 1 of the Public Employees' Retirement System (PERS), appeals a decision by the Department of Retirement Systems (DRS) denying his application for PERS Plan 1 duty-related disability retirement benefits.

In this proceeding Mr. Hobson appeared and was represented by Darin Spang, Attorney at Law, and Edward E. Younglove III, Attorney at Law. Susan E. Thomsen, Assistant Attorney General, represented DRS. The Presiding Office held a hearing on August 25 and 26, 2003. The hearing record, including post-hearing submission of briefs, originally closed September 20, 2003. The Presiding Officer entered a Final Order on February 3, 2004 denying Mr. Hobson's application for duty-related disability retirement.

On February 11, 2004, the Appellant Mr. Hobson filed a petition for reconsideration of the Final Order. The petition was in the nature of a motion to re-open the hearing record for additional evidence rather than a re-examination of the record considered for the Final Order, as it did not allege any specific error in the Corrected Final Order, but proposed that the Department consider evidence that was not available for inclusion in the record at the time of the hearing.

On April 28, 2004, after hearing oral arguments from counsel, the Presiding Officer entered an Order Granting Petition for Reconsideration and for Further Hearing. On January 5, 2005, the Presiding Officer admitted into the record three additional documents proposed by Mr. Hobson and heard testimony regarding the newly admitted documents.

The Presiding Officer has considered the evidence presented and the arguments of the parties, and now enters this Final Order After Further Hearing. This Order adopts the findings of fact and conclusions of law in the Corrected Final Order of February 2004; additional findings numbered 74 through 80 and additional conclusions of law numbered 25 through 29 appear in this Order in italic script for ease of reference.

### ISSUE

Whether Mr. Hobson is totally incapacitated for duty and thus entitled to receive duty-related disability benefits under PERS Plan 1?

### RESULT

Mr. Hobson has not been proven to be totally incapacitated for duty, and thus is not entitled to receive duty-related disability benefits under PERS Plan 1.

### FINDINGS OF FACT

1. Donald E. Hobson is a member of the Public Employees' Retirement System (PERS). His most recent PERS-covered employment began in August 1995, when the Child Study and Treatment Center (CSTC) hired him as a Psychiatric Child Care Counselor.
2. On April 21, 2000, Mr. Hobson became involved in an altercation with one of the students at CSTC and was injured. He has not returned to work since that date.
3. At the time of the 2003 hearing in this matter Mr. Hobson was 48 years of age. During all periods relevant to this appeal he has resided in Port Orchard, Washington.

#### *Employment and Education History*

4. Mr. Hobson graduated from high school in 1973. In October that year, he joined the U.S. Air Force. After approximately six months as a construction equipment operator, he received an honorable discharge in view of medical problems related to his kidneys and high blood pressure.
5. In 1974 and 1975, Mr. Hobson worked for 11 months, 40 hours per week, as a counselor with Kitsap Youth Homes. In this grant project employment he supervised, counseled and assisted dependent juveniles convicted of felonies, and acted as a liaison with schools and courts.
6. In 1976 and 1977, Mr. Hobson worked for 24 months as an ambulance driver and emergency medical technician for a private ambulance company. His employment with this company also included management of sales of medical supplies to other emergency services agencies. In this position he worked more than 40 hours per

week.

7. Between 1975 and 1977, Mr. Hobson earned 88 quarter hours of credit from Olympic Community College.
8. For about 6 months beginning in October 1977, Mr. Hobson worked as a fuel systems operator for a chemical processing company, planning, laying out, fabricating and operating pumping systems for removal of hazardous materials from inactive naval vessels.
9. In April 1978, Mr. Hobson began a 12-year period of employment with the U.S. Department of the Navy at its shipyard in Bremerton, Washington. Between 1978 and 1987, he worked primarily as a pipefitter, with some responsibility for nuclear production. In 1987, he was injured at work in an accident with a truck from which he was unloading goods. Through the Department of Labor and Industries (L&I), the administrating agency for workers' compensation in Washington State, he received time loss compensation and coverage of his medical treatment. The injuries required spinal surgery and two surgeries on one of his knees. He was given temporary light duty assignments, acting as a union shop steward and counseling employees with personal problems, referring them as needed to assistance programs. When it became clear that Mr. Hobson would not be able to return to heavier duty in the shipyard as a result of his injuries, he accepted a disability retirement from the Navy in 1990.
10. After a period of physical therapy and an unsuccessful search for employment, Mr. Hobson returned to school in September 1991. He earned an Associate of Arts degree in Social Services from Olympic Community College in 1992, and a Bachelor of Arts degree in Law and Justice, with a minor in Psychology, from Central Washington University in June 1995.
11. In August 1995 Mr. Hobson began work as a counselor with the Child Study and Treatment Center (CSTC). CSTC is a program housed on the grounds of Western State Hospital, a public hospital for the mentally ill, in Lakewood, Washington. The CSTC program is operated independently of the state hospital by the Mental Health Division of the Washington State Department of Social and Health Services (DSHS). The CSTC serves youth with emotional and behavioral disorders who are sometimes violent. The facility provides 24-hour treatment and supervision for some students, in three 16-person residential groups known as "cottages." The facility also provides a weekday school and treatment program for up to 24 other students.
12. Mr. Hobson began work for the CSTC as a Psychiatric Child Care Counselor 1. After seven months he promoted to a supervisory position as Psychiatric Child Care Counselor 2, in March 1996. In this position he directly supervised and counseled students; he had responsibility for care and safety of sixteen residents ages 6 to 12 in one cottage, and for up to 24 day students; he assisted with development of individualized student programs and ensured that they were followed; he investigated and reported on patient incidents; and he used two different types of computers for staff scheduling and communications with groups

affiliated with the CSTC program. His supervisory duties included directing, scheduling, counseling and evaluating "several" other staff members, setting up required in-service training for staff. When the cottage supervisor (a Psychiatric Child Care Counselor 3) was absent he would assume the additional duties of the cottage supervisor as needed.

13. Mr. Hobson promoted to Psychiatric Child Care Counselor 3, a cottage supervisor, in 1997. In this position he supervised a team of 16-18 interdisciplinary staff members. He also helped develop facility-wide programs and standards, and assisted and participated in activities supporting accreditation of the facility. He was required to use several office machines and to lift, carry, push or pull 50 to 75 pounds on occasion. His monthly salary was \$2,950 for full-time work. At this time Mary LaFond was the Chief Executive Officer of the CSTC, and she is listed as Mr. Hobson's supervisor in the August 2002 Ability to Work Assessment Report, but Mr. Hobson referred to her as his "second line supervisor." Mr. Hobson was employed in this position at the time of the assault and injury on April 21, 2000. L&I and its contractors therefore refer to this position as Mr. Hobson's "job of injury." He was considered still in CSTC's employ as of March 7, 2002, though he had not worked for his employer since April 2000.

*Work-related Injury and treatment history*

14. Since the 1987 accident in the course of his Navy duties, Mr. Hobson has been treated and followed by neurologist William J. Stump, M.D. Mr. Hobson considers Dr. Stump his treating or attending physician. In 1988 Mr. Hobson had a spinal surgery fusing the L5 and S1 vertebrae to correct a spondylolisthesis. Dr. Stump has consistently stated his diagnosis of Mr. Hobson's neck and back problems as "cervical and lumbar degenerative disk disease."
15. Mr. Hobson had two surgeries on his right knee between 1987 and 1990. These surgeries were followed by a period of physical therapy.
16. Following his new employment as a Psychiatric Child Care Counselor with CSTC in 1995, Mr. Hobson was injured frequently in his contact with students, but for the most part the injuries were minor and did not cause him to miss work.
17. In July 1998 a student assaulted Mr. Hobson, twisting his left knee and rupturing a disk in his back. He required a second back surgery (laminectomy and discectomy) for disk herniation at L-4/5. In the Spring of 1999, Dr. Van Buecken, an orthopedic surgeon, operated arthroscopically on Mr. Hobson's left knee, with good results in the doctor's opinion.
18. On April 21, 2000, Mr. Hobson was called from his office at CSTC to assist with restraining a student. A thrown object broke one of his teeth. Another staff member being already injured, Mr. Hobson attempted to restrain the student by himself, but was thrown "sideways." The impact caused sprains to Mr. Hobson's neck, right shoulder, low back, right leg and buttock.
19. After he was injured in April 2000, Mr. Hobson received benefits through the

Department of Labor and Industries (L&I), the administering agency for workers' compensation in Washington State, as he has for on-the-job injuries in the past. The benefits included both time-loss compensation and payment of medical expenses.

20. Mr. Hobson underwent an MRI (magnetic resonance imaging) scan of his neck area on May 11, 2000, which showed "multilevel degenerative disease without herniated nucleus pulposus." As of August 24, 2000, Mr. Hobson's neurologist Dr. Stump and orthopedic surgeon Dr. Van Bueken had both recommended physical therapy to address the increased pain Mr. Hobson was experiencing in his lower back, neck, left knee and new pain in his right shoulder. Dr. Stump reported to L&I that he had been unable to detect increased abnormalities in Mr. Hobson's neck and back, but noted that the incident in April 2000 had aggravated existing abnormalities and increased his "symptomatology."
21. On August 28, 2000, Mr. Hobson had another MRI scan of his right shoulder. His orthopedist recommended surgery to repair a possible labral tear. On October 25, 2000, Dr. Bliss operated arthroscopically on Mr. Hobson's right shoulder (debridement of the anterior labrum and glenoid fossa).
22. Since at least January 2001, Dr. Stump has prescribed ibuprofen and Soma for Mr. Hobson's regular use to control pain and muscle spasms.
23. As of February 21, 2001, Dr. Stump reported that the medical condition of Mr. Hobson's neck and back was stable, with no further planned treatment.
24. On May 21, 2001, Dr. Van Buecken operated arthroscopically on Mr. Hobson's left knee a second time, "and after some postoperative care felt that Mr. Hobson was ready to close his [workers' compensation] claim."

#### *Later Injury and Treatment*

25. On April 16, 2002, Mr. Hobson had a sudden surge of pain and loss of control in his right leg at the top of the stairs in his home. He fell down some of the stairs, and twisted his left arm and left shoulder as he held on to the handrail. Dr. Stump saw Mr. Hobson that day for complaints of increased back pain and new left shoulder pain. Chart notes for this visit are not in the record. In a later office visit on June 27, 2002, Dr. Stump observed that Mr. Hobson behaved in a way indicating more discomfort. Sometime after this fall, Dr. Stump prescribed Vicodin, an opioid, for Mr. Hobson's regular use in managing pain.
26. Mr. Hobson filed for additional L&I medical benefits for treatment of this new injury. L&I, after initially rejecting his claim, accepted it when Dr. Stump explained that the fall was likely related to the April 2000 assault at CSTC, since one of the lingering effects of that assault was an increased risk of falling. Mr. Hobson consulted with a different orthopedic surgeon, Dr. Staker, and had had an MRI scan of both shoulders a few weeks before the hearing, but had not discussed results with Dr. Staker. The record does not disclose what further treatment, if any, Mr. Hobson has received after L&I accepted that the new left shoulder injury was related to his

earlier injuries.

*Return to Work Efforts, Assessments of Physical Capacities  
and Ability to Work*

27. On July 3, 2000, Dr. Stump saw Mr. Hobson on a follow-up visit for "cervical and lumbar degenerative disk disease, aggravated by industrial injury in April 2000." Mr. Hobson reported less pain in his neck, but continued pain and problems in low back, knee and shoulder. The doctor noted that Mr. Hobson had been in contact with his employer regarding whether there was work to be done from home since he did not feel "up to the commute and work schedule." Physical therapy was continuing.

On July 27, 2001, Dr. Stump again reported Mr. Hobson's neurological condition as fixed and stable.

28. On August 24, 2000, Dr. Stump responded to inquiries from L&I, as follows:

**1. What is the current diagnosis?**

My current diagnoses are the following:

- A. History of L5-S1 spondylosis status post fusion with chronic low back pain secondary to an OWCP claim.
- B. Industrial injury in July 1998 with L4-5 disk herniation status post laminectomy and diskectomy with chronic low back pain.
- C. Left knee injury secondary to a 1998 industrial injury status post surgery with persistent knee complaints, symptomatically increased as a result of the April 2000 industrial injury.
- D. Industrial injury in April 2000 with increased neck and low back pain complaints, increased left knee pain and new onset of right shoulder pain.

**2. Is this worker able to return to work at the job of injury? If so, when?**

Mr. Hobson has not felt capable of returning to work at this point. He reports that his level of pain is greater than what permits him to travel the distance to work and carry out his work activities. The patient's neck and back pain is primarily related to a soft tissue injury. Objective testing has not demonstrated increased abnormalities in his neck and back. The patient has reported increased left knee pain since the current industrial injury and new right shoulder pain. These conditions also limit his employability. His conditions are currently being evaluated by the patient's orthopedic surgery [sic], Dr. Kent Van Buecken.

**3. If not, is this worker able to return to light-duty work? If so, when?**

Mr. Hobson would be able to work in a light-duty position. One limitation, unfortunately, is the long commute to work. A return to work would need to avoid any take-down involvement since it is this activity that produced the current injury and is likely to aggravate his condition further.

**4. Are pre-existing or unrelated conditions interfering with this worker's ability to return to work?**

As stated above, The patient has considerable pre-existing abnormalities related to prior injuries in his neck, back and left knee. Aggravation of those conditions are producing his current symptomatology and limiting his employability.

**5. What are the worker's current physical restrictions?**

Mr. Hobson should avoid any straining or physical activity. I would advise that he avoid any takedown activities, that he be able to freely change his position throughout his workday, that he not be required to stand or sit a prolonged period of time and that lifting and carrying activities be restricted to 15 pounds or less. I would request that you contact Dr. Van Buecken concerning any additional restrictions that may be imposed with reference to his right shoulder and left knee.

**6. What are the objective medical findings upon which you base your recommendations for restrictions?**

The patient's restrictions with reference to his neck and back are attributed to the multilevel degenerative abnormalities in his neck and back, his lumbar fusion, and his soft tissue injuries. He also had pain complaints in the right shoulder and left knee. I have not evaluated these conditions personally. These conditions have been evaluated by Dr. Kent Van Buecken.

**7. Are the restrictions temporary or permanent? If temporary, for what period of time will restrictions apply?**

Mr. Hobson will have permanent restrictions. The restrictions as to the amount of weight he can handle will likely improve as his condition improves. However, the restrictions as to avoidance of takedown procedures and the requirement that he be able to freely change positions throughout his workday will likely be permanent.

**8. What additional treatment is planned that will aid this worker in returning to work?**

Mr. Hobson is currently involved in physical therapy with reference to his neck and back. Hopefully, through a physical therapy restoration program, his neck and back complaints will stabilize. The patient is currently under evaluation by Dr. Kent Van Buecken with reference to his right shoulder and left knee. I would encourage you to contact Dr. Van Buecken in order to obtain information concerning these conditions.

29. Mr. Hobson saw Dr. Stump again January 12, 2001. Dr. Stump wrote in his chart notes for that visit,

Patient related overall his neck and back pain have been stable and he can currently live with the situation," using ibuprofen and Soma. . . . " From a neurological standpoint the patient is fixed and stable. He is capable of returning to work at this point but will require restrictions. The patient should continue to use an ergonomic chair. He should be able to freely change his position from the sitting, standing and ambulatory positions throughout the day. He should avoid overhead work. He should avoid repetitive bending

and lifting. He should restrict lifting to 35 pounds or less. It would be my advice that the patient avoid physical contact with patients. I would request that his employer prepare a formal return to work. I would be happy to review the job analysis when this is available and determine if the patient is physically capable of returning to that employment.

30. Beginning in January 2001, Mr. Hobson participated in activities arranged through L&I intended to make it possible for him to work again. Concentra Managed Care, Inc. (CMC) operated the first program to which Mr. Hobson was referred, an "early intervention" program. The first priority for early intervention is to return the injured worker to the "job of injury." Mr. Hobson's vocational counselor at CMC, Bruce Johnson, focused initially on facilitating Mr. Hobson's continued employment as a Psychiatric Child Care Counselor 3 at CSTC. Since Dr. Stump had advised that Mr. Hobson would be limited in the physical tasks he could perform, Mr. Johnson assisted the employer, with some success, to reduce the physical demands of the Psychiatric Child Care Counselor 3 position.
31. Mr. Johnson asked Dr. Stump to complete a medical questionnaire, Doctor's Estimate of Physical Capacities, and a job analysis for Psychiatric Child Care Counselor. He also contacted affected persons at CSTC and the DSHS Office of Risk Management. He obtained authorization from Mr. Hobson's L&I claims manager for an ergonomic evaluation of Mr. Hobson's workstation, and scheduled the evaluation with a registered occupational therapist.
32. On February 1, 2001, Dr. Stump completed the medical questionnaire, Doctor's Estimate of Physical Capacities, and the physician's opinion portion of the job analysis sent to him by Bruce Johnson. On the medical questionnaire, Dr. Stump stated that, as of the last time he had seen Mr. Hobson on January 12, 2001, his diagnosis was cervical and lumbar degenerative disc disease, that Mr. Hobson he was stable and not scheduled for further treatment to his neck, back and right shoulder, but that regarding his left knee Dr. Van Buecken should be contacted. He marked "no" to the question, "Can worker return to work in the same job at his/her former place of employment?"; he marked "yes" to the question, "Can worker participate in vocation rehabilitation services focusing on lighter duty employment?" He stated that Mr. Hobson could be tested to tolerance for a performance based physical capacities evaluation. He referred to his office note of 1/12/01 "for suggested restrictions."
33. On the Doctor's Estimate of Physical Capacities, Dr. Stump reported:

In an 8-hour workday, worker can:

Total at one time (hours):

- Sit ½
- Stand 1
- Walk 1

Total during entire 8 hour day (hours):

- Sit 3
- Stand 4

- Walk 4

Worker can:

- Frequently lift and carry 5 lbs
- Frequently carry 5 lbs
- Occasionally can lift 6-10 lbs, lift and carry 11-25 lbs
- Seldom lift and carry 35 lbs
- Never lift or carry 51-100 lbs

Worker can use both hands for repetitive tasks such as simple grasping, pushing and pulling, fine manipulations, max. 35 lbs.

Worker is able to: bend occasionally, but not repetitively, and cannot squat, kneel, crawl, climb or reach above shoulder level

Restrictions on driving automotive equipment: max. ½ hour sitting

On this form, Dr. Stump recommends use of an ergonomic chair and “no physical contact with violent patients,” and that patient could be tested to tolerance if a performance-based physical capacities evaluation is requested.

On page 7 of the job analysis for Psychiatric Child Care Counselor, Dr. Stump also marked “X” by the printed statement, “I agree that the injured worker can perform the described job but only with the following modifications: (the following are handwritten)

NO INTERVENTION ACTIVITIES (emphasis in original)

Lifting max 35 lbs	Walking max ½ hr
Sitting max ½ hr	Bending occ[asionally] only
Twisting occ[asionally] only	Other ergonomic chair
Standing max ½ hr	Restrictions permanent yes
Hand use max 35 lbs	Free change of position
Push/pull max 35 lbs	

34. Mr. Hobson saw Dr. Stump again on February 13, 2001 for a follow-up visit. Dr. Stump's notes from this visit show that he was aware that Mr. Hobson would be discussing a potential return to work with his employer, and that he planned to re-evaluate Mr. Hobson “a couple of weeks after his return to work to discuss his status.”
35. On Feb 18, 2001, Bruce Johnson generated the first Early Intervention Progress Report for Mr. Hobson's case. In this report he characterized Dr. Stump's reports as follows: “Dr Stump stated that the worker was able to perform the job of injury on a full time basis with restrictions and limitations” and “Dr Stump stated that . . . the worker is able to return to work to [sic] the job of injury with restrictions on lifting 35 pounds or less, has restrictions on bending, sitting and twisting, and no

contact with violent patients.”

36. On February 22, 2001, an occupational therapist evaluated Mr. Hobson's workstation and made recommendations in a report dated March 6, 2001, for rearrangement of books, removal of an overhead shelf, and provision of a sit/stand desk, monitor risers, telephone with speakerphone capacity, additional file cabinet, slant board, document holder and adjustable footrest. She also instructed Mr. Hobson in the use of an ergonomic chair as part of the evaluation visit.
37. On March 20, 2001, in his next progress report, Mr. Johnson reported that Mr. Hobson was refusing to meet with his employer if the DSHS risk management representative was there, and also that Mr. Hobson was interpreting Dr. Stump's restrictions as meaning that he could not be in a room with CSTC patients. Mr. Johnson's report also shows that needed agreements for returning Mr. Hobson to work at CSTC were not moving forward.
38. Shortly after this report, Mr. Johnson sent the ergonomic evaluation to Dr. Stump for review along with a Psychiatric Child Care counselor job analysis that had modifications corresponding to restrictions Dr. Stump had placed on Mr. Hobson's physical activities. On page 6 of this analysis, Dr. Stump marked "X" next to the printed statement, "I disagree that the injured worker can perform the physical activities described in the job analysis based on the following physical limitations and objective medical findings:" then added the following handwritten notations: "Pt unable to have direct patient care (#10 & # 11) max lifting & pushing – 35 lbs – this should be stated on J.A. Pt should be permitted free position change."
39. In response to this opinion on the job analysis, Mr. Johnson or someone at L&I sent Dr. Stump another questionnaire, apparently to clarify the basis of his opinion.

Over his signature dated April 30, 2001, Dr. Stump marked "yes" to the question "Is Mr. Hobson able to work on a full time basis?" He marked "light" in response to the question "If yes, at what level is Mr. Hobson able to work on a full time basis?" The next section contained the instruction, "If no, provide objective medical evidence that relates Mr. Hobson's inability to work on a full time basis to the accepted conditions" (the "accepted conditions" identified at the top of this document were "847.0 sprain of neck; 847.2 strain of lumbar region, DenL 20 Dental and broken Dentures, L 844.8 Sprain Lateral Coll Lig and 840.8 Sprain Shoulder/Arm Nec [all sic]). In response to this instruction, Dr. Stump wrote: "cervical deg[enerative] disc disease, knee and shoulder surgeries."

Then Dr. Stump responded as follows to the last three instructions on this form:

**The job of injury job analysis reviewed by you on 4/20/01 stated that the worker is not to have direct patient care. Please provide objective medical evidence that relates Mr. Hobson's inability to perform the modified job of injury on a full time basis to the accepted conditions at this time.**

**Comment:** cervical deg[enerative] disc disease, knee and shoulder surgeries.

**The job of injury job analysis reviewed by you on 4/20/01 stated that the job analysis needed to state that the worker is restricted from pushing or pulling 35 pounds or less on an occasional basis. The pushing and pulling sections of the job analysis stated that only 15 pounds of force is require[d] to perform the modified job of injury. Please provide objective medical evidence that relates Mr. Hobson's inability to perform the modified job of injury on a full time basis to the pulling and pushing of 15 pounds of force or less.**

**Comment: as above**

**The job of injury job analysis reviewed by you on 4/20/01 stated that the job analysis needed to state that the worker is restricted from lifting or carrying 35 pounds or less on an occasional basis. The lifting and carrying sections of the job analysis stated that worker is required to lift or carry 1-5 pounds to perform the modified job of injury. Please provide objective medical evidence that relates Mr. Hobson's inability to perform the modified job of injury on a full time basis to the lifting or carrying of 1-5 pounds [or] less.**

**Comment: as above**

40. On May 18, 2001, Mr. Johnson wrote a report recommending that vocational services for Mr. Hobson be cancelled in anticipation of the left knee surgery scheduled for May 21. In the narrative, he reiterated that Dr. Stump had stated that Mr. Hobson was capable of full-time work at the sedentary level, though he could not return to his job of injury because of the degenerative disc disease and prior surgeries. In the Medical/Physical Information portion of the report, Mr. Johnson stated: "Mr. Hobson is not able to work at this time due to his knee injury. Mr. Hobson's mental capacities were not evaluated." At the end of a review of Mr. Hobson's education background and the requirements for jobs that Mr. Hobson had had previously, Mr. Johnson stated, "Mr. Hobson has acquired the skills, training, education to work as counselor."
41. On July 3, 2001, Mr. Johnson went with Mr. Hobson to a follow-up examination with Dr. Stump. Dr. Stump's chart note for this date reports that Mr. Hobson rejected the modified job analysis that Mr. Johnson had developed with CSTC because even though it was specific about no physical intervention with students, the risk of assault with any interaction with students remained high. Dr. Stump stated, "The patient's vocational counselor could not really deal with this question. Mr. Hobson has indicated that he will discuss this further with his employer. We have reviewed the other job requirements, and, *except for this element*, Mr. Hobson appears comfortable with a potential return to work soon." (emphasis added)
42. Through July 2001, Dr. Stump, Mr. Hobson, Mr. Johnson and CSTC continued to discuss and anticipate Mr. Hobson's return to work at CSTC in a position requiring only light physical duty. On July 25, Dr. Stump's chart note of another follow-up visit reports, "[Mr. Hobson] has continued conversations with his employer about returning to work. Although there is some minor sticking points [sic], it appears that

things are getting worked out so that he can go back to work shortly." On July 27, 2001, Dr. Stump specifically stated on a medical questionnaire that Mr. Hobson could return to work full time. Exhibit 13, p. 3. Dr. Stump indicates no change in Mr. Hobson's physical condition in either of his July 2001 chart notes. In comparison to the Estimate of Physical Capacities he had completed in February 2001, Dr. Stump slightly downgraded his estimate of Mr. Hobson's physical capacities for lifting and carrying, and right-hand pushing and pulling in his new Estimate on July 27, 2001.

43. Mr. Johnson again submitted a job analysis describing the requirements for the job titled "Psychiatric Child Care Counselor III." It summarizes the physical demands as "sedentary."

It makes the following pertinent specifications:

Job Description: Supervises a team of 16-18 PCCC's in the treatment, counseling and care of children and youth with emotional and behavioral disorders in a multi-disciplinary residential treatment program, 24 hours per day, 7 days per week. In addition to these staff, supervise cottage clerk and employees on temporary, intermittent and float status

Essential Job Functions:

1. Responsible for the management of the cottage budget.
2. Conduct performance and competency evaluations of the PCCC 1's, PCCC 2's and Cottage Clerk.
3. Ensure the WAC's, RCW's DSHS's and CTC's policies and procedures are adhered to by subordinate staff.
4. Conduct pre-employment interviews for position vacancies, make selections based on the interviews and submit recommendations to the DNS [Director of Nursing Services].
5. Provide and/or supervise on-the-job training to subordinate staff.
6. Serve as liaison for CSTC, when directed by the CEO, to other agencies.
7. Lead a team and/or independently conduct Critical Incident Reviews Investigations and make recommendations to the CEO.
8. Daily review patient incident reports.
9. Attend daily and weekly clerical/administrative meetings.
10. Monitor the children's lunch time, participate in counseling, supervise play and daily activities and only verbally intervene when necessary.
11. The employer stated that the job has been modified so as not required or permitted the worker [sic] to participate in physical interventions, containment, transporting or restraining of patients. The employer has stated that the worker's job has been modified to require verbal intervention when required.

Marginal job functions:

\*Attend schools, training and other in-service to enhance counseling and administrative skills

\*Develop annual employee vacation schedule, including registered nursing staff.

Physical Demands:

1. Standing: Occasionally

Comments: the worker may change position as required); The worker will stand or sit while monitoring lunch time for the patients, discussing issues with staff informally and talking with patients. The employer stated that the worker is required to monitor lunch, provide counseling, supervise play and daily living activities for the patients and verbally intervene when necessary. The worker may change his position as required.

2. Walking: Occasionally

Comments: The worker will walk from the cottage to other buildings for meetings.

3. Sitting: Frequently

Comments: The worker will sit while using the telephone or computer, participating in meetings and staffings. The worker may change position as required.

4. Pulling: Occasionally

Comments: The worker will pull open doors, up to 15 pounds of force, and pull open desk and file cabinet drawers. The attending physician has stated the worker is restricted of [sic] pulling 35 pounds or less on an occasional basis.

5. Pushing: Occasionally

Comments: The worker will push doors, file and cabinet drawers, not to exceed 15 pounds of force. The attending physician has stated that the worker is restricted from pushing 35 pounds or less on an occasional basis.

6. Lifting: Above shoulder: Seldom  
Lifting: Waist to shoulder: Occasionally  
Lifting: Below waist: Seldom

Comments: The worker will lift documents, books, files, telephone handset and other documents. 1-5 pounds. The attending physician has stated that the worker is restricted from lifting 35 pounds or less on an occasional basis.

7. Carrying: Occasionally

Comments: The worker will carry books, files, and documents, 1-6 pounds. The attending physician has stated that the worker is restricted from carrying 35 pounds or less on an occasional basis.

8. Climbing: Never

Comments: Climbing is not required.

9. Balancing: Never

Comments: As required to perform job while walking.

10. Bending/Stooping/Kneeling/Crouching: Seldom

Comments: The worker will bend, stoop, kneel or crouch to access files, books or documents. The employer has stated that the worker's office can be modified to reduce bending, stooping, kneeling or crouching for work-related items.

11. Crawling: Never, Seldom

Comments: The employer has stated that this is not a requirement of the job and can be modified to exclude crawling.

12. Reaching: Above shoulder: Never  
Reaching: Waist to shoulder: Occasionally  
Reaching: Below waist: Never

Comments: The worker may reach to access files, books or documents, 1-5 pounds. The employer has stated that the worker's office can be modified to reduce above shoulder and below waist reaching for work-related items.

13. Handling:

Simple Grasp: Frequently  
Power Grasp: Seldom  
Push/Pull: Seldom  
Wrist Twisting: Frequently

Comments: The worker is required to use simple grasp to handle the telephone, computer, files, books and documents. The worker is required to use power grasp to open or close doors. The worker may be required to push or pull open doors, like cabinets/desk drawers. The worker may use wrist twisting to use a telephone or operate doors when using keys. The worker stated that he has power grasp and push/pull on an occasional basis.

14. Fingering:  
Fine Manip.: Frequently

Comments: The worker may use fingering to operate a telephone, computer keyboard, read papers and use door keys.

15. Feeling: Never

Comments: Not required to perform the job

16. Talking/Hearing: Continuous

Comments: The worker is required to communicate continuously.

17. Seeing: Continuous

Comments: The worker must be able to see in order to perform the job.

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Work Pattern: 5 days per week, 8 hours per day, 40+ hours per week. The worker might be required to be available by page for 24 hours at a time. The worker will have a beeper to be contacted and will use a

telephone to give directions or instructions to staff members after regular working hours. Might be required to work overtime. The employer stated that flex time is appropriate as long as the worker works 8 hours & 15 minutes per day and provides supervision of both day and afternoon shifts.

Work/Rest Cycle: 45 minute lunch and (2) 15 minute breaks.

Environmental: Indoors 90% of the day, will be outdoors moving from building to building.

Hazards/Obstacles: The employer has stated that the workers job has been modified to eliminate physical intervention with the patients.

Unprotected Heights: None.

Training Required: On-the-job training

Licenses/Certification/Registrations Required: A Bachelor's degree with a major study in Social Sciences, Education, Recreation, Psychology or related field and three years of social service experience,

OR

Three years as a Psychiatric Child Care Counselor 1

OR

Two years as a Psychiatric Child Care Counselor 2.

Registration as a nursing assistant is required to perform the job.

The job requires First Aide and CPR training and Continued Education Units.

Special Skills/Aptitudes: Knowledge of team building, supervision, child growth and development, psychiatric and behavioral disorders, mediation, problem solving, concepts of group process and behavioral therapy, and psychiatric child care treatment techniques. Ability to communicate effectively orally and in writing, and intervene verbally in crisis situations to de-escalate volatile situations.

Machines, Tools, Office or Special Equipment Used: Computer, fax, copier, calculator and telephone.

Vehicles or Moving Equipment Used: The worker is not required to provide transportation for patients.

Modifications or Accommodations Available: See the attached ergonomic evaluation.

44. On July 27, 2001, Dr. Stump signed the physician's opinion page (Page 7) of this modified job analysis. Dr. Stump marked his choice of the statement, "I agree the injured worker can perform the described job, but only with the following modifications:", then inserted, "deletion of #10 – essential job functions." On Exhibit 12, the copy submitted for the record, Dr. Stump lines out essential job function 10, "Monitor children's lunch time, participate in counseling, supervise play and daily activities and only verbally intervene when necessary."
45. On August 7, 2001, two doctors with Corvel IME (Independent Medical Evaluation) Services examined Mr. Hobson at the request of Labor and Industries. Mr. Hobson went for this examination, in his words, "fully medicated." His friend Mr. Marshall drove him to the appointment and accompanied him through the

examination of about one and one-half hours. Mr. Hobson remembers being put through tests of gripping, pushing and pulling, and sensation (pin pricks). Orthopedic surgeon Dr. Richard Thorson, M.D. and neurologist Dr. Laura Morris, M.D. concluded that Mr. Hobson was capable of light duty work. They found, "he has a cervicodorsal Category I with no orthopedic or neurologic impairment. The dorsolumbar/lumbrosacral spine was Category IV before and after the April 2000 injury due to prior fusion. The right shoulder has 8 percent permanent partial disability due to loss of motion and residual weakness. . . he has no ratable impairment regarding aggravating injury to left knee . . . " Exhibit 14 pp. 8, 9. Mr. Hobson felt that this examination was thorough and he was able to express himself fully to the examining doctors.

46. Drs. Thorson and Morris also reviewed the modified job analysis for Psychiatric Child Care Counselor III. On the final page of the modified job analysis, the doctors placed an "X" next to the statement, "I disagree that the injured worker can perform the physical activities described in the job analysis based on the following physical limitations and objective medical findings: I.W. [injured worker] has multiple injuries [unexplained symbol] multiple assaults. He should not be exposed to further assault. These restrictions are permanent." Both doctors signed this statement without additional comments.
47. L&I forwarded the Corvel IME report to three other physicians who were involved in Mr. Hobson's care at that time. Dr. Van Buecken, orthopedic surgeon, concurred with the impairment rated by Drs. Thorson and Morris. Neurologist Dr. Stump concurred "neurologically," but advised that a Dr. Ciani should review the panel's report because his impairment rating for the left knee was higher (2%) compared to the Corvel panel rating (0%). On October 22, 2001, Dr. Ciani also concurred with the medical panel impairment rating.
48. Mr. Johnson continued with steps toward Mr. Hobson's return to work at CSTC. His progress reports for August and September indicate continued planning, but the progress report for October 2001 shows that CSTC was no longer offering return to work options for Mr. Hobson. L&I requested that a transferable skills analysis, job analyses and a labor market survey be performed to develop other return to work options for Mr. Hobson.
49. Mr. Johnson's November progress report stated the DSHS Office of Risk Management had informed him that there were no return-to-work options for Mr. Hobson with CSTC after review of the Corvel IME and Dr. Stump's review of the job analysis for the modified job of injury. Mr. Hobson characterized this as a personal decision by Ms. Lafond, the CEO of CSTC; Sue Lind, Human Resource Consultant Assistant with the DSHS Child Study and Treatment Center, speaking for CSTC in her employer's statement letter to DRS in March 2002 characterized it as a decision by Mr. Hobson's doctors. Mr. Johnson identified Dr. Stump's deletion of essential job function 10 as the critical barrier to resolution of Mr. Hobson's case, as Mr. Hobson's attorney was threatening legal action.
50. In his December progress report, Mr. Johnson stated that a transferable skills analysis had yielded eight job categories in which someone with Mr. Hobson's

skills could possibly work. He developed a job analysis for one of them, Case Aide, for Dr. Stump's review. On December 31, 2001, Dr. Stump saw Mr. Hobson in a follow-up visit and noted that Mr. Hobson's back pain had stabilized after completion of physical therapy earlier that month, but had increased again as he spent time sitting while filling out job applications. He noted, "The primary problem is a return-to-work position at this time. [Mr. Hobson] notes that he may be required to retire as of April if employment options cannot be found. He continues to put in various applications for employment." The record does not document Dr. Stump's specific response to the Case Aide job analysis.

51. For approximately two months between November 2001 and January 2002, Mr. Hobson participated in a Return to Work Initiative through the Washington State Department of Personnel. He completed part of the learning activities by telephone. In the closing report, the vocational counselor who worked with him on identifying transferable skills, writing resumes and cover letters, completing the Washington State Employment Application, interviewing and follow-up techniques, and access to special registers stated that "Mr. Hobson . . . would be an asset to any agency," and "Mr. Hobson retains many transferable skills, especially in the areas of training, supervision and management." The counselor remarked that he was hopeful Mr. Hobson would return to work with the State of Washington in the near future. In her January 14, 2002, cover letter forwarding the vocational counselor's report to L&I, Denise McKay, Return to Work Program Manager for Department of Personnel, reported that she was continuing to work with Mr. Hobson, assisting him with application and testing for a variety of state positions in the Kitsap and Pierce County areas, and that DSHS continued to investigate reasonable accommodation for employment in that agency.
52. Mr. Hobson went for a follow-up visit to Dr. Stump on February 22, 2002. At this visit Dr. Stump observed that Mr. Hobson was having "butt cramps" that, though episodic, "will still limit his activity for periods of time." Dr. Stump reviewed two job analyses, for "teacher assistant" and "general clerk." Dr. Stump wrote on the physician's page for the "teacher assistant" that Mr. Hobson was "unable to frequently sit, stand, walk or carry," and disagreed that he could perform the physical activities described on the job analysis. Dr. Stump listed no objective medical findings as requested on the form. For the "general clerk," Dr. Stump also disagreed that Mr. Hobson could perform the described physical activities, commenting, "Excessive sitting, standing, twisting, walking, crouching and reaching." All of these activities had been marked as occasional to frequent in the job analysis. Again he listed no objective medical findings as requested.
53. In response to a request from Mr. Hobson, Sue Lind, Human Resource Consultant Assistant with the DSHS Child Study and Treatment Center, wrote a letter to the Department of Retirement Systems on March 7, 2002. In the letter, written as an Employer's Statement (part 2 of an application for disability retirement), Ms. Lind reports that Mr. Hobson, though still employed by CSTC, had been off work since April 21, 2000; that CSTC had not, to date, received "any medical documentation that Mr. Hobson cannot work in any capacity;" that Drs. Stump, Thorson and Morris had determined that Mr. Hobson could not return to his job of injury; and that after a meeting on November 2, 2001, the agency was still actively searching

for another position for Mr. Hobson.

54. Dr. Stump completed a Physician's Statement, Part 3 of Mr. Hobson's application for disability retirement, and in that document reported to DRS that Mr. Hobson was capable of working, with restrictions. Dr. Stump's Part 3 is not part of the record here.
55. Meanwhile, Mr. Johnson continued his efforts to identify jobs in state government that Mr. Hobson might be able to do within the work restrictions identified by Dr. Stump. On February 27, 2002, he met on-site with Jane Bradley, with the Bremerton Community Services Office for DSHS. That day, after his meeting with Ms. Bradley, Mr. Johnson completed a job analysis form for a position titled Financial Service Specialist 3. The physical demands for this position are listed as "light." The form specifies that for this position, sitting is "continuous (greater than 66% of work cycle)," then, under "comments," the following: "The worker will sit while interviewing clients, working on the computer, completing paperwork or attending meetings. The employer stated that a sit/stand workstation would be appropriate if required." Other physical tasks, standing, walking, pulling pushing, lifting, carrying, climbing, balancing, bending, stooping kneeling, crouching, crawling, and handling, are all marked at "Occasional," "Seldom," or "Never." While reaching waist-to-shoulder is marked as "Frequent," reaching below-waist or above-shoulder are both marked "Seldom." Under "Modifications or Accommodations Available," Mr. Johnson noted that the employer had stated that ergonomic equipment such as a sit/stand workstation, ergonomic chair, or telephone headset would not be a barrier to the worker's employment. On March 15, 2002, Ms. Bradley signed the form affirming that the information was an accurate representation of the job.

On April 1, 2002, Dr. Stump marked the paragraph on the physician's page of the Financial Service Specialist 3 job analysis form stating: "I do not agree that the injured worker can perform the physical activities described on the job analysis. . ." In the accompanying comments, the doctor wrote, "excessive sitting, may consider J.A. to assist in functional level." This was the extent of Dr. Stump's comments on this form. There were no objective medical findings listed to support his statement of disagreement, as requested on the form. On this date Dr. Stump also suggested that Mr. Hobson have a PCE (Physical Capacities Evaluation) to help determine his ability to work.

56. In March 2002, Mr. Hobson refused to drive to Lacey, Washington, to participate in testing sessions offered by the Department of Personnel. These tests are for the purpose of qualifying job applicants for hiring registers from which jobs in state government are filled.
57. On May 14, 2002, Dr. Stump wrote a letter to DRS at Mr. Hobson's request. The body of the letter states as follows:

I have been informed by Mr. Hobson that he has applied for disability retirement.

Apparently some question has arose [sic] concerning my completion of a

retirement systems form on March 12, 2002. In that report, I stated the patient was capable of working with restrictions.

I have subsequently had the opportunity of reviewing the RCW and its relationship to retirement. Following the review of that information, it is my belief that Mr. Hobson does meet the requirements for total disability with reference to his State of Washington Employment.

I have reviewed multiple job analysis [sic] as submitted by the patient's vocational counselor, Bruce Johnson. Unfortunately, Mr. Hobson has not qualified for any of the available positions.

Exhibit 31.

58. Mr. Hobson's L&I claims manager scheduled a physical capacities evaluation for Mr. Hobson on May 9, 2000, which Mr. Hobson did not attend. The claims manager also scheduled an independent medical evaluation for June 4, 2002, to determine more clearly Mr. Hobson's medical condition, and deferred decisions on his claims for further medical benefits stemming from his fall until she received the IME results.
59. On June 4, 2002, orthopedist Patrick Bays, D.O. and neurologist Edward DeVita, M.D., of Objective Medical Assessments Corporation (OMAC) in Seattle, Washington, examined Mr. Hobson. Mr. Hobson did not take pain medications before the examination. Mr. Marshall again drove Mr. Hobson to the examination site and accompanied him through the examination.

Drs. Bays and DeVita reported the results of their examination to Mr. Hobson's claims manager at L&I. At paragraphs 4 and 5 of the "Recommendations and Discussion" portion of their report, the doctors stated that Mr. Hobson

is capable of gainful employment from an objective or lack thereof basis on full duty without restrictions; however, due to his significant pain behavior and recurrent injuries, we would concur with prior assessments that sedentary to light duty work logistically would be the best option. This is solely in reference to this claim and not due to any other potential preexisting conditions.

At paragraph 10, the instructions on the report were to "please specify the objective findings upon which your recommendation is based. In addition, specify any subjective complaints that are supported by objective findings." In response, Drs. Bays and DeVita stated:

The examination was dominated by significant nonphysiologic findings and pain behavior despite having three out of five Waddell's findings being negative.

The doctors identified impairments with respect to Mr. Hobson's spine (Category 1 for cervical and cervicodorsal spine, Category 4 for lumbar and lumbrosacral spine based on a prior fusion). They did not find ratable impairments of the right

shoulder or left knee.

Drs. Bays and DeVita reviewed and approved job analyses for Financial Aid Counselor, General Clerk and Family Support Assistant, with allowances for frequent changes of position and avoidance of repetitive bending and stooping.

60. Mr. Hobson feels that the OMAC examination was tainted by some hostility to his friend Mr. Marshall's presence and attempts to take notes during the examination. At the insistence of both the doctors' office and Mr. Hobson's L&I claims manager, Mr. Marshall agreed not to take notes during the examination. Mr. Hobson and Mr. Marshall felt that this examination was extremely brief and lacking in thoroughness in comparison to the earlier IME by Drs. Thorson and Morris.
61. On June 7, 2002, Mr. Johnson proposed closing CMC's vocational services for Mr. Hobson, perceiving that Mr. Hobson's failure to attend a scheduled PCE appointment and to test for state jobs indicated that Mr. Hobson was not cooperating with the efforts to find work. He also was nearing the end of the funding from L&I for the services of one particular vocational counselor. Mr. Johnson did not propose to close services because he thought that Mr. Hobson would not benefit from them. It is his professional opinion that Mr. Hobson's skills and experience qualify him for a wide range of jobs, and that there are jobs available in Mr. Hobson's labor market for which his skills would qualify him, and which either are within the medical restrictions on physical activity or could be modified to fit within them.
62. Mr. Hobson, distrustful of the medical examination arrangements being made by L&I, arranged for a physical capacities evaluation on his own. Mr. Hobson contacted Ann L. Armstrong, a Registered Physical Therapist with a B.S in that field from the University of Washington, to perform a physical capacities evaluation as suggested by Dr. Stump. Mr. Hobson paid for this examination rather than having L&I approve and pay for it; Mr. Hobson had no prior experience or relationship with Ms. Armstrong. Ms. Armstrong has practiced for 16 years as a physical therapist, and for 12 years has performed physical capacities evaluations as an approved provider for the Washington State Department of Labor and Industries. She has no training or experience in vocational counseling.

Ms. Armstrong evaluated Mr. Hobson on June 11, 2002. Ms. Armstrong happened to be at the front desk office in Poulsbo, Washington at the time that Mr. Hobson arrived, and observed his movements through unobstructed plate glass windows as he exited the car and passed the desk area on his way to the entrance. She observed that he moved slowly and with difficulty as he walked 35 to 40 feet to the front door. She took a subjective history from Mr. Hobson regarding injuries, past medical care, work history and current complaints. Mr. Hobson was not using pain medications on that day. Ms. Armstrong tested and observed Mr. Hobson for approximately two hours, a normal amount of examination time in her experience. Ms. Armstrong asked Mr. Hobson to perform certain actions to assess his ability in sitting, walking, sitting, pulling, pushing, lifting, carrying, balancing, bending, stooping, kneeling, crouching, crawling, reaching, handling, fingering, feeling talking seeing and hearing. She did not perform a ladder-climbing test out of safety

considerations. Evaluating some of these abilities involved progressive tasks, such as pulling or pushing an empty box, then repeating the action with some weight in the box. Ms. Armstrong relied on Mr. Hobson's relation of pain or inability to determine where to stop a particular task.

63. Using Mr. Hobson's statements and her observations of his movements, Ms. Armstrong stated the following in her report of June 27, 2002:

*Impressions*

Based on testing and the examiner's observations, M[r]. Hobson can manage no lifting, carrying, bending, reaching, or heavy tasks of any sort. He cannot carry objects or push and pull. He is able to complete varied sitting, standing and walking tasks, but this is variable due to pain levels and sudden onset of spasms which have an immediate impact on any task. He has normal fine motor control, feeling, talking, seeing and hearing. He cannot complete any overhead work.

Testing and observation indicated that Mr. Hobson is in poor physical condition. He has significant deficits in range of motion and strength in various joints.

Our observations and discussions with the client suggest that he is not highly motivated to return to work. He is too impaired and uncertain about his daily function and pain levels to be employed outside of the home.

**Recommendations**

Based on testing and the examiner's observations, it would be difficult for Mr. Hobson to return to work in any capacity. It is certain that he is not capable of working an 8 hour day.

She noted her observations and estimates of his ability for the following:

- Standing: up to one hour continuous (requires space to rock/sway in place). Can perform standing intermittently during the day, up to two hours out of an 8 hour day
- Walking: up to ¼ mile in 30 minutes. Can perform walking intermittently during the day, up to one hour out of an 8 hour day. Requires use of a standard cane.
- Sitting: range of 5 to 45 minutes, up to 1-½ hours out of an 8 hour day
- Stooping: for 10 to 15 second intervals only.

She characterized his level of functioning as very low. She understood as part of Mr. Hobson's subjective history that he had a difficult time driving, that he could sometimes drive up to 30 to 45 minutes, but was unable to drive at all if he was taking medications.

64. In her testimony at the hearing, Ms. Armstrong elaborated on some statements in her report. In connection with walking, Ms. Armstrong testified that Mr. Hobson did not at that time have the ability to bring his right foot up fully for walking ("foot drop"), making him more likely to drag his toe, and putting him at much greater risk for falling. In connection with grasping, she noted ulnar nerve distribution numbness in the outside of the right hand, including the ring and small fingers, making him more likely to drop things. She stated he had no ability to push or pull,

because any attempt to pull or push brought on back spasms. She did not feel his back spasms herself, but stated that mid- and lower-back spasms can be extremely painful and debilitating and could cause complete inability to walk around, sit or function "until the spasm settles down." She assumed a complete inability to carry objects because of Mr. Hobson's need to use a cane. She stated his limitations are somewhat variable from one day to the next, and would likely not improve, but would get progressively worse. Ms. Armstrong did not believe that Mr. Hobson was exaggerating his movement limitations or reporting of pain. Nothing in the record suggests that Ms. Armstrong had any contact with Dr. Stump, or received any medical information from him, regarding Mr. Hobson. She did not review his medical records.

65. With regard to Mr. Hobson's functional capacities affecting his ability to work, Ms. Armstrong thought it significant that his physical limitations, combined with high pain levels and back and buttock spasms, would unpredictably stop him from functioning, preventing him from following any kind of normal work schedule. The only employment she could imagine Mr. Hobson engaging in would be something he could do at home, such as telemarketing, or telecommuting, where he could control his own hours depending on his physical condition on any given day. She opined that he could not perform jobs, such as customer service clerk, that required pushing, pulling, reaching above the shoulder, climbing, bending, and especially prolonged sitting or standing.
66. On July 10, 2002, L&I again referred Mr. Hobson to CMC, specifically requesting that labor market surveys be completed based on the OMAC-approved job analyses. In August 2002 vocational counselors with CMC surveyed the labor market in Kitsap County, the county in which Mr. Hobson resides. They did not complete a survey for Financial Aid Counselor, as the employment for that job type was too limited in the county. They saw Mr. Hobson as qualified for positions as both Family Support Assistant and General Clerk. They completed a market survey for Family Support Assistant, but found that employment opportunities were limited to part time, temporary or on-call positions. Since L&I would not recognize positions offering less than full-time work (fitting the work pattern at the time of injury), the counselors did not consider this a positive market survey.

The CMC counselors identified a positive labor market in Kitsap County only for the General Clerk classification. This survey identified clerical and administrative positions that had been filled in the most recent six months or would likely be filled within the next six months. These positions, in social service agencies, automobile dealerships, and a community college, would generally require frequent sitting but little in the way of physical demands otherwise. The employers contacted indicated that someone with some of Mr. Hobson's transferable knowledge and skills would meet their minimum hiring requirements. The survey report does not indicate that the identified positions were discussed with any specific reference to Mr. Hobson or to accommodations that might be needed for him to actually fill any of the identified positions, or that Mr. Hobson was encouraged to apply for any of these positions. The wages reported for these positions ranged from \$6.75 to \$10.75 per hour.

67. In September 2002, the federal Social Security Administration (SSA) notified Mr. Hobson by letter of its determination that he had met "the medical requirements for disability benefits," based on a May 14, 2002 report from Dr. Stump and a June 27, 2002 report from Ann Armstrong. The notice advised that the SSA was still considering whether he met the "nonmedical requirements," and once SSA made that next determination it would make an appealable decision on his application for disability benefits.

*Mr. Hobson's Testimony (August 2003)*

68. Mr. Hobson recounts that after his surgeries and postoperative physical therapy he was recovering well from his 1987 accident. His outlook changed with the 1998 student assault, after which, despite additional surgeries and physical therapy, he experienced chronic pain in his back and spasms and weakness in his right leg. He had difficulty sitting, standing, and doing other normal work activities, but with the eventual provision of an ergonomic chair, he continued to work at CSTC after returning from the back surgery.
69. Since the 2000 assault, he had headaches "for quite some time," almost daily for some two years. He has experienced "tremendous pain" from spasms in his back, spasms that he reports "just would never go away." He has persistent tingling and numbness in his right arm and hand. He has had numbness, weakness and increased "lightning bolt" pain and muscle spasms and right leg, cramps in his right buttock, and "locking up" in his left knee. He has had difficulty controlling his right foot while walking. He relates that continuing pain in his right shoulder, even after surgery, greatly limits his ability to lift with that arm and to sleep on his right side. After the 2002 fall in his home, his experience of pain has generally been worse, so that he must take pain medication almost constantly, and that he uses a cane to walk nearly all the time. Although there are times when he can sit comfortably for short periods, he usually avoids sitting because it increases spasms in his back and the pain and numbness in his right leg.
70. On the day of the hearing, Mr. Hobson testified that he had taken the medications prescribed by Dr. Stump for pain and muscle spasms, and that these medications impaired his ability to remember information accurately and to concentrate or process information quickly. He nonetheless testified cogently with good memory for his interactions with professionals and for event sequence.
71. Mr. Hobson also testified to his belief that he could not drive safely while taking these medications because he is groggy and reacts slowly, and so had come to the hearing location as a passenger in a vehicle driven by a friend.
72. During the hearing the Presiding Officer observed that Mr. Hobson used a cane when he walked, and stood during part of his testimony and throughout the first period of the second day, often leaning against a wall or on his cane for support. He sat in an upholstered chair intermittently. He frequently shifted position while standing and sitting. He took notes during the hearing, and appeared to be listening carefully to other speakers, even when he did not focus on them visually.

*Mr. Hobson's application for disability retirement*

73. An application for PERS Plan 1 disability retirement has three parts, one completed by the system member, one by the member's employer and one by the member's attending physician. On March 7, 2002, Sue Lind, CSTC Human Resources Consultant Assistant, wrote the employer's statement letter in connection with Mr. Hobson's application. On March 12, 2002, Dr. Stump wrote a physician statement in connection with Mr. Hobson's application. The application itself is not in the record and no document in the record records the date on which Mr. Hobson submitted his application for disability retirement to DRS.

*Further Vocational and Physical Evaluation for L&I*

74. *The Department of Labor and Industries (L&I) continued to process Mr. Hobson's claim after the DRS hearing in August 2003. L&I contracted with Whittall Management Group Ltd. for an Ability to Work Assessment. Ms. Jennifer Kabacy, a certified disability management specialist, and at the time a vocational rehabilitation counselor with Whittall, coordinated the response and developed the recommendation to L&I for Mr. Hobson.*
75. *Ms. Kabacy identified four jobs based on "the skills that he's [Mr. Hobson has] demonstrated to be able to perform." Supplemental Hearing Transcript at 43. She produced job analyses for these four jobs, Psychiatric Child Care Counselor 3, journeyman super-foreman sprinkler fitter, emergency medical technician and sales representative.*
76. *In part, Ms. Kabacy developed the job analysis for Psychiatric Child Care Counselor 3 by conducting an on-site visit at CSTC and interviewing staff there. Her analysis records that qualifications for the job include a bachelor's degree in a specific or related field and at least two years of on the job experience. In the listing of essential job functions, number 10 is "Monitor the children's lunch time and intervene when necessary." Number 11 is "If required, assist in containment and restraint of patients." The report adds the following statement to both these functions, "The employer has stated this function can be modified or eliminated as an essential function of the job." A similar statement appears under Additional Comments, "The employer has stated that the worker's job can be modified to eliminate physical containment and restraint of patients."*
77. *Ms. Kabacy sent new "medical questionnaires" to Drs. Stump and Staker. Regarding Mr. Hobson's ability to work, Dr. Staker did not give an opinion, but recommended input from Dr. Stump and a Physical Capacities Evaluation (PCE). Dr. Stump responded with a Physician's Estimate of Physical Capacities indicating that Mr. Hobson could sit, stand and walk up to 4 hours in an 8-hour day.*
78. *Ms. Kabacy ordered a performance-based PCE from Capen and Associates. With this order she included the four job analyses she had produced. Christina Casady, an occupational therapist and owner of Capen Associates, performed the PCE on December 5, 2003. Ms. Casady gathered background information and tested Mr. Hobson for his capacity to perform certain physical actions and tasks*

*keyed to requirements of the four job analyses provided by Ms. Kabacy. She reported to Ms. Kabacy that Mr. Hobson was unable to perform any of these jobs on a reasonably continuous basis, that is, for an eight-hour day or a 40-hour week. Her evaluation rested on her observations and Mr. Hobson's reports of what he could physically do.*

79. *Ms. Kabacy sent the Capen PCE results to Dr. Staker and Dr. Stump for review. Dr. Staker again deferred to Dr. Stump. Dr. Stump reviewed the PCE and concurred with Ms. Casady's estimate that Mr. Hobson retained the capacity for sedentary-level work activities up to six and one-half hours per day, but could not maintain "reasonably continuous" (full-time) employment because of his physical limitations.*
80. *On January 28, 2004, Ms. Kabacy completed the Ability to Work Assessment for L&I. Her report concluded that Mr. Hobson is "not able to work or participate in vocation rehabilitation due to industrial injury," and incorporates the determinations from both the occupational therapist and the attending physician that Mr. Hobson could not maintain "reasonably continuous" (full-time) employment because of his physical limitations. Ms. Kabacy did not attempt to identify any other possible employment in Mr. Hobson's market area given these professionals' opinions that Mr. Hobson could maintain full-time employment even in sedentary positions.*

#### CONCLUSIONS OF LAW

1. The Department of Retirement Systems (DRS) has jurisdiction over the parties and the subject matter of this appeal. RCW 41.40.068 and .073, Chapter 41.50 RCW, and WAC 415-08-020(1).
2. The Presiding Officer, as the designee of the agency Director, issues this final order for DRS: RCW 41.50.060, RCW 34.05.425 and RCW 34.05.461.
3. DRS is charged with the administration and management of the Public Employees' Retirement System, and with responsibility for implementing the provisions of Chapter 41.40 RCW (the PERS authorizing statute). RCW 41.40.020. DRS is also responsible for the administration of the PERS trust fund for the benefit of its intended beneficiaries. In doing so, DRS must follow the direction of the Washington State Legislature, which authorizes retirement plans for State and other public employees.
4. The PERS Plan 1 member must prove by a preponderance of the evidence that he or she meets the standards for PERS Plan 1 retirement for disability in the line of duty ("duty disability"). WAC 415-08-420(2); *Grosche v. Washington State Employees' Retirement Board*, 69 Wn.2d 337 (1966). Those standards are set out in the companion provisions of RCW 41.40.200 (describing the eligibility criteria for duty disability retirement) and RCW 41.40.010 (28) (defining "total incapacitation for duty").
5. A PERS Plan 1 member may receive a duty disability retirement allowance if he

timely files an application within two years of an incapacitating injury, and then is able to prove that he is totally incapacitated for duty as the result of an accident occurring in the performance of duty. RCW 41.40.200(1). The record in this case is not sufficient to support a conclusion that Mr. Hobson is entitled to a duty-related disability retirement allowance under PERS Plan 1. This record lacks persuasive evidence on the elements of total incapacity for the member's employment, and total incapacity for any other employment for which the member is qualified.

6. The PERS Plan 1 duty-related disability statute, RCW 41.40.200, provides in pertinent part:

(1) . . . [U]pon application of a member, . . . a member who becomes **totally incapacitated for duty as the natural and proximate result of an accident occurring in the actual performance of duty . . . shall be retired subject to the following conditions:**

(a) That the medical adviser, after a medical examination of such member made by or under the direction of the medical adviser, shall certify in writing that the member is mentally or physically totally incapacitated for the further performance of his or her duty and that such member should be retired;  
[and]

(b) That the director concurs in the recommendation of the medical adviser;

(c) That **no application shall be valid or a claim thereunder enforceable unless, in the case of an accident, the claim is filed within two years after the date upon which the injury occurred . . .**

(bold emphasis added)

7. Eligibility for a duty-related disability retirement under PERS Plan 1 involves two threshold questions, membership in Plan 1 and timely filing of the proper application with DRS. On the first question, Mr. Hobson's membership in Plan 1 of PERS, no proof has been offered in this proceeding other than Mr. Hobson's response to questions put by the Presiding officer, that he had understood in 1995 that he was still a member of PERS Plan 1 as a result of some earlier employment. On the second question, the timeliness of Mr. Hobson's application for disability retirement under RCW 41.40.200(1)(c), there is only indirect evidence from documents generated by Mr. Hobson's employer and doctor. These documents, Exhibits 28 and 31, dated March 7, 2002, and May 14, 2002 (but relating back to the physician's statement of March 12, 2002), suggest that Mr. Hobson submitted his application in the first part of March 2002. Mr. Hobson testified to filing the application, but could not remember a date. Since the application itself is not in the record, nor is any other record from which a date of submission could be determined, there is no finding of fact regarding the date on which DRS received Mr. Hobson's application for disability retirement. DRS has raised no concerns and submitted no evidence on either of these threshold questions. DRS has argued the case under the PERS Plan 1 disability statutes. For the purposes of this decision Mr. Hobson is considered a PERS Plan 1 member, and his application is considered to have been timely filed, that is, filed within two years from the date of accident after which the member did not return to work. RCW 41.40.200(2); *Marler v. DRS*, 100 Wn.App. 494 (2000), review denied, 141 Wn.2d 1012 (2000).

8. There appears to be no dispute in this case that Mr. Hobson sustained injuries from an accident in the actual performance of his duties at Child Study and Treatment Center, in addition to earlier accidents, and that these injuries have had lasting effects that substantially limit the kinds of physical tasks he can perform. The central inquiry here is whether he has become totally incapacitated for duty as a natural and proximate result of the accident(s). The remaining questions to be resolved concern Mr. Hobson's ability to work at his former employment or other employment.
9. A PERS Plan 1 member is totally incapacitated for duty if he is totally unable to perform the duties of his former job, or any other work for which he is qualified by training or experience. RCW 41.40.010(28) defines the term "totally incapacitated for duty" for application in RCW 41.40.200:

"Totally incapacitated for duty" means total inability to perform the duties of a member's employment or office or any other work for which the member is qualified by training or experience.

Mr. Hobson has not produced persuasive evidence that he is totally incapacitated from the performance of the duties of his employment.

10. This employability standard is a high one. In establishing that standard the legislature implicitly acknowledged that PERS is a retirement benefit, not an industrial insurance benefit. As is true with any public pension system, the trust fund out of which PERS benefits are paid is to be protected for its primary purpose: to provide eligible members with a consistent income after retirement.

The PERS duty disability retirement benefit was not intended as a disability insurance policy. It is not a supplement to the job-related disability compensation provisions of the state workers' compensation laws for workers who are temporarily unable to work (codified at Title 51 RCW). It was designed primarily to maintain a member's ability to continue earning service credit toward a service retirement when that member has been forced to resign from the productive workforce due to a job-related disability. See RCW 41.40.038. It was legislatively designed to be a limited benefit, and it is the Department's responsibility to administer it accordingly.

11. A PERS member can be "totally incapacitated for duty" for duty-related disability retirement under PERS Plan 1 under one or both of two prongs. The first is that the member may be **totally unable to perform the duties of his or her employment or office**. In this case, DRS has essentially conceded that Mr. Hobson is unable to return to his employment at CSTC. However, the record here does not prove that Mr. Hobson's situation meets this prong of the definition of "totally incapacitated for duty." This is because the basis of Mr. Hobson's doctor(s) refusal to approve his return to employment at CSTC was the exposure to and risk of re-injury, and not total inability to perform the duties of the employment, as the definition requires.
12. To apply the first prong of the definition, it is necessary first to establish what the

duties of the employment were. Mr. Hobson's last employment was as a Psychiatric Child Care Counselor 3 at the Washington State Child Study and Treatment Center (CSTC). Lacking evidence such as classification questionnaires, job descriptions or performance evaluations for the period prior to April 2000 when Mr. Hobson was assaulted, it is not possible to state with certainty what the duties of the Psychiatric Child Care Counselor 3 position were at that time. But it is clear that the majority of the duties involved in the Psychiatric Child Care Counselor 3 position are sedentary in nature and could be performed at a desk or workstation, and in meeting rooms. These duties, obtained from the 2001 modified job analysis (Exhibit 12), Mr. Hobson's job application (Exhibit 1), and the vocational services closure report of June 7, 2002 (Exhibit 34), include scheduling staff shifts, hiring and evaluating staff, supervising staff, reporting and reviewing reports, setting up training for staff, developing policies and standards, and acting as the top administrator for CSTC when needed in the administrator's absence. Duties also include counseling staff, acting as a counseling consultant, participating in counseling both staff and students, and supervising student activities and living quarters. Mr. Hobson himself testified that on the date when he was injured trying to restrain a student who was out of control, he was called out of his office to assist other staff members. No documents in this record state that physical intervention or restraint of students is an essential duty of the position.

13. In September 2001, CSTC appeared to be ready to return Mr. Hobson to work as a Psychiatric Child Care Counselor 3 with modified job duties. It is not entirely clear from the record what happened between September 2001 and November 2001, when CSTC administrators told Mr. Johnson that there were no return to work options there for Mr. Hobson, but the evidence does indicate that the impasse centered on supervision of CSTC students. CSTC would not alter Mr. Hobson's job duties to the extent of eliminating all responsibilities for student supervision and counseling. Sometime over the summer of 2001 Dr. Stump's restrictions changed from prohibiting physical contact such as restraint or takedown of students to no contact with students at all. It may be inferred that Dr. Stump adopted Mr. Hobson's point of view that any contact with students raised the possibility of unpredictable assault. Given the new restriction, it would be expected that CSTC could not consider returning Mr. Hobson to a counselor position in that facility.
14. The evidence in the record shows that Mr. Hobson's treating physician and the Corvel independent medical examiners believed that Mr. Hobson was capable of performing the duties of his position at CSTC (as modified by CSTC administrators with Mr. Johnson's assistance). They did not say that he was not *able* to perform the duties of direct student counseling and supervision. Rather, they said that the risk of assault from patient contact had to be minimized or eliminated. That is, Mr. Hobson was barred by examining physicians from returning to that employment for safety reasons, and *not because of any perceived inability to perform the modified duties of that position based on his medically verifiable impairments*. With various modifications and accommodations agreed to by the employer, Mr. Hobson had the capability to perform virtually all of the functions of his job as Psychiatric Child Care Counselor 3. So while DRS has not asserted that Mr. Hobson could return to his former employment, his situation still does not meet the statutory requirements.

RCW 41.40.200(1) and RCW 41.40.010(28) recognize only one basis for this prong of disability retirement, that is, total inability to perform the duties of the employment. The record shows that Mr. Hobson was capable of performing virtually all duties of his employment once they were modified, but could not return to it because of his doctor's concerns about future safety.

15. The second prong of the definition specifies that a member may be totally incapacitated for duty following an accident in the performance of one's employment duties if one is totally unable to perform **any other work for which the member is qualified by training or experience**. The preponderance of the evidence in this case supports a conclusion that Mr. Hobson retains the capacity to work in available light duty positions for which he is qualified.
16. The record contains the opinions of five medical or osteopathic physicians about Mr. Hobson's ability to work. Since April 2000, all of them have said that he is capable of light or sedentary employment after reviewing his medical history and examining him physically. Two independent medical examination panels have reached essentially the same conclusion, despite the differences in the circumstances of the examinations as noted by Mr. Hobson and his friend Mr. Marshall.
17. The one exception within the medical opinion presented is Dr. Stump's letter of May 14, 2002, stating, "Mr. Hobson does meet the requirements for total disability." For the following reasons, the opinion he expressed in this letter does not carry much weight in this decision. First, it is inconsistent with the opinions of the other doctors. Second, it is inconsistent with his own expectations and opinions, repeated from August 2000 throughout 2001 and into 2002, in several examination notes and in reports to L&I and to DRS, that Mr. Hobson is capable of light duty employment with specific suggested restrictions. Third, it does not identify which "RCW" he reviewed. The requirements of RCW 41.40.200(1) for duty-related disability differ from requirements for disability status in other statutes administered by DRS. Dr. Stump's conclusory letter does not refer to the terms of this statute, or explain how reading the "RCW" changed the opinion he had given in his earlier physician's statement. It does not relate Mr. Hobson's particular problems to those terms to support his opinion. Fourth, as with a number of other communications from Dr. Stump in the record here, it fails to identify how the medical conditions which Dr. Stump is qualified to diagnose and treat have resulted from the April 2000 accident, and fails to explain how they interfere with work activities to such an extent that Mr. Hobson is totally unable to perform the duties proposed. Dr. Stump's medical opinion in this area lost credibility after July 2001 as he repeatedly rejected work possibilities for Mr. Hobson that to all appearances met all the restrictions Dr. Stump had previously identified. In the course of these rejections he detailed no changes in Mr. Hobson's neurological condition, provided no explanations for the inconsistencies, and failed to support the rejections with objective findings related to specific physical activities, tending instead to recite injury or surgery history or pain complaints. Fifth, the letter fails to mention any change in Mr. Hobson's condition and capacities between the letter date and December 31, 2001 (the last office visit chart note in the record), or between the letter date and his physician's statement to DRS in March 2002

stating that Mr. Hobson was capable of employment, with restrictions. It does not, for example, document an observable deterioration in condition or functioning after Mr. Hobson's fall on April 16. Finally, Dr. Stump was not available to be examined about the bases for his apparently inconsistent statements and change in position.

18. The report and testimony of Ms. Armstrong were consistent and persuasive in describing the challenges and limitations that Mr. Hobson faces should he attempt employment duties. Her recommendation was that "it would be difficult for Mr. Hobson to return to work in any capacity. It is certain that he is not capable of working an 8 hour day." The record well supports her opinion that it would be difficult for Mr. Hobson to return to work. However, this is not the standard that must be met for disability retirement under PERS Plan 1. The standard is whether Mr. Hobson, as a result of an accident occurring in the actual performance of duty, is totally unable to perform the duties of any work for which he is qualified. The value of the evidence provided on these points by Ms. Armstrong is limited. She is not in a position to diagnose his physical conditions, relate them to the April 2000 assault, or say that he is totally unable to perform the duties of work for which he is qualified. She did not review Mr. Hobson's medical records. She has no vocational training or experience. She has performed evaluations for L&I clients for some years, and makes her recommendations in the context of full-time work on a regular schedule. While this might be a standard for various benefits for L&I, it is not particularly useful for determining whether a member meets the standard for total disability for PERS Plan 1.
19. Total disability for PERS Plan 1 disability retirement depends upon both medical and vocational evidence, because it involves both the assessment of the severity of a medical condition related to a particular accident and also assessment of what type of work a member may be able to perform based on the member's training and experience. Expert vocational testimony is admissible and relevant to determine for what work a member may be qualified in addition to the work the member was performing when he was injured.
20. In this matter the only expert vocational testimony was offered by DRS. The testimony and reports of Bruce Johnson and other counselors at Concentra Managed Care identified potential employment for which Mr. Hobson would be qualified, and which was sedentary or light duty in physical demands. In addition to his job of injury, which was modified to be sedentary, this included the Financial Services Specialist, which could also have been modified, some counseling and some clerical job titles within the "general clerk" classification. The work that Mr. Johnson did with the Financial Services Specialist job analysis strongly indicates that jobs for which Mr. Hobson is qualified by training and experience can be modified to accommodate his physical activity limitations. This alone means that the evidence fails to reach the standard set in the definition of "totally incapacitated for duty." RCW 41.40.010(2).
21. Beyond this, however, the record also strongly suggests that the job analyses submitted in this proceeding are not a useful measure of what other work might be available to Mr. Hobson. They are not representative of the range of possible available employment for someone with Mr. Hobson's training and experience.

There has been no comprehensive investigation of possible types of employment for which someone with a bachelor's degree, apparently successful management experience, and more particular skills in social services might be qualified. Mr. Johnson's efforts were cut short because of L&I funding limitations and the difficulty in obtaining needed cooperation from Dr. Stump.

22. It is reasonable to assume that, within the range of potential employment options, Mr. Hobson's physical limitations would narrow the possibilities. The restrictions identified by all the physicians would likely eliminate many positions from consideration, such as one of the positions identified in the labor market survey for which the employer reported that the worker would be sitting almost continuously. Other positions would likely require some modification similar to the changes that were made to the job duties of Psychiatric Child Care Counselor in 2001 as part of Mr. Johnson's attempts to facilitate Mr. Hobson's return to the job of injury. But it is still significant that all of the physicians concurred that Mr. Hobson's ratable impairment was small, and that he remains capable of light or sedentary work. Even Ms. Armstrong's low assessment of his stamina admitted the possibility that Mr. Hobson could perform various physical work activities for at least a half day.
23. Mr. Hobson doubts his ability to withstand much automobile travel to and from work, and also his ability to fill a position with regular attendance requirements because of the variable amounts of pain and spasms that he experiences. These are real concerns, and the record here substantiates his doubts on this point. They would likely have to be addressed in the event that Mr. Hobson were to be considered for particular employment. However, they do not bear directly on the question that the statutes pose, whether Mr. Hobson is totally incapacitated for employment for which he is qualified by training or experience, because this standard considers only the ability to perform the employment duties. At most, Dr. Stump on February 22, 2002, related, "[Mr. Hobson] reports that he continues to have the low back pain and butt cramps episodically. They are not as severe as they were before, but they will still limit his activity for periods of time." The evidence suggests that the unpredictability of Mr. Hobson's pain and muscle spasms would likely present a difficulty for him, but there is no independent medical verification here that they are of such frequency and severity that he is totally incapable of working. On this point, Ms. Armstrong's comments are merely a repetition of Mr. Hobson's comments to her.
24. It is difficult to form a complete impression of Mr. Hobson's remaining capacities for work without credible evidence about the physical or mental effects that Mr. Hobson's medications have on his ability to perform the duties of jobs for which he might be qualified by training and experience. The record here presents no reason to doubt his statement that he must take these medications nearly all the time. His own account of the effects of the medications he takes to control pain and muscle spasms is credible, but it is not corroborated by any medical evidence, or by any person who would be in a position to observe the effects of the medications on Mr. Hobson and relate them to his abilities to perform employment duties.
25. *The new evidence produced at the 2005 supplemental hearing shows that a Department of Labor and Industries (L&I) contractor made a recommendation that*

Mr. Hobson is not able to work or participate in vocational rehabilitation because he cannot maintain full-time employment in light of his physical condition. The recommendation presumably qualifies Mr. Hobson for disability benefits from that agency. The Ability to Work Assessment (Exhibit 46, and its supporting documentation) does not appreciably change the weight or sufficiency of the evidence as a whole in this proceeding.

26. The PERS 1 standard for duty-related disability retirement is "totally incapacitated for duty," defined as "total inability to perform the duties of a member's employment or office or any other work for which the member is qualified by training or experience." This is, as noted, a stringent standard, possibly much more stringent than that employed by L&I (the parties have not thoroughly discussed standards for L&I disability as part of this proceeding). The PERS standard does not recognize **partial** inability to perform employment duties.
27. The January 2005 Ability to Work Assessment shows more clearly where the PERS Plan 1 standard for disability retirement differs from standards used in L&I determinations. (1) The L&I process of determining disability as illustrated in Exhibit 46 focuses on the worker's ability to complete a standard 8-hour day (i.e.), full-time work, and (2) in determining this in Mr. Hobson's case, the process looked exclusively at his past employment to define the universe of possibility for current employment.
28. Ms. Casady concluded that Mr. Hobson does not have the physical capacity to work an eight-hour day in sedentary employment, and Ms. Kabacy adopted this conclusion in her report when Dr. Stump concurred. Their conclusions are consistent with Ms. Armstrong's report and testimony to the same effect. The original Final Order already recognized that Mr. Hobson has physical limitations that will likely restrict the number of hours he can work in a day and the environment in which he could work. But the evidence still falls short of demonstrating that Mr. Hobson is totally incapacitated for duty according to the PERS standards. The record continues to document that Mr. Hobson retains the capacity to perform light duty work from one-half to three-quarters of a workday, even if he would not be able to maintain full-time work activities.
29. The L&I process as implemented by Whittall Management Group limited possible job categories to only those in which Mr. Hobson had previously worked. Only one that Mr. Hobson has performed in the past 15 years, Psychiatric Child Care Counselor 3, could be characterized on this record as sedentary. Mr. Hobson likely cannot return to this former employment, as it was described to Ms. Kabacy in her on-site interviews (that is, without the necessity for direct supervision or interaction with patients), but for reasons other than his ability to perform the duties (commute distance, doctor's insistence on no patient contact, employer unwillingness, unpredictable need for rest periods). Mr. Hobson's relatively recent educational accomplishments and management experience are not reflected in three of the four job classes for which Ms. Kabacy asked Ms. Casady to test Mr. Hobson; those relate to jobs that Mr. Hobson had before he obtained his degrees between 1991 and 1995. The Ability to Work Assessment does not consider the possibility that Mr. Hobson may be qualified for types of work beyond the narrow job types

*identified there. The Assessment is not helpful in applying the PERS disability standards because it stopped well short of any credible inquiry into "any other work for which the member is qualified by training or experience" once it was apparent that Mr. Hobson has less physical capacity than would be required for full-time work.*

#### Summary and Conclusion

30. The evidence demonstrates that Mr. Hobson has been injured in the course of his duties, that the injuries have had damaging and lasting effects on him, and that these effects place significant limitations on his abilities to perform employment duties. However, the evidence does not establish that Mr. Hobson is totally incapacitated for his previous employment or for any other employment for which he is qualified. The conclusion follows that he is not eligible for duty-related disability retirement under the PERS Plan 1 standards in RCW 41.40.200(1) and 41.40.010(28).

#### ORDER

Mr. Hobson's application for disability retirement benefits under PERS Plan 1 is denied.

#### Notice of Further Appeal Rights

**Reconsideration:** Any party to this appeal may ask the DRS Presiding Officer to reconsider this Final Order. Within ten days of the mailing of this Final Order, the party must file a petition for reconsideration, addressed to the Presiding Officer at the Department of Retirement Systems, PO Box 48380, WA 98504-8380. The petition for reconsideration must state specific reasons why the Final Order should be changed. "Filing" means **delivery** to DRS, not mailing; the ten-day time limit is strictly observed. RCW 34.05.010(6), 34.05.470.

**Judicial Review:** A party may request judicial (Superior Court) review of this Final Order. A petition for judicial review must be filed within 30 days of the Final Order mailing date. **Any party seeking Superior Court review should carefully read and comply with the Administrative Procedure Act requirements (chapter 34.05 RCW).** Petitions for judicial review go directly to the Superior Court; it is not necessary to request DRS reconsideration. RCW 34.05.470, 34.05.542.

Done this 12th day of July, 2005.

  
ELLEN G. ANDERSON  
Presiding Officer  
Department of Retirement Systems

# Archives Info

re: 1965 Senate Bill 223

From: Governor Evans'

Legislative file

Note: no committee bill files  
at Archives for this bill

SCANNED



STATE OF WASHINGTON

3-11-65  
4:4

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DIRECTOR

STATE  
EMPLOYEES RETIREMENT SYSTEM  
501 GENERAL ADMINISTRATION BLDG  
OLYMPIA WASHINGTON

PHONE  
AREA CODE 206 753 5281

SCANNED

0-000000185

**MEMORANDUM**

January 26, 1965

**To: Sponsors of S.B. 223, and Members of the Legislature**

**From: Lloyd G. Baker, Director  
State Employees' Retirement System**

**Subject: S.B. 223, Departmental Request Bill of State Employees'  
Retirement Board**

The following brief explanation will outline the purpose and effect of the amendments to the State Employees' Retirement Act as set forth in the proposed bill:

1. In RCW 41.40.010, the definition of "regular interest" is amended deleting the maximum of 4% interest to be credited by the Board to the various fund accounts. The deletion of the maximum will permit the Board to credit a more realistic interest return to employee and employer accounts based on the portfolio's investment earnings.

A new subsection is added, defining "totally incapacitated for duty" to mean total inability to perform the duties of a member's employment or office or any other work for which the member is qualified by training or experience. The definition clarifies the Act and assists the Board in handling the disabled member's benefit upon rehabilitation, partial entry into gainful employment, or suspension of the benefit upon return to employment.

2. RCW 41.40.120 has been amended to provide that after July 1, 1965, all new employees will establish membership in the Retirement System at the beginning of their employment with their employers. This will eliminate the six months' probationary period for all new employees.

3. RCW 41.40.150 is amended to provide a more liberal vesting provision. The minimum qualifications of 15 years of service or 10 years of service after attaining age 50 or over, have been deleted. The qualification for vesting or receiving a deferred annuity at age 65, or a reduced allowance at age 60 or over, has been set at the minimum of eight years of service. The amendment permits earlier voluntary vesting in order to preserve service credit and rights upon transfer to private employment or to employers not covered under the Act.

D I A N N E D

0-000000186

4. RCW 41.40.270 and RCW 41.40.290 are each amended to provide more protection to the surviving spouse under the automatic Option II provision of the Act. The requirements of acquiring 30 years of service or having attained age 60 with at least 10 years of service before an automatic Option II can be elected by the surviving spouse upon the member's death in service, have been deleted. The amendment provides that the minimum requirement for the automatic Option II is 10 years of service at the time of death, irrespective of age. The amendment provides more protection for the surviving spouse and eliminates hardship if a member dies in service prior to attaining age 60, or acquiring 30 years of service.

5. RCW 41.40.310 is amended to provide clarification where a disability beneficiary resumes gainful employment. The amendment provides clarification and guidelines for the Retirement Board in determining future payments to a disability beneficiary if he becomes rehabilitated or resumes full or partial employment. It also provides the administrative staff with authority to set up an earnings test. This procedure will permit the Board to award partial benefits to assist disability beneficiaries in voluntary rehabilitation.

6. RCW 41.40.070, outlining the present investment authority of the Board, is repealed, and a new section is substituted providing a more flexible and broadened investment authority. The continuing growth of the System and the expansion of its portfolio requires a more flexible investment policy. The Board under the new amendment can avail itself of higher yields under the continuing doctrine of maximum security with the best yield possible.

The Board is requesting the above mentioned amendments for the benefit of the participating members of the System. A cost study has been made by the Actuaries of the Board. There will be no increase in rates. The System is funding its liabilities pursuant to sound actuarial principles and the law. (See the Report of the 4th Valuation of the Assets and Liabilities, published October 1, 1964). The new amendments will be incorporated within the present rate structure of 6% of contributions. If a detailed cost explanation is desired, please contact the Director at 201 General Administration Building, Olympia - Telephone 753-5281.

Effect of Committee Amendments.

- (1) Page 7, section 7, lines 15 and 16 have been amended. This section provides that a person or student employed by institutions of higher learning, where the employment is incident to and in furtherance of his education or training, is personally ineligible to participate in the State Employees' Retirement System. The amendment provides that the working spouse is also personally ineligible to participate while employed by the institution of higher learning. The Board favors the amendment because the Act was not set up to cover this type of temporary employment.
- (2) A new subsection numbered 12, following line 30 on page 7, removes an ambiguity in the Act because of deletion of the six month's probationary period. This section provides that persons hired in an eligible position on a temporary basis for a period not to exceed six months are ineligible to participate in the System. In other words, the amendment would give the employer an opportunity to cover only full time employees in eligible positions and would not allow participation of temporary help or people hired to replace vacationing employees in eligible positions under the Act.
- (3) On page 10, section 4, following line 13, adds a new section 4 and renumbers the remaining sections. The amendment pertains to creditable service on the acquisition of private enterprises by public utilities. Prior to the amendment all service to the private enterprise was given to the employees on the payroll when it was acquired by a public utility. The amendment will correct the situation where a few current members of the System (4 or 5) were in the unfortunate position of transferring between the various districts in their formative period generally to help out, but were not actually on the payroll when the public utility district acquired the private enterprise. In other words, it removes the requirement that the employee had to be physically on the monthly payroll when the private enterprise was actually acquired by the public utility district. Apparently, there was a good deal of condemnation and transferring of personnel during the earlier periods and some of the employees lost their service to the private enterprise because they were helping another district and were not on the payroll the month the governing authority chose to enter the System. These employees came back to their regular job and continued in service of the district to the present time.
- (4) In paragraph 3 of this memorandum the vesting requirement was reduced to 8 years of service. This was to coincide with terms of office. The Senate amended this figure from 8 years back to 10 years. The Board has no objection although this is not as liberal a recommendation as proposed by the Board and its actuary. The cost is within the rate of 6% of contributions.



OFFICE OF GOVERNOR

March 19, 1965

TO Governor Evans

FROM Tom Belerle and Ray Haman

SUBJECT SB 223 - Amending state employees' retirement act  
(Bailey, Freise and Knoblauch)  
(By Request of State Employees' Retirement System)

*Ryder says  
cost \$1.4 to \$1.8  
per annum to  
the unfunded  
liability.*

Action by March 23

Section 1 Under existing law, "regular interest" payable on employee and employer accounts is limited to between 1% per annum and 4% per annum. This bill deletes the limitations. The Board wants this change to allow them to pay a flexible amount of interest based on the portfolio's investment earnings

A new subsection is added defining "totally incapacitated for duty" as an inability to perform a member's work.

*400,000  
2  
750,000  
per annum*

Section 2. Under existing law, an employee does not become a member of the system until he is employed for six months. This bill will eliminate the six-month requirement. It amends some of the twelve exceptions to eligibility, these amendments are designed primarily to make certain non full-time employees ineligible for membership.

Section 3. Under existing law, an employee must have 15 years of service or 10 years after age fifty before his interest in the fund vests. Vesting allows him to leave state employment but remain a member of the system for the purpose of receiving a retirement benefit at age 65 or an actuarially reduced benefit at age 60. This bill will allow vesting after 10 years of service.

Section 4. (As proposed by amendment) Will allow employees of private utilities acquired by public agencies to become members of the association and receive credit for their private employment as if they had been public employees during that time.

*SB 111 -- in  
investments may make  
up for this*

SCANNED

0-000000189

Governor Evans

-2-

March 19, 1965

Sections 5 and 6. Under existing law, when a member dies after 30 years of service or ten years of service and he has reached age 60, the surviving spouse is given the option of receiving an annuity instead of a lump sum payment. Under this bill, the option will be available to a surviving spouse after the employee has ten years of service, irrespective of age. This option goes into effect unless a contrary intent is indicated.

Section 7. Clarifies the law as to the situation when a member who was disabled, and received benefits, returns to employment; provides partial benefits under certain conditions.

Section 8. A new section which replaces the existing authority for investment by the board. The new section gives the board broader powers by liberalizing the investments available.

There is a severability clause.

The bill declares an emergency.

Passed House: 94-0

Passed Senate: 46-0

Comment. See also Lloyd Baker's explanatory letter dated January 26, 1965 (attached). He states that all changes can be made within the present rate structure of 6% of contributions.

Recommend Approval.

GOVERNOR'S ACTION DESIRED: \_\_\_\_\_

*find info*

1. Biennial Cost
2. Total Addition to Unfunded Liability
3. Present payoff plan for unfunded liability
4. How much is in budget 65-66 to reduce unfunded liability
5. Doesn't this set a precedent for teachers to do same?

SCANNED

0-000000190

March 19, 1965

Governor Evans

Tom Beterie and Ray Haman

SB 223 - Amending state employees' retirement act.  
(Bailey, Freise and Knoblauch)  
(By Request of State Employees' Retirement System)

Action by March 23

Section 1. Under existing law, "regular interest" payable on employee and employer accounts is limited to between 1% per annum and 4% per annum. This bill deletes the limitations. The Board wants this change to allow them to pay a flexible amount of interest based on the portfolio's investment earnings.

A new subsection is added defining "totally incapacitated for duty" as an inability to perform a member's work.

Section 2. Under existing law, an employee does not become a member of the system until he is employed for six months. This bill will eliminate the six-month requirement. It amends some of the twelve exceptions to eligibility; these amendments are designed primarily to make certain non full-time employees ineligible for membership.

Section 3. Under existing law, an employee must have 15 years of service or 10 years after age fifty before his interest in the fund vests. Vesting allows him to leave state employment but remain a member of the system for the purpose of receiving a retirement benefit at age 65 or an actuarially reduced benefit at age 60. This bill will allow vesting after 10 years of service.

Section 4. (As proposed by amendment) Will allow employees of private utilities acquired by public agencies to become members of the association and receive credit for their private employment as if they had been public employees during that time.

S T A N N E D

0-000000191

March 19, 1965

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Section 7. Clarifies the law as to the situation when a member who was disabled, and received benefits, returns to employment; provides partial benefits under certain conditions.

Section 8. A new section which replaces the existing authority for investment by the board. The new section gives the board broader powers by liberalizing the investments available.

There is a severability clause.

The bill declares an emergency.

Passed House: 94-0

Passed Senate: 46-0

Comment: See also Lloyd Baker's explanatory letter dated January 26, 1965 (attached). He states that all changes can be made within the present rate structure of 6% of contributions.

Recommend Approval.

GOVERNOR'S ACTION DESIRED: \_\_\_\_\_

STATE EMPLOYEES' RETIREMENT SYSTEM

PROPOSED LEGISLATIVE PENSIONS

House Bill No. 582

<u>Legislative Terms</u>	<u>Years of Service</u>		<u>Present Amount (Monthly)</u>	<u>Per HB 582 (Monthly)</u>	<u>\$1200 Salary Accelerated Service</u>	<u>\$3600 Salary Only</u>
	<u>Actual</u>	<u>Accelerated</u>				
3	6	18	\$15.69	\$ 61.60	60.00	\$ 31.60
4	8	24	18.25	79.82	70.00	39.82
5	10	30	20.87	98.31	90.00	48.30
6	12	36	23.59	117.07	90.00	57.07
7	14	42	26.39	136.14	90.00	67.39
8	16	48	60.00	155.55	90.00	75.55
9	18	54	60.00	175.44	90.00	85.31
10	20	60	70.00	195.47	90.00	95.47
11	22	62	70.00	206.04	90.00	106.04
12	24	64	70.00	217.07	90.00	117.07
13	26	66	80.00	228.59	90.00	128.59
14	28	68	80.00	240.65	90.00	140.65
15	30	70	90.00	253.27	90.00	152.68

NOTE: Computed at Age 60

Formula is average final compensation divided by 120 times the years of service  
 Plus Basic Pension of \$100.00 per year  
 Plus Annuity

Example, \$3600 salary divided by 120 = \$30.00 per year times years of service

Example: \$1200 salary divided by 120 = 10.00 per year times years of service

S C A N N E D

0-000000193



**RETIREMENT BOARD**  
EX-OFFICIO MEMBERS

**JOHN J. O'CONNELL**  
Attorney General, Chairman  
**ROBERT V. GRAHAM**  
State Auditor  
**ROBERT S. O'BRIEN**  
State Treasurer  
**LAS I. KIMMELMAN**  
Insurance Commissioner

**EMPLOYEE REPRESENTATIVES**  
**CHESTER G. MAYRAND**, Vice Chairman  
**JAMES L. STUCKE**  
**DON HALL**

**STATE EMPLOYEES' RETIREMENT SYSTEM**  
**OF THE**  
**STATE OF WASHINGTON**  
201 General Administration Building  
P. O. Box 918  
**OLYMPIA**

**LLOYD G. BAKER**,  
Director  
**JAMES L. McCOFFIN**,  
Asst. Director  
Attn Code 206  
753-5283

March 23, 1965

Honorable Daniel J. Evans  
Governor of Washington  
Legislative Building  
Olympia, Washington

Attention: Mr. Raymond Haman, Attorney

Re: Senate Bill No. 223  
Departmental Request Legislation

My dear Governor

Pursuant to the request of Mr. Haman, I am setting forth in this letter the similarity of the benefit structure between the Washington State Teachers' Retirement System and the State Employees' Retirement System as amended by Senate Bill 223.

It should be noted that the administrators of the Teachers' System have been trying to standardize its administration and benefit structure to parallel that of the State Employees' Retirement System over the last several legislative sessions.

The members of the Teachers' Retirement System commence to contribute upon employment with the school district. Senate Bill 223 provides the same privilege to public employees under the State Employees' Retirement System. The amendment will take effect commencing with the new biennium July 1, 1965. This procedure coordinates this System with the Teachers' and the Social Security program.

The benefit structure of the Teachers' System and the State Employees' Retirement System is very similar. The Teachers' System provides for a regular retirement allowance, Options I, II, III and IV, and in addition, an Automatic Option II for death in service. The State Employees' Retirement System provides for a regular service retirement allowance and Options I, II and III. The Teachers' System provides an Option IV, which is not available under the State System. This option permits a teacher upon retirement

STANFORD

0-000000194

Hon. Daniel J. Evans

-2-

March 23, 1965

the privilege of withdrawing a lump sum annuity and then only draw the pension portion of the retirement allowance over his remaining life expectancy.

It should be noted that the Teachers' System provides a \$300.00 death benefit which is drawn from a separate fund. The State System does not have this award.

The Automatic Option II benefit provided by the Teachers' System is set up with 30 years of service or at age 60, and is tied in with the Social Security program. The amendment to the State System struck the age limitation and made the basic requirement ten years of service. This was done to alleviate a great deal of hardship caused the surviving spouse by the member's early death in service or death in service while eligible for retirement. In these cases the only benefit would be a lump sum refund of savings. The Board concluded that the limitations were too arbitrary. The State System's benefit is not related to the Social Security program. It should be noted that the turnover in the State program is much higher than in the Teachers' System whose longevity is well established by experience. Therefore, the benefit should be related to service not age.

The Teachers' System has a ten year vesting benefit irrespective of age. The amendments in Senate Bill 223 standardized the benefit with the Teachers' System, that is, ten years vesting without any age limitation.

Senate Bill 223 also standardizes the investment authority between Systems and results in more flexibility in scope and yield.

It is hoped that the foregoing answers several of the questions that may have been in your mind concerning the amendments to the State Employees' Retirement Act. The proposed amendments in the bill were closely studied by the Retirement Board, its Consulting Actuaries, Milliman & Robertson, Inc. in Seattle, Washington, and F. E. Huston, the State Actuary.

The Board is pleased to advise that the costs of the amendments in Senate Bill 223, though liberalizing the benefits somewhat to the advantage of the members, are funded within the present rate structure and will not extend the funding period. This fact is due to the excellent performance of the System, as verified by the 4th valuation of the System published in October, 1964.

The Retirement Board would appreciate your early consideration and approval of this bill as passed unanimously by the Legislature.

Very truly yours,

*Lloyd G. Baker*

LLOYD G. BAKER  
Director

LGB:mky

U. S. G. A. N. N. F. D.

0-000000195

IN THE LEGISLATURE  
of the  
**STATE OF WASHINGTON**



CERTIFICATION OF ENROLLED ENACTMENT

SENATE BILL NO. 223

CHAPTER NO. \_\_\_\_\_

Passed the Senate March 5, \_\_\_\_\_ 1965

Yeas 46 Nays 0

Passed the House March 9, \_\_\_\_\_ 1965

Yeas 94 Nays 0

CERTIFICATE

*I, Ward Bowden, Secretary of the Senate of the State of Washington do hereby certify that the attached is enrolled Senate Bill No. 223 as passed by the Senate and the House of Representatives on the dates hereon set forth*

  
Secretary of the Senate

U A N N E O

0-000000196

SENATE BILL NO. 223

State of Washington  
39th Regular Session

By Senators Bailey, Freise and  
Knoblauch  
(By Request of State  
Employees Retirement Board)

Read first time January 26, 1965 and referred to Committee on LABOR AND  
SOCIAL SECURITY.

1 AN ACT Relating to the state employees' retirement system; amending sec-  
2 tion 1, chapter 274, Laws of 1947, as last amended by section 1,  
3 chapter 174, Laws of 1963, and by section 1, chapter 225, Laws of  
4 1963, and RCW 41.40.010; amending section 13, chapter 274, Laws of  
5 1947, as last amended by section 1, chapter 210, Laws of 1963, and  
6 by section 2, chapter 225, Laws of 1963, and RCW 41.40.120; amend-  
7 ing section 16, chapter 274, Laws of 1947, as last amended by sec-  
8 tion 8, chapter 174, Laws of 1963, and RCW 41.40.150; amending sec-  
9 tion 17, chapter 274, Laws of 1947 as last amended by section 9,  
10 chapter 174, Laws of 1963 and RCW 41.40.160, amending section 28,  
11 chapter 274, Laws of 1947, as last amended by section 13, chapter  
12 174, Laws of 1963, and RCW 41.40.270; amending section 30, chapter  
13 274, Laws of 1947, as last amended by section 10, chapter 291, Laws  
14 of 1961, and RCW 41.40.290, amending section 32, chapter 274, Laws  
15 of 1947, as last amended by section 14, chapter 174, Laws of 1963,  
16 and RCW 41.40.310, adding a new section to chapter 41.40 RCW; re-  
17 pealing section 8, chapter 274, Laws of 1947, as last amended by  
18 section 5, chapter 174, Laws of 1963, and RCW 41.40.070, and de-  
19 claring an emergency.

20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON.

21 Section 1. Section 1, chapter 274, Laws of 1947, as last amended  
22 by section 1, chapter 174, Laws of 1963 and by section 1, chapter 225,  
23 Laws of 1963, and RCW 41.40.010 are each amended to read as follows:

24 As used in this chapter, unless a different meaning is plainly re-  
25 quired by the context:

26 (1) "Retirement system" means the state employees' retirement sys-  
27 tem provided for in this chapter.

1 (2) "Retirement board" means the board provided for in this  
2 chapter to administer said retirement system.

3 (3) "State treasurer" means the treasurer of the state of  
4 Washington.

5 (4) "Employer" means every branch, department, agency, com-  
6 mission, board, and office of the state and any political subdivision  
7 of the state admitted into the retirement system; and the terms shall  
8 also include any labor guild, association, or organization the mem-  
9 bership of a local lodge or division of which is comprised of at least  
10 forty percent employees of an employer (other than such labor guild,  
11 association, or organization) within this chapter.

12 (5) "Member" means any employee included in the membership  
13 of the retirement system, as provided for in RCW 41 40.120.

14 (6) "Original member" of this retirement system means:

15 (a) Any person who became a member of the system prior to  
16 April 1, 1949;

17 (b) Any person who becomes a member through the admission of  
18 an employer into the retirement system on and after April 1, 1949,  
19 and prior to April 1, 1951;

20 (c) Any person who first becomes a member by securing employ-  
21 ment with an employer prior to April 1, 1951, provided he has render-  
22 ed at least one or more years of service to any employer prior to  
23 October 1, 1947;

24 (d) Any person who first becomes a member through the admis-  
25 sion of an employer into the retirement system on or after April 1,  
26 1951, provided, such person has been in the regular employ of the  
27 employer for at least six months of the twelve month period preceding  
28 the said admission date;

29 (e) Any member who has restored all his contributions that  
30 may have been withdrawn by him as provided by RCW 41.40.150 and who  
31 on the effective date of his retirement becomes entitled to be credit-  
32 ed with ten years or more of membership service except that the pro-  
33 visions relating to the minimum amount of retirement allowance for

1 the member upon retirement at age seventy as found in RCW 41.40.190  
2 (4) shall not apply to the member;

3 (f) Any member who has been a contributor under the system  
4 for two or more years and who has restored all his contributions that  
5 may have been withdrawn by him as provided by RCW 41.40.150 and who  
6 on the effective date of his retirement has rendered eight or more  
7 years of service for the state or any political subdivision prior to  
8 the time of the admission of the employer into the system, except  
9 that the provisions relating to the minimum amount of retirement  
10 allowance for the member upon retirement at age seventy as found in  
11 RCW 41.40.190 (4) shall not apply to the member

12 (7) "New member" means a person who becomes a member on or  
13 after April 1, 1949, except as otherwise provided in this section.

14 (8) "Compensation earnable" means salaries or wages earned  
15 during a payroll period for personal services and where the compen-  
16 sation is not all paid in money maintenance compensation shall be  
17 included upon the basis of the schedules established by the member's  
18 employer.

19 (9) "Service" means periods of employment rendered to any  
20 employer for which compensation is paid, and includes time spent in  
21 office as an elected or appointed official of an employer. Full  
22 time work for ten days or more or an equivalent period of work in any  
23 given calendar month shall constitute one month of service. Only  
24 months of service shall be counted in the computation of any retire-  
25 ment allowance or other benefit provided for in this chapter. Years  
26 of service shall be determined by dividing the total number of months  
27 of service by twelve. Any fraction of a year of service as so de-  
28 termined shall be taken into account in the computation of such re-  
29 tirement allowance or benefits. Service by a state employee official-  
30 ly assigned by the state on a temporary basis to assist another pub-  
31 lic agency, shall be considered as service as a state employee  
32 PROVIDED, That service to any other public agency shall not be con-  
33 sidered service as a state employee if such service has been used to

1 establish benefits in any other public retirement system.

2 (10) "Prior service" means all service of an original member  
3 rendered to any employer prior to October 1, 1947.

4 (11) "Membership service" means:

5 (a) In the case of any person who first becomes a member  
6 through the admission of an employer into the retirement system on  
7 and after April 1, 1949, all service rendered after October 1, 1947,  
8 except as qualified by RCW 41.40.120;

9 (b) In the case of all other members, all service as a member.

10 (12) "Beneficiary" means any person in receipt of a retire-  
11 ment allowance, pension or other benefit provided by this chapter

12 (13) "Regular interest" means such rate as the retirement  
13 board may determine (~~(r-such-rate-not-to-be-lower-than-one-percent~~  
14 ~~per-annum-nor-more-than-four-percent-per-annum-compounded-annually)).~~

15 (14) "Accumulated contributions" means the sum of all contri-  
16 butions for the purchase of annuities standing to the credit of a  
17 member in his individual account together with the regular interest  
18 thereon

19 (15) "Average final compensation" means the annual average  
20 of the greatest compensation earnable by a member during any consec-  
21 utive five year period of service for which service credit is allow-  
22 ed; or if he has less than five years of service then the annual  
23 average compensation earnable during his total years of service for  
24 which service credit is allowed.

25 (16) "Final compensation" means the annual rate of compensa-  
26 tion earnable by a member at the time of termination of his employ-  
27 ment

28 (17) "Annuity" means payments for life derived from accumu-  
29 lated contributions of a member. All annuities shall be paid in  
30 monthly installments

31 (18) "Pension" means payments for life derived from contri-  
32 butions made by the employer. All pensions shall be paid in monthly  
33 installments.

1 (19) "Retirement allowance" means the sum of the annuity and  
2 the pension.

3 (20) "Annuity reserve" means the present value, computed upon  
4 the basis of such mortality, and other tables, as shall be adopted  
5 by the retirement board, of all payments to be made on account of any  
6 annuity or benefits in lieu of any annuity granted to a member under  
7 the provisions of this chapter.

8 (21) "Pension reserve" means the present value, computed upon  
9 the basis of such mortality, and other tables, as shall be adopted  
10 by the retirement board, of all payments to be made on account of any  
11 pension, or benefits in lieu of any pension, granted to a member under  
12 the provisions of this chapter.

13 (22) "Employee" means any person who may become eligible for  
14 membership under this chapter, as set forth in RCW 41.40.120.

15 (23) "Contributions for the purchase of annuities" means  
16 amounts deducted from the compensation of a member, under the pro-  
17 visions of RCW 41.40 330, other than contributions to the retirement  
18 system expense fund.

19 (24) "Actuarial equivalent" means a benefit of equal value  
20 when computed upon the basis of such mortality and other tables as  
21 may be adopted by the retirement board.

22 (25) "Retirement" means withdrawal from active service with  
23 a retirement allowance as provided by this chapter.

24 (26) "Eligible position" means:

25 (a) Any position which normally requires five or more un-  
26 interrupted months of service a year for which regular compensation  
27 is paid to the occupant thereof;

28 (b) Any position occupied by an elected official or person  
29 appointed directly by the governor for which compensation is paid.

30 (27) "Ineligible position" means any position which does not  
31 conform with the requirements set forth in subdivision (26).

32 (28) "Leave of absence" means the period of time a member is  
33 authorized by the employer to be absent from service without being

1 separated from membership.

2 (29) "Totally incapacitated for duty" means total inability  
3 to perform the duties of a member's employment or office or any other  
4 work for which the member is qualified by training or experience.

5 Sec. 2. Section 13, chapter 274, Laws of 1947, as last amend-  
6 ed by section 1, chapter 210, Laws of 1963 and by section 2, chapter  
7 225, Laws of 1963, and RCW 41.40.120 are each amended to read as  
8 follows:

9 Membership in the retirement system shall consist of all reg-  
10 ularly compensated employees and appointive and elective officials  
11 of employers as defined in this chapter who have served at least six  
12 months without interruption or who are first employed, appointed or  
13 elected on or after July 1, 1965, with the following exceptions:

14 (1) Persons in ineligible positions;

15 (2) Employees of the legislature except the officers thereof  
16 elected by the members of the senate and the house and legislative  
17 committees, unless membership of such employees be authorized by the  
18 said committee;

19 (3) Persons holding elective offices or persons appointed  
20 directly by the governor: PROVIDED, That such persons shall have  
21 the option of applying for membership and to be accepted by the  
22 action of the retirement board, such membership may become effective  
23 at the start of the initial or successive terms of office held by  
24 the person at the time application is made: AND PROVIDED FURTHER,  
25 That any such persons previously denied service credit because of  
26 any prior laws excluding membership which have subsequently been re-  
27 pealed, shall nevertheless be allowed to recover or regain such ser-  
28 vice credit denied or lost because of the previous lack of authority;

29 (4) Employees holding membership in, or receiving pension  
30 benefits under, any retirement plan operated wholly or in part by  
31 an agency of the state or political subdivision thereof, or who are  
32 by reason of their current employment contributing to or otherwise  
33 establishing the right to receive benefits from any such retirement

1 plan: PROVIDED, HOWEVER, In any case where the state employees' retire-  
2 ment system has in existence an agreement with another retirement system  
3 in connection with exchange of service credit or an agreement whereby mem-  
4 bers can retain service credit in more than one system, such an employee  
5 shall be allowed membership rights should the agreement so provide: AND  
6 PROVIDED FURTHER, That an employee shall be allowed membership if other-  
7 wise eligible while receiving survivor's benefits as secondary payee under  
8 the optional retirement allowances as provided by RCW 41.40.290;

9 (5) Patient and inmate help in state charitable, penal and correc-  
10 tional institutions,

11 (6) "Members" of state veterans' home or state soldiers' home,

12 (7) Persons employed by an employer or serving in an institution  
13 of higher learning operated by an employer, primarily as an incident to  
14 and in furtherance of their education or training, or the education or  
15 training of a spouse;

16 (8) Employees of the University of Washington and the Washington  
17 State University during the period of service necessary to establish  
18 eligibility for membership in the retirement plans operated by such in-  
19 stitutions,

20 (9) Persons rendering professional services to an employer on a  
21 fee, retainer or contract basis or as an incident to the private practice  
22 of a profession,

23 (10) Persons appointed after April 1, 1963 by the liquor control  
24 board as agency vendors ((pursuant-to-RCW-66-08-050-(2))).

25 ((10)) (11) Employees of a labor guild, association, or organi-  
26 zation. PROVIDED, That elective officials of a labor guild, association,  
27 or organization which qualifies as an employer within this chapter shall  
28 have the option of applying for membership and to be accepted by the  
29 action of the retirement board.

30 (12) Persons hired in eligible positions on a temporary basis for  
31 a period not to exceed six months. PROVIDED, That if such employees are  
32 employed for more than six months in an eligible position they shall be-  
33 come members of the system.

1           Sec. 3. Section 16, chapter 274, Laws of 1947, as last amended by  
2 section 8, chapter 174, Laws of 1963, and RCW 41.40.150 are each amended  
3 to read as follows:

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1           Should any member die, or should he separate or be separated from  
2 service without leave of absence before attaining age sixty years, or should  
3 he become a beneficiary, except a beneficiary of an optional retirement al-  
4 lowance as provided by RCW 41.40.290, he shall thereupon cease to be a  
5 member except;

6           (1) As provided in RCW 41.40.170.

7           (2) An employee who reenters or has reentered service within ten  
8 years from the date of his separation, shall upon completion of six months  
9 of continuous service and upon the restoration of all withdrawn contribu-  
10 tions, which restoration must be completed within a total period of three  
11 years of membership service following his first resumption of employment,  
12 be returned to the status, either as an original member or new member which  
13 he held at time of separation.

14           (3) A member who separates after having completed at least (~~fif-~~  
15 ~~teen-years-of-service,-or-at-least-ten-years-of-service-and-is-age-fifty~~  
16 ~~or-older-or-who-separates-after-having-completed-at-least~~) ten years of  
17 service (~~as-an-elective-official~~) shall remain a member during the period  
18 of his absence from service for the exclusive purpose only of receiving a  
19 retirement allowance to begin at attainment of age sixty-five, however,  
20 such a member may upon thirty days written notice to the board elect to re-  
21 ceive a reduced retirement allowance on or after age sixty which allowance  
22 shall be the actuarial equivalent of the sum necessary to pay regular  
23 retirement benefits as of age sixty-five. PROVIDED, That if such member  
24 should withdraw all or part of his accumulated contributions, he shall  
25 thereupon cease to be a member and this section shall not apply.

26           (4) (a) The recipient of a retirement allowance who has not yet  
27 reached the compulsory retirement age of seventy and who shall be employed  
28 in an eligible position shall be considered to have terminated his retire-  
29 ment status and he shall immediately become a member of the retirement  
30 system with the status of membership he had as of the date of his retire-  
31 ment. Retirement benefits shall be suspended during the period of his  
32 eligible employment and he shall make

33

1 contributions and receive membership credit. Such a member shall  
2 have the right to again retire if eligible in accordance with RCW  
3 41.40.180: PROVIDED, That where any such right to retire is exer-  
4 cised to become effective before the member has rendered six uninter-  
5 rupted months of service the type of retirement allowance he had at  
6 the time of his previous retirement shall be reinstated, but no ad-  
7 ditional service credit shall be available;

8 (b) The recipient of a retirement allowance who has not yet  
9 reached the compulsory retirement age of seventy, following his elec-  
10 tion to office or appointment to office directly by the governor,  
11 and who shall apply for and be accepted in membership as provided in  
12 RCW 41.40.120 (3) shall be considered to have terminated his retire-  
13 ment status and he shall become a member of the retirement system  
14 with the status of membership he had as of the date of his retirement.  
15 Retirement benefits shall be suspended from the date of his return to  
16 membership until the date when he again retires and he shall make  
17 contributions and receive membership credit. Such a member shall  
18 have the right to again retire if eligible in accordance with RCW  
19 41.40.180: PROVIDED, That where any such right to retire is exer-  
20 cised to become effective before the member has rendered six uninter-  
21 rupted months of service the type of retirement allowance he had at  
22 the time of his previous retirement shall be reinstated, but no ad-  
23 ditional service credit shall be available: AND PROVIDED FURTHER,  
24 That if such a recipient of a retirement allowance does not elect to  
25 apply for reentry into membership as provided in RCW 41.40.120 (3),  
26 or should he have reached the age of seventy and be ineligible to  
27 apply as provided in RCW 41.40.125, he shall be considered to remain  
28 in a retirement status and his retirement benefits shall continue  
29 without interruption.

30 (5) Subject to the provisions of RCW 41.04.070, 41.04.080  
31 and 41.04.100, any member who leaves the employment of an employer  
32 and enters the employ of a public agency or agencies of the state of  
33 Washington, other than those within the jurisdiction of the state

1 employees' retirement system, and who establishes membership in a retire-  
2 ment system or a pension fund operated by such agency or agencies and who  
3 shall continue his membership therein until attaining age sixty, shall re-  
4 main a member for the exclusive purpose only of receiving a retirement  
5 allowance without the limitation found in RCW 41.40.190 (5) to begin on  
6 attainment of age sixty-five, however, such a member may upon thirty days  
7 written notice to the retirement board elect to receive a reduced retire-  
8 ment allowance on or after age sixty which allowance shall be the actuar-  
9 ial equivalent of the sum necessary to pay regular retirement benefits com-  
10 mencing at age sixty-five: PROVIDED, That if such member should withdraw  
11 all or part of his accumulated contributions, he shall thereupon cease to  
12 be a member and this section shall not apply.

13 Sec. 4. Section 17, chapter 274, Laws of 1947 as last amended by  
14 section 9, chapter 174, Laws of 1963 and RCW 41.40.160 are each amended to  
15 read as follows:

16 (1) Subject to the provisions of RCW 41.40.150, at retirement the  
17 total service credited to a member shall consist of all his membership  
18 service and, if he is an original member, all of his certified prior ser-  
19 vice.

20 (2) Employees of a public utility or other private enterprise all  
21 or any portion of which has been heretofore or may be hereafter acquired  
22 by a public agency as a matter of public convenience and necessity, where  
23 it is in the public interest to retain the trained personnel of such enter-  
24 prise, all service to that enterprise shall, upon the acquiring public  
25 agency becoming an employer as defined in RCW 41.40.010 (4) be credited on  
26 the same basis as if rendered to the said employer: PROVIDED, That this  
27 shall apply only to those employees who ((are)) were in the service of the  
28 enterprise at or prior to the time of acquisition by the public agency and  
29 who remain in the service of the acquiring agency until they attain member-  
30 ship in the state employees' retirement system; and to those employees who  
31 were in the service of the enterprise at the time of acquisition by the  
32 public agency and subsequently attain membership through employment with  
33 any participating agency: PROVIDED FURTHER, In the event that the

1 acquiring agency is an employer at the time of the acquisition, employer's  
2 contributions in connection with members achieving service credit here-  
3 under shall be made on the same basis as set forth in RCW 41.40.361 for  
4 an employer admitted after April 1, 1949.

5 Sec. 5. Section 28, chapter 274, Laws of 1947, as last amended by  
6 section 13, chapter 174, Laws of 1963, and RCW 41.40.270 are each amended  
7 to read as follows:

8 Should a member die before the date of his retirement the amount  
9 of the accumulated contributions standing to his credit in the employees'  
10 savings fund, at the time of his death, shall be paid to such person or  
11 persons, having an insurable interest in his life, as he shall have nom-  
12 inated by written designation duly executed and filed with the retirement  
13 board: PROVIDED, That if there be no such designated person or persons  
14 still living at the time of the member's death, his accumulated contribu-  
15 tions standing to his credit in the employees' savings fund shall be paid  
16 to his surviving spouse as if in fact such spouse had been nominated by  
17 written designation as aforesaid, or if there be no such surviving spouse,  
18 then to his legal representatives: PROVIDED, HOWEVER, That this section,  
19 unless elected, shall not apply to any member who shall ((have-herebefore  
20 died-or-who-shall)) hereafter die while still in service ((at-an-attained  
21 age-of-seventy-years-or-more,-or-at-an-attained-age-of-sixty-years-but  
22 less-than-seventy-years-having-fifteen-or-more-years-of-total-service-or  
23 ten-or-more-years-of-membership-service,-or-at-any-age-having-thirty-or  
24 more-years-total-service,-all-as-provided-for-in-RCW-41.40.290-when-said  
25 member-has-elected-option-II-or-has-a-surviving-spouse)) leaving a sur-  
26 ving spouse who is entitled to, and elects to take an option II benefit  
27 as provided for in RCW 41.40.290: PROVIDED FURTHER, That this section,  
28 unless elected, shall not apply to any member who has applied for service  
29 retirement in RCW 41.40.180 and thereafter dies between the date of his  
30 separation from service and his effective retirement date, where the mem-  
31 ber has selected either option II or option III in RCW 41.40.290. The  
32 beneficiary named in the member's final application for service retirement  
33 may elect to receive either a cash refund or monthly payments according

1 to the option selected by the member.

2 Sec. 6. Section 30, chapter 274, Laws of 1947, as last amended by  
3 section 10, chapter 291, Laws of 1961, and RCW 41.40.290 are each amended  
4 to read as follows:

5 Except as provided by RCW 41.40.250, any member may elect, in  
6 accordance with the provisions of this section and in lieu of a regular  
7 retirement allowance payable throughout life with termination at death, to  
8 receive as an optional retirement allowance the actuarial equivalent, at  
9 the time of his retirement, of his regular retirement allowance in accord-  
10 ance with the provisions of options I, II, and III, as hereinafter set  
11 forth (~~(--No election of an optional retirement allowance shall be effec-~~  
12 ~~tive in case the member making such election dies before his actual retire-~~  
13 ~~ment date;--PROVIDED, That any option selected in writing by any member~~  
14 ~~who shall have heretofore died or who shall hereafter die while still in~~  
15 ~~service at an attained age of seventy years or more shall be effective and~~  
16 ~~in any such case if no such option shall have been selected, then option~~  
17 ~~II shall automatically be given effect as if in fact selected for the bene-~~  
18 ~~fit of the surviving spouse, unless such spouse is entitled to take pay-~~  
19 ~~ment under RCW 41.40.270 and elects to do so;--PROVIDED, HOWEVER, That any~~  
20 ~~member who shall hereafter die while still in service at an attained age~~  
21 ~~of sixty years but less than seventy years and who has fifteen or more~~  
22 ~~years of total service or ten or more years of membership service, or who~~  
23 ~~has thirty or more years of total service regardless of age shall have op-~~  
24 ~~tion II automatically given effect as if in fact selected for the benefit~~  
25 ~~of the surviving spouse, unless such spouse is entitled to take payment~~  
26 ~~under RCW 41.40.270 and elects to do so;)) : PROVIDED, That unless payment~~  
27 shall be made under RCW 41.40.270, option II shall automatically be given  
28 effect as if selected for the benefit of the surviving spouse upon the  
29 death in service of any member who is qualified for a service retirement  
30 allowance or has completed ten years of service at the time of death, ex-  
31 cept that if the member is not then qualified for a service retirement  
32 allowance, such option II benefit shall be based upon the actuarial equiv-  
33 alent of the sum necessary to pay the accrued regular retirement allowance

1 commencing when the deceased member would have first qualified for a ser-  
2 vice retirement allowance.

3       Option I. If he dies before the total of the annuity portions of  
4 the retirement allowance paid to him equals the amount of his accumulated  
5 contributions at the time of retirement, then the balance shall be paid to  
6 such person or persons having an insurable interest in his life, as he  
7 shall have nominated by written designation duly executed and filed with  
8 the retirement board, or if there be no such designated person or persons,  
9 still living at the time of his death, then to his surviving spouse, or if  
10 there be neither such designated person or persons still living at the time  
11 of his death nor a surviving spouse, then to his legal representative; or

12       Option II. Upon his death his reduced retirement allowance shall  
13 be continued throughout the life of and paid to such person, having an in-  
14 surable interest in his life, as he shall have nominated by written desig-  
15 nation duly executed and filed with the retirement board at the time of his  
16 retirement, or

17       Option III. Upon his death, one-half of his reduced retirement  
18 allowance shall be continued throughout the life of and paid to such per-  
19 son, having an insurable interest in his life, as he shall have nominated  
20 by written designation duly executed and filed with the retirement board  
21 at the time of his retirement.

22       Sec. 7. Section 32, chapter 274, Laws of 1947, as last amended by  
23 section 14, chapter 174, Laws of 1963, and RCW 41.40.310 are each amended  
24 to read as follows:

25       Once each year during the first five years following the retirement  
26 of a member on a disability pension or retirement allowance, and at least  
27 once in every three year period thereafter the retirement board may, and  
28 upon the member's application shall, require any disability beneficiary,  
29 who has not attained age sixty years, to undergo a medical examination;  
30 such examination to be made by or under the direction of the medical ad-  
31 viser at the place of residence of said beneficiary, or other place  
32 mutually agreed upon. Should any disability beneficiary, who has not at-  
33 tained age sixty years, refuse to submit to such medical examination in any

1 such period, his disability pension or retirement allowance may be dis-  
2 continued until his withdrawal of such refusal, and should such refusal  
3 continue for one year, all his rights in and to his disability pension,  
4 or retirement allowance, may be revoked by the retirement board. If upon  
5 such medical examination of a disability beneficiary, the medical adviser  
6 reports and his report is concurred in by the retirement board, that the  
7 disability beneficiary is ~~((physically-able-and-capable-of-resuming-employ-~~  
8 ~~ment,-or-is))~~ no longer totally incapacitated for duty as the result of the  
9 injury or illness for which the disability was granted, or that he is en-  
10 gaged in a gainful occupation, his disability pension or retirement allow-  
11 ance shall cease ((,)) : PROVIDED, That if the disability beneficiary  
12 resumes a gainful occupation and his compensation is less than his compen-  
13 sation earnable at the date of disability, the board shall continue the  
14 disability benefits in an amount which when added to his compensation does  
15 not exceed his compensation earnable at the date of separation, but the  
16 disability benefit shall in no event exceed the disability benefit origin-  
17 ally awarded.

18 NEW SECTION. Sec. 8. There is added to chapter 274, Laws of 1947,  
19 as amended, and to chapter 41.40 RCW a new section to read as follows

20 The members of the retirement board shall be the trustees of the  
21 several funds created by this chapter and the retirement board shall have  
22 full power to invest or reinvest, or to authorize the state finance com-  
23 mittee to invest or reinvest, such funds in the following classes of invest-  
24 ments, and not otherwise.

25 (1) Bonds, notes, or other obligations of the United States, or of  
26 any corporation wholly owned by the government of the United States, or  
27 those guaranteed by, or for which the credit of the United States is  
28 pledged for the payment of the principal and interest or dividends thereof;

29 (2) Bonds or other evidences of indebtedness of this state or a  
30 duly authorized authority or agency thereof, and full faith and credit  
31 obligations of, or obligations unconditionally guaranteed as to principal  
32 and interest by any other state of the United States and the Commonwealth  
33 of Puerto Rico;

1 (3) Bonds, debentures, notes, or other full faith and credit obli-  
2 gations issued, guaranteed, or assumed as to both principal and interest  
3 by the government of the Dominion of Canada, or by any province of Canada:  
4 PROVIDED, That the principal and interest thereof shall be payable in  
5 United States funds, either unconditionally or at the option of the holder

6 (4) Bonds, notes, or other obligations of any municipal corpora-  
7 tion, political subdivision or state supported institution of higher learn-  
8 ing of this state, issued pursuant to the laws of this state: PROVIDED,  
9 That the issuer has not, within ten years prior to the making of the in-  
10 vestment, been in default for more than ninety days in the payment of any  
11 part of the principal or interest on any debt evidenced by its bonds,  
12 notes, or obligations;

13 (5) Bonds, notes, or other obligations issued, guaranteed or as-  
14 sumed by any municipal or political subdivision of any other state of the  
15 United States PROVIDED, That any such municipal or political subdivision  
16 or the total of its component parts, shall have a population as shown by  
17 the last preceding federal census of not less than ten thousand and shall  
18 not within ten years prior to the making of the investment have defaulted  
19 in payment of principal or interest of any debt evidenced by its bonds,  
20 notes or other obligations for more than ninety days,

21 (6) Bonds, debentures, notes, or other obligations issued, guaran-  
22 teed, or assumed as to both principal and interest by any city of Canada  
23 which has a population of not less than one hundred thousand inhabitants  
24 PROVIDED, That the principal and interest thereof shall be payable in  
25 United States funds, either unconditionally or at the option of the holde  
26 PROVIDED FURTHER, That the issuer shall not within ten years prior to the  
27 making of the investment have defaulted in payment of principal or intere  
28 of any debt evidenced by its bonds, notes or other obligations for more  
29 than ninety days;

30 (7) Bonds, notes, or other obligations issued, assumed, or uncon-  
31 ditionally guaranteed by the international bank for reconstruction and de-  
32 velopment, or by the federal national mortgage association or the inter-  
33 American bank;

- 1 (8) Bonds, debentures, or other obligations issued by a federal  
2 land bank, or by a federal intermediate credit bank, under the act of con-  
3 gress of July 17, 1916, known as the "federal farm loan act", as amended  
4 or supplemented from time to time;
- 5 (9) Obligations of any public housing authority or urban redevelop-  
6 ment authority issued pursuant to the laws of this state relating to the  
7 creation or operation of a public housing or urban redevelopment authority;
- 8 (10) Obligations of any other state or the Commonwealth of Puerto  
9 Rico, municipal authority or political subdivision within the state or the  
10 commonwealth issued pursuant to the laws of such state or commonwealth  
11 with principal and interest payable from tolls or other special revenues.  
12 PROVIDED, That the issuer has not, within ten years prior to the making  
13 of the investment, been in default for more than three months in the pay-  
14 ment of any part of the principal or interest on any debt evidenced by its  
15 bonds, notes, or obligations;
- 16 (11) Bonds and debentures issued by any corporation duly organized  
17 and operating in any state of the United States of America: PROVIDED,  
18 That such securities can qualify for an "A" rating or better by two  
19 nationally recognized rating agencies;
- 20 (12) Capital notes or debentures of any national or state bank  
21 doing business in the United States of America,
- 22 (13) Equipment trust certificates issued by any corporation duly  
23 organized and operating in any state of the United States of America;
- 24 (14) Investments in savings and loan associations organized under  
25 federal or state law, insured by the federal savings and loan insurance  
26 corporation, and operating in this state PROVIDED, That the investment  
27 in any such savings and loan association shall not exceed the amount in-  
28 sured by the federal savings and loan insurance corporation;
- 29 (15) Savings deposits in commercial banks and mutual savings banks  
30 organized under federal or state law, insured by the federal deposit in-  
31 surance corporation, and operating in this state: PROVIDED, That the de-  
32 posit in such banks shall not exceed the amount insured by the federal de-  
33 posit insurance corporation;

1 (16) First mortgages on unencumbered real property which are in-  
2 sured by the federal housing administration under the national housing act  
3 (as from time to time amended), or are guaranteed by the veterans admin-  
4 istration under the servicemen's readjustment act of 1944 (as from time to  
5 time amended), or are otherwise insured or guaranteed by the United States  
6 of America, or by any agency or instrumentality of the United States of  
7 America, so as to give the investor protection at least equal to that pro-  
8 vided by the said national housing act or the said servicemen's readjust-  
9 ment act,

10 (17) Appropriate contracts of life insurance or annuities from in-  
11 surers duly authorized to do business in the state of Washington, if and  
12 when such purchase or purchases in the judgment of the retirement board  
13 be appropriate or necessary to carry out the purposes of this chapter.

14 For the purpose of meeting disbursements for annuities and other  
15 payments in excess of the receipts, there shall be kept available by the  
16 retirement board an amount, not exceeding ten percent of the total amount  
17 in the funds provided by this chapter, on deposit in the state treasury.

18 All investments made and all investment agreements, contracts, or  
19 proceedings made or entered into by the retirement board in accordance  
20 with state laws governing any such investments, agreements, contracts or  
21 proceedings prior to the date this act takes effect, are hereby validated,  
22 ratified, approved and confirmed.

23 NEW SECTION. Sec. 9. Section 8, chapter 274, Laws of 1947, as last  
24 amended by section 5, chapter 174, Laws of 1963, and RCW 41.40.070 are each  
25 repealed.

26 NEW SECTION. Sec. 10. If any provision of this act, or its appli-  
27 cation to any person or circumstance is held invalid, the remainder of the  
28 act or the application of the provision to other persons or circumstances  
29 is not affected.

30 NEW SECTION. Sec. 11. This act is necessary for the immediate  
31 preservation of the public peace, health and safety, and for the support  
32 of the state government, and shall take effect immediately.

33