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

GARY FOX,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal involves a claim for additional state retirement benefits. Appellant Gary Fox has been receiving a retirement benefit from the Law Enforcement Officers' and Fire Fighters' Retirement System (LEOFF) Plan 1 since he retired, based on disability, from work as a police officer in 1990. In 1991, he began work as an investigator for a Public Employees' Retirement Systems (PERS) employer. In general, a LEOFF Plan 1 disability retiree is statutorily estopped from receiving a second retirement benefit from the PERS pension fund. However, there is an exception: Mr. Fox could almost double his retirement allowance if he could establish that he was eligible for membership in PERS *prior to March 1976*.

Recognizing this opportunity, Mr. Fox reflected back to his days as a student-athlete at the University of Washington (UW) during the 1960s and 1970s and remembered doing some hourly janitorial work for which his gymnastics coach had recommended him. He asserts that he remembers receiving regular paychecks from the UW for his work as a janitor, with PERS retirement contributions, taxes, and social security withholdings taken out of each paycheck. However, there is no evidence from the UW substantiating the janitorial employment Mr. Fox remembers, or from the Department of Retirement Systems (Department)

reflecting the PERS contributions he remembers, or from the Internal Revenue Service or Social Security Administration showing the withholdings he remembers. Nonetheless, Mr. Fox has sought to convince the Department, the Superior Court, and now this Court that the janitorial hours he put in during his student days should qualify as bona fide retirement-eligible work entitling him to PERS membership and service credit in PERS for his two years at the UW and the 18 years he worked as an investigator while receiving his LEOFF disability retirement benefit.

In the Final Order from the Department, (attached hereto as Appendix A) the Presiding Officer concluded that Mr. Fox is not eligible to augment his LEOFF retirement benefit with a retirement benefit from PERS based on his janitorial hours during his student days. The Presiding Officer found alternatively: (1) Mr. Fox had not met his burden of proof to establish that his janitorial duties were performed in a PERS-eligible position; and (2) even if Mr. Fox had worked in a PERS-eligible position, he would have been excluded from PERS membership at the time by the statutory exclusion from PERS membership for student employment.

The Superior Court affirmed the Presiding Officer's Final Order on both grounds. The Presiding Officer's Final Order is now before this Court. The Department respectfully requests this Court to affirm.

II. STATEMENT OF THE ISSUE

A. Applicable Law

From 1970 to 1972, the PERS membership statute provided:

Membership in the retirement system shall consist of all regularly compensated employees . . . with the following exceptions:

- (1) persons in ineligible positions; . . .
- (7) persons employed by an institution of higher learning . . . primarily as an incident to and in furtherance of their education or training; [and] . . .
- (12) persons hired in eligible positions on a temporary basis for a period not to exceed six months: PROVIDED, That if such employees are employed for more than six months in an eligible position they shall become members of the system.

Former RCW 41.40.120 (Laws of 1969, ch. 128, § 5), recodified as RCW 41.40.023 (Laws of 1990, ch. 274, § 10) (emphasis added).

“Ineligible position” was defined as any position that was not an “eligible position.” Former RCW 41.40.010 (Laws of 1969, ch. 128, § 1). In turn, “eligible position” was defined as “any position which normally requires five or more uninterrupted months of service a year for which regular compensation is paid.” Former RCW 41.40.010 (Laws of 1969, ch. 128, § 1). One “month of service” was “[f]ull time work for ten days or more *or* an equivalent period of work in any given calendar month.” Former RCW 41.40.010 (Laws of 1969, ch. 128, § 1). Since 1948, the

Department has deemed 70 or more hours of service during a calendar month to constitute one “month of service.” R. 532-39, 543-49. The Department has further interpreted the term “5 uninterrupted months” to mean 5 consecutive calendar months. *Id.* The 5 months of 70 hours must occur in each of two consecutive years. WAC 415-108-690(4)(a).

Thus, to prevail, Mr. Fox was required first to prove by a preponderance of the evidence that he occupied a PERS-eligible position, meaning he was regularly compensated by a PERS employer for working 70 or more hours per month in each of 5 consecutive months within two consecutive years. Even if he proved this, he also had to prove that he was not subject to the express statutory exclusions from PERS membership based on student employment or temporary employment.

B. Issues on Appeal

The ultimate question is whether Mr. Fox met his burden of presenting evidence of eligibility for membership in PERS Plan 1, based on the hourly janitorial work he did while a student-athlete at the UW between 1970 and 1972. The question raises the following two issues decided adversely to Mr. Fox by the Department’s Presiding Officer:

1. PERS-Eligible Position: Was there substantial evidence to support the Presiding Officer’s Findings of Fact that Mr. Fox did not occupy a PERS-eligible position, *i.e.*, he was not regularly compensated by a PERS employer for

working 70 or more hours in each month for 5 consecutive months in two consecutive years?

2. Student-Employment Exclusion: If the Court first finds that – contrary to the Presiding Officer’s Findings and Conclusion – Mr. Fox occupied a PERS-eligible position, did the Presiding Officer correctly conclude that Mr. Fox was nonetheless excluded from PERS membership pursuant to the express statutory exclusion of university students hired into PERS-eligible positions “incident to and in furtherance of their education”?¹

III. COUNTER-STATEMENT OF FACTS

This is a judicial review of an agency’s final order and is governed by the Washington Administrative Procedure Act, RCW 34.05 (APA). For this reason, the Department’s Counter-Statement of Facts provides citations first to the Presiding Officer’s Findings of Fact (FOF) and Conclusions of Law (COL) and then to the supporting evidence in the Administrative Record (R.).

A. Overall Chronology of the Years in Question

In high school, Mr. Fox excelled in gymnastics and was enrolled in gymnastics classes at the UW. R. 690. When Mr. Fox was graduated from high school in 1968 at age 17, he worked a three-month summer job

¹ Because each of the Presiding Officer’s conclusions independently excluded Mr. Fox from PERS membership, the Presiding Officer found it unnecessary to rule on whether Mr. Fox would also have been excluded based on the express statutory exclusion of employees in temporary positions. *See* COL 29. For this reason, if this Court reaches the temporary-employment exclusion in its analysis, the issue should be remanded for a determination by the Presiding Officer, as discussed later in this brief.

at Bethlehem Steel and then began his freshman year at the UW. FOF 9-11; R. 688, 690, 693.

When he arrived at college, he began assisting his gymnastics coach in teaching children's gymnastics classes, which were offered through the extension department at the UW.² FOF 12; R. 690, 747-48, 690-91. In 1970, when he found he needed more money, he asked his gymnastics coach for help. FOF 12, 13; R. 693. His coach was able to make some calls and help Mr. Fox get an hourly job buffing floors and stocking custodial supplies in certain buildings on campus. FOF 13, 15; R. 693, 700, 739, 748-49. The job allowed him the flexibility to attend classes, go to daily gymnastics practice, compete, teach children's gymnastics classes, participate in police reserve activities – and get his work hours in at his convenience. FOF 16; R. 738-41, 690-91.

B. Mr. Fox Seeks Membership in PERS Plan 1

Mr. Fox graduated in four years with a degree in Business Administration, worked briefly with the Boeing Company and the Seattle Police Reserves, and eventually landed a job with the Tukwila Police Department in 1974, the beginning of his career in law enforcement. FOF 9, 19, 21; R. 688, 694.

² This was a student-assistant position for which Mr. Fox was paid \$1.90 per hour starting his freshman year. FOF 12; R. 690-91. He does not claim the gymnastics position as a basis for PERS membership. FOF 31.

Mr. Fox was enrolled in LEOFF Plan 1 when he began employment with the Tukwila Police Department in 1974. FOF 21-23; COL 7; R. 688. He later joined the Kent Police Department, from which he was retired in 1990 due to a duty-related disability. FOF 7, 22, 23; COL 7; R. 685. Accordingly, Mr. Fox has been a LEOFF Plan 1 disability retiree since 1990. *Id.*

In 1991, Mr. Fox began employment in a PERS-eligible position as a full-time, professional investigator for the Attorney General's Office. FOF 24; R. 705-06. He continued in that position for 18 years while receiving his LEOFF Plan 1 disability retirement benefit. *Id.*

However, because he was already receiving a LEOFF disability benefit, he was statutorily estopped from membership in PERS pursuant to RCW 41.04.270(1)(c), which became effective March 19, 1976.³ FOF 5; COL 5. A narrow exception to this estoppel statute is reflected in the Department's administrative rule, adopted in 1995, allowing membership

³ RCW 41.04.270(1)(c) provides in relevant part: "[O]n and after March 19, 1976, any member or former member who . . . (c) is the beneficiary of a disability allowance from any public retirement system listed in RCW 41.50.030 shall be estopped from becoming a member of or accruing any contractual rights whatsoever in any other public retirement system listed in RCW 41.50.030"

in PERS for disability retirees who were eligible for membership in PERS prior to March 1, 1976.⁴ WAC 415-108-725(2). FOF 27; COL 6, 7.

Soon after the Department adopted the rule in 1995, Mr. Fox began a series of attempts to establish that that he is entitled to membership in PERS pursuant to WAC 415-108-725 based on his part-time, hourly, janitorial work at the UW between 1970 and 1972 while a student-athlete at the UW. FOF 29, 30, 33-39; COL 7, 8; R. 708-19.

However, neither the UW nor the Department has any record of his having worked in a PERS-eligible position, and Mr. Fox produced no employment, Social Security, or income tax documents to establish he was enrolled in PERS as a university student or that his hourly janitorial work was PERS-eligible. FOF 32-39; COL 12-16.

C. Mr. Fox's Evidence, Introduced to Establish That He Was Eligible for PERS

To support his claim that he was entitled to PERS membership for his janitorial hours during his junior and senior years, Mr. Fox, himself experienced as a professional investigator, made a diligent effort to locate as many records as he could from the critical two-year period (1970-72).

⁴ WAC 415-108-725(2) provides: "If you are receiving a disability allowance from any retirement system administered by the department you can not participate in PERS unless you established membership in PERS prior to March 1, 1976."

FOF 32-39; R. 708-19. Despite his efforts, no employment records were located to support his claim. *Id.*

Without dispute, Mr. Fox put in some janitorial hours while a student-athlete at the UW more than 35 years ago. COL 12. However, how he was paid, who cut his checks, and who kept an employment file on him are all questions that remain unanswered by the evidence in this record, after extensive searches by numerous parties to find factual corroboration for Mr. Fox's recollections. FOF 32-39; COL 12, 14; R. 708-19, 724.

To establish PERS eligibility at the APA hearing before the Presiding Officer, Mr. Fox introduced the testimony of his former gymnastics coach, a 1974 letter of recommendation, a declaration he obtained from a UW janitorial supervisor, and his own testimony. None of this testimony established that Mr. Fox was eligible for membership in PERS.

Mr. Fox testified that between 1970 and 1972, he worked as a janitor at the UW while he was a full-time student and athlete there. FOF 15; R. 692. However, he has no pay stubs, Social Security statements, W-2s, or tax returns reflecting that employment. FOF 32-39; COL 12-16; R. 718, 730. Mr. Fox testified that his gymnastics coach, Coach Hughes, helped him get the job. FOF 13; R. 693.

Coach Hughes testified that he found jobs for student athletes, including Mr. Fox, by knowing people in University departments whom he could call up and say, “Hey, I have a gymnast who needs work. Do you have a job for him?” FOF 13; R. 749. Coach Hughes had no involvement with who paid Mr. Fox, how Mr. Fox was paid, or how many hours Mr. Fox worked, and he had no involvement with Mr. Fox’s performance of the janitorial work. FOF 17; R. 751-52.

Mr. Fox also introduced a 1974 letter of recommendation from the person who supervised his janitorial work, Joseph Caldwell, now deceased. FOF 15; R. 224. Mr. Caldwell wrote that Mr. Fox “augmented” Mr. Caldwell’s “regular crew” and “did many special projects for me due to his special hours he was allowed to work as a half-time employee.” *Id.* Mr. Caldwell’s letter did not address by whom Mr. Fox was employed, how he was paid, or why he was not a member of Mr. Caldwell’s “regular crew.” *Id.*

Mr. Fox also introduced a declaration that he obtained in 2005 from M. B. Byrd, who was the Superintendent of Janitorial Services on the UW campus in the early 1970s. FOF 15; R. 695. Mr. Byrd’s declaration, made nearly 35 years after supervising nine custodial crews in various locations throughout the UW campus in the 1970s, FOF 15; R. 694, nonetheless states that Mr. Byrd remembers “interviewing and hiring Gary

in June of 1970 as a half time custodian scheduled to work 80 hours per month.” FOF 16; R. 273-74. It does not, however, address who paid Mr. Fox, how he was paid, or who kept an employment record for him. R. 273-74.

D. Mr. Fox Produced No Records From the UW or From the Department to Establish PERS Eligibility

1. University of Washington Records

Contrary to Mr. Fox’s repeated assertion that the UW “breached its duty to maintain records,” Appellant Brief at 1, 3, 5, 10-12, 17-18, the Presiding Officer made no such finding. Indeed, the evidentiary hearing produced extensive, detailed testimony establishing the opposite: the UW had each of the types of records sought, for the exact years at issue; it simply had none that supports Mr. Fox’s contention that the UW employed him as he claims. FOF 34-35; COL 12, 16, 20; R. 775-78.

Director of the UW’s Benefits Office, Kati Dwyer, testified that in the 1970s, the UW stored all payroll information from all departments throughout the University in one centralized payroll system, which was stored in a mainframe computer. FOF 35; R. 763. Information about each employee was input by data processors in “Computing Communications,” and these were the only individuals authorized to input data into the centralized payroll system. *Id.* They received and input data *from* all

University departments and *for* all University employees, including students paid on an hourly basis. FOF 35; R. 765.

In addition to the files maintained by the Payroll Office in the 1970s, files for each employee were also maintained separately by the Human Resources Office and the Benefits Office. R. 766. Each office kept files relating to its area of operation. For example, the Payroll Office kept files relating to hours and rates of pay while the Benefits Office kept original documents the employee completed to sign up for benefits. *Id.* Thus, for any employee at the UW in the 1970s, the UW maintained three distinct files. R. 767.

Within about two years of an employee's termination from the UW, the employee's data is purged from the mainframe and merged with the Human Resources file into one payroll file that is sent to the University Records Center, where payroll files are kept for 75 years in compliance with the UW's formal retention schedule. FOF 35; R. 767-68. The Benefits Office purges its files annually, sending inactive files to the University Records Center, where the files are kept for six years, also in compliance with the UW's formal retention schedule. R. 767-68.

In addition to the individual Payroll, Benefits, and HR files, the UW maintains *microfiche copies of every payroll the UW has ever run.* FOF 35; R. 768-69. Payroll reports that are maintained on microfiche

include “all the core data about how many hours were worked, the different kind of pay types that the person received . . . their Social Security number, any kind of individualized deductions that came out of it, federal withholding taxes, Social Security, etc.” and the amount the employee was paid. R. 769; *see also* R. 310-24 (sample report).

These University payroll reports were maintained in the 1970s, included student employees paid on an hourly basis (listed alphabetically with all other employees), and are retained for 75 years. FOF 35; R. 770-71. The reports are stored on microfiche and held at the University Records Center, and at the Payroll Office and the Benefits Office, so the offices “have a copy of whatever came off the payroll run [which] acts as an official record of that person’s pay.” R. 771.

The same is true for the UW’s W-2 reports: retained for 75 years, these reports provide a record of what the University sent to the federal government for each employee in each year, including the gross wages paid. R. 771-72. Individuals are listed alphabetically in these reports as well. R. 772. The W-2 reports, like the payroll reports, are kept in microfiche form at the University Records Center and in both the Payroll Office and Benefits Office. *Id.*

In an effort to aid Mr. Fox in his search for the UW payroll records, Benefits Director Dwyer personally searched these microfiche

files, looking at each month in which Mr. Fox claimed he was employed at the UW. R. 775-76. She personally searched alphabetically in the payroll records and the W-2 reports and then searched again at the beginning and end of the microfiche to ensure that the reports had not been misfiled. R. 775. Likewise, Ms. Dwyer personally searched the hard-copy files maintained for each employee at the University Records Center, looking two years prior to and five years beyond Mr. Fox's claimed end-date. R. 776. She found nothing:

I have simply found no evidence that he was a University of Washington employee during that time, either in our microfiche, in our paper documents. There's nothing that tells me that he was our employee during that time.

R. 777-78. *See also*, FOF 34.

2. Department of Retirement Systems' Records

Department of Retirement Systems employee Michelle Hardesty, who was the PERS Plan Administrator at the time of the hearing, testified that she and her staff conducted an extensive review of the Department's member records and found no reference at all to Mr. Fox's having been enrolled at any time in any retirement plan other than LEOFF Plan 1, the plan from which he retired. FOF 38; R. 660-61, 666-67.

The PERS Plan Administrator's own efforts included multiple communications with Mr. Fox and with members of the Department's

staff who had assisted Mr. Fox; personal reviews of the Department's electronic databases, hard-copy files, and ledgers; and suggestions to Mr. Fox that he secure tax, Social Security, and human resource records that might help establish eligibility. R. 675-77.

Despite these comprehensive efforts, no record of PERS enrollment or membership for Mr. Fox was found at the Department. FOF 38; COL 27. Nor did Mr. Fox provide the Department with the income tax or Social Security documents that the PERS Plan Administrator had requested from him. FOF 36-38; R. 676-77.

E. Three Administrative Levels of the Department Denied Mr. Fox's Request for Enrollment in PERS Plan 1, and the Superior Court Affirmed the Department's Final Order

The PERS Plan Administrator subsequently denied Mr. Fox's request for membership in PERS. R. 253-54. Mr. Fox petitioned the Department for review of the Plan Administrator's denial. R. 262-74. The Department's Petitions Examiner conducted an administrative review of the documentary record; the Petitions Examiner also denied Mr. Fox's request for membership in PERS. R. 275-81.

Mr. Fox then appealed the Petitions Examiner's decision to the Department's Presiding Officer, R. 66-71, who conducted a two-day evidentiary hearing pursuant to the APA. R. 632-957. Following the

APA hearing and post-hearing briefing, the Presiding Officer entered the Final Order denying Mr. Fox's request for membership in PERS. R. 1-18.

The Superior Court affirmed the Presiding Officer's Final Order denying Mr. Fox's request for PERS membership. CP 48-49. Mr. Fox appealed as of right to this Court.

F. The Appellant's Brief Ignores or Misapprehends the Presiding Officer's Findings of Fact, Often Presenting Mr. Fox's Claims as Though They Are the Facts to Be Reviewed by This Court

Mr. Fox states, "It is a verity on appeal that Mr. Fox was a regularly compensated half-time employee of a PERS employer for 24 continuous months." FOF 13, 15. Appellant Brief at 16. These assertions are not verities on appeal. Nor are they the Presiding Officer's Findings of Fact. They are merely Mr. Fox's claims.

Other significant misstatements of fact include:

1. Mr. Fox attributes a conclusion to the Presiding Officer that does not exist. Mr. Fox claims that the Presiding Officer "found all elements of a PERS eligibility [sic] except hours worked." Appellant Brief at 21; *see also* Appellant Brief at 16. This is not accurate. The Presiding Officer expressly concluded that Mr. Fox had failed to prove not only hours worked, but also *compensation from the UW*. COL 13-15, 20. The Presiding Officer stated, for example:

This record does not contain enough reliable evidence to establish . . . that Mr. Fox actually worked the requisite number of regularly compensated hours for the University,
...

COL 12 (emphasis added). And:

There is no official or disinterested corroborating record that Mr. Fox fulfilled these [PERS-eligibility] requirements, and particularly no record of any compensation paid for this position on comprehensive UW payroll check registers.

COL 14 (emphasis added). In short, Mr. Fox failed to prove that he was employed by the UW.

Contrary to Mr. Fox's assertion that the only "missing" fact was the number of hours he worked, it is clear from the Presiding Officer's express Findings of Fact and Conclusions of Law that, in addition to failing to prove that he worked the requisite hours for PERS membership, Mr. Fox also failed to prove the threshold element critical to PERS eligibility: he failed to prove that he had been regularly compensated by a PERS employer for his hourly janitorial duties. COL 12-14, 20.

2. Mr. Fox states as fact that he worked "half time" at the UW and that this "fact" is corroborated by the testimony of Kati Dwyer, Director of the UW's Benefits Office. Appellant Brief at 18. Actually, Ms. Dwyer's testimony contradicted Mr. Fox's testimony. Mr. Fox claimed he was employed as a half-time janitor, worked 80 hours per

month or 20 hours per week, and was paid *hourly*. FOF 17; R. 723-24, 730. Ms. Dwyer testified that half-time employees on the UW payroll worked 87.5 hours each month, were classified employees, and were paid *on salary*. FOF 8; R. 125-26. Ms. Dwyer's testimony leads to the necessary conclusion that Mr. Fox did *not* occupy a "half-time" position on the UW payroll.

Alternatively, Ms. Dwyer's testimony showed that, even if Mr. Fox had established that he was regularly compensated through the UW payroll (a fact he did not establish), his work must have been less than half-time, or he would have received a salary for it rather than an hourly wage.

Likewise, Ms. Dwyer testified that if Mr. Fox held the position he remembers (hourly employment as a janitor while enrolled as a full-time student in Business Administration), the employment would most likely have been "student hourly" employment that was both temporary and presumed to be "incident to and in furtherance of" his education at the UW. R. 754-60; 784-85. Thus, Ms. Dwyer's testimony did not corroborate Mr. Fox's testimony that he held a half-time position on the UW payroll; it did the opposite, and the Presiding Officer's Final Order reflects this. FOF 8, 17; COL 13-14, 20.

3. Mr. Fox states throughout his opening brief that the UW breached its duty to maintain records, thereby denying him any means to demonstrate his claimed employment. Appellant Brief at 1, 3, 5, 10-12, 17-18. In fact, the Presiding Officer made no finding that the UW failed to maintain employment records. To the contrary, the Presiding Officer found that the absence of employment records despite extensive searches *contradicted* Mr. Fox's testimony. COL 16.

Further, the Presiding Officer emphasized that the UW was not the only source from which no employment records were produced. FOF 36-37. The Presiding Officer noted that Mr. Fox also failed to produce tax records and Social Security statements for the relevant time period in his effort to substantiate the claimed UW employment. *Id.* Nothing in the Presiding Officer's Findings of Fact or Conclusions of Law supports Mr. Fox's bald assertion that UW breached its duty to maintain records of Mr. Fox's employment or that the lack of UW records alone was fatal to Mr. Fox's claims.

This Court should focus its review on the Findings of Fact made by the Presiding Officer and the evidence in the record supporting those Findings, rather than accepting Mr. Fox's characterization of the Findings and of the evidence.

IV. ARGUMENT

A. This Court Should Affirm the Presiding Officer's Final Order Because Mr. Fox Cannot Establish Its Invalidity

Judicial review of an agency's final order is governed by the Washington Administrative Procedure Act (APA), RCW 34.05.510. The function of the Court is to review the decisions of the agency under the APA, not to try the case *de novo*. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The APA requires the court to affirm the agency's final order unless the petitioner can demonstrate its invalidity. RCW 34.05.570(1)(a), (b); RCW 34.05.570(3).

“The validity of agency action shall be determined in accordance with the standards of review provided in [the APA]” RCW 34.05.570(1)(b). In reviewing an agency order arising out of an adjudicative proceeding, the court shall grant relief *only if* it determines that one or more of the enumerated statutory bases for relief are established. *See Heidgerken v. Dep't of Nat. Res.*, 99 Wn. App. 380, 384, 993 P.2d 934 (2000). Only two of these bases are relevant to this appeal:

The Court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: . . .

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

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court; . . .

RCW 34.05.570(3)(d), (e).

Mr. Fox has not demonstrated invalidity of the Presiding Officer's Final Order on either of these bases.⁵ Where, as here, the Petitioner has not established the invalidity of an administrative agency's Final Order, the reviewing court is required to affirm. RCW 34.05.570(1)(a), (b); RCW 34.05.570(3). Accordingly, this Court should affirm the Department's Final Order.

1. This Court's Review of the Presiding Officer's Findings of Fact Is Governed by the Substantial Evidence Standard

When findings of fact are challenged on judicial review, the challenging party has the burden of establishing that the facts are not

⁵ Mr. Fox also argues that the Presiding Officer's decision is inconsistent with the Department's administrative rule implementing the student-employment statutory exclusion to PERS membership, WAC 415-108-520. While there is an enumerated statutory basis for relief under the APA where "the order is inconsistent with a rule of the agency," RCW 34.05.570(3)(h), that basis is not available when, as here, "the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency." *Id.*

Here, the Presiding Officer explained: (1) the student-employment exclusion assumes a PERS-eligible position, which Mr. Fox did not establish; (2) the administrative rule was not in effect until 20 years after Mr. Fox's janitorial work at the UW; and (3) even had Mr. Fox occupied a PERS-eligible position that would trigger the student-employment exclusion, and even had the Department's administrative rule retroactively governed the student-employment analysis, application of the rule would have yielded the same result: Mr. Fox failed to establish any objective evidence that he had elected to participate in PERS when he assumed his janitorial duties as a college student in 1970. COL 28.

supported by substantial evidence. RCW 34.05.570(3)(e). Under the “substantial evidence” test, the Presiding Officer’s Findings of Fact must be upheld if there is evidence in the record in “sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995).

Similarly, the Presiding Officer’s Final Order must be upheld if it is supported by evidence that is substantial when viewed in light of the whole record before the court; *i.e.*, “a sufficient quantity of evidence to persuade a fair-minded person of [its] truth or correctness.” *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997). *See also Valentine v. Dep’t of Licensing*, 77 Wn. App. 838, 847, 894 P.2d 1352 (1995). This is so even if the reviewing court would form a different conclusion from its own reading of the record. *Callecod*, 84 Wn. App. at 676; *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993).

a. The Court Should Reject Mr. Fox’s Invitation to Ignore the Substantial Evidence Standard

Mr. Fox urges the Court to ignore this standard and review the facts with “no restrictions.” Appellant Brief at 14. He urges this based on an incorrect statement of the record and citation to inapplicable law:

Two main material facts are disputed, neither of which were reduced to findings by DRS’s presiding officer:

Mr. Fox's hours of work and his affirmative election into PERS. DRS's refusal to make a finding despite the evidence places no restrictions on the Court's review

Id., citing *State v. Reite*, 46 Wn. App. 7, 12, 728 P.2d 625 (1986).

Contrary to Mr. Fox's assertion, the Presiding Officer did not refuse to make findings on these disputed facts. Rather, the Presiding Officer specifically found that Mr. Fox failed to prove his hours with the specificity required to establish PERS membership. FOF 32-37; COL 12-21. Likewise, the Presiding Officer specifically found that Mr. Fox's evidence was insufficient to prove that he made an affirmative election into PERS, whether by filling out an enrollment form as he recalls or by having PERS contributions deducted from his paychecks, as he remembers:

Any potential mitigating effect of the [PERS] enrollment form Mr. Fox recalls filling out is lost here because the form itself is lost. Further, the contributions to PERS he recalls making through payroll deduction have never shown up in either the University's or the Department's business records.

COL 27.

These findings demonstrate the Presiding Officer's consideration of all of the evidence. Contrary to Mr. Fox's assertion, there was no failure to "accept[] evidence which it was the hearing officer's duty to accept." Appellant Brief at 14 (citing *Chmela v. State Dep't of Motor*

Vehicles, 88 Wn.2d 385, 391, 561 P.2d 1085 (1977)). In *Chmela*, the administrative reviewing officer accepted into evidence the sworn statements of two witnesses. *Chmela* 88 Wn.2d at 391. Unlike Mr. Fox’s testimony in this appeal, the sworn statements in *Chmela* contained only undisputed facts. *Id.* The reviewing officer in *Chmela* did not make a specific finding as to the *undisputed* facts contained in the sworn witness statements. *Id.* The court held that under these circumstances, “an appellate court can itself make such a finding without sending the case back for that purpose.” *Id.*

In support of his theory that this Court should jettison the established “substantial evidence” standard of review and instead review facts without deference to the Presiding Officer’s first-hand findings, Mr. Fox relies also on *State v. Reite*, 46 Wn. App. 7, 12, 728 P.2d 625 (1986). *Reite* involved a paternity suit in which the court, following *Chmela*, simply acknowledged that a reviewing court is free to make findings based on “undisputed” evidence that was “overlooked or ignored by the factfinder.” *Id.* at 11-12 (citing *Chmela*, 88 Wn.2d at 391). The *Reite* Court emphasized:

By “undisputed” fact we mean a fact disclosed in the record or pleadings that the party against whom the fact is to operate either has admitted or has conceded to be undisputed.

Id. at 12.

Chmela and *Reite* plainly do not apply to the facts surrounding Mr. Fox's janitorial hours as a student athlete at the UW and his recollection of filling out a PERS enrollment form; these facts were far from undisputed. These were contested facts at the center of the PERS-eligibility issue. Mr. Fox concedes as much at the outset, stating that "[t]wo main material facts are disputed" Appellant Brief at 14.

The Presiding Officer did not fail to make a finding on any disputed fact. The Presiding Officer's careful and comprehensive review of all of the facts is evidenced by her 20-page decision in which she addressed each disputed fact and set out 39 detailed Findings of Fact followed by 29 Conclusions of Law based on her findings. R. 1-18.

Where, as here, the Presiding Officer has evaluated all the disputed evidence and weighed the credibility of the witnesses first-hand, the reviewing court will not re-weigh the evidence or substitute its view of the facts for that of the agency. *Nghiem v. State*, 73 Wn. App. 405, 869 P.2d 1086 (1994). Indeed, "review is deferential and entails acceptance of the fact finder's views regarding the credibility of witnesses and weight to be given reasonable but competing inferences." *Callecod*, 84 Wn. App. at 676; *see also Valentine*, 77 Wn. App. at 847; *Shofield v. Spokane Cy.*, 96 Wn. App. 581, 980 P.2d 277 (1999) (requiring the court to "view the

evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority”).

b. The Court Should Reject Mr. Fox’s Burden-Shifting Theory and “Just and Reasonable Inference” Standard

Mr. Fox also urges the court to shift the burden from him to the Employer (which he asserts was the UW) and to replace the Presiding Officer’s Findings of Fact with findings based on whether Mr. Fox supported his claims by “just and reasonable inference.” Appellant Brief at 16-18. Neither the UW nor any other identifiable employer, however, has ever been a party to this appeal. Mr. Fox’s theory of shifting the burden to the UW, a non-party, and applying a standard of review not required under the APA is not supportable.

Mr. Fox’s burden-shifting theory is apparently based on the United States Supreme Court’s decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S. Ct. 1187, 1192-93, 90 L. Ed. 1515 (1946). Appellant Brief at 17. The Supreme Court in *Anderson* addressed an employer’s statutory duty under the federal Fair Labor Standards Act to keep records of time worked and wages paid. *Id.* at 687-88, 66 S. Ct. at 1192. Specific provisions of the Act permit an award of damages in certain circumstances where the employer has failed to do so. *Id.* at 688,

66 S. Ct. at 1192. The “*Anderson* rule,” Appellant Brief at 17, does not apply here.

Mr. Fox’s burden-shifting theory, constructed from the inapplicable *Anderson* rule, would require (1) an identifiable Employer, when Mr. Fox’s employer has not been identified in this appeal; (2) the Employer to be a party to the proceedings, which is not the case here; (3) a finding that the Employer breached its duty to maintain records, a finding which does not exist in this case; (4) a finding that Mr. Fox was granted a PERS pension, a finding which does not exist in this case; and (5) a finding that the Employer’s failure to maintain records denied Mr. Fox his PERS pension rights, a finding that does not exist in this case. Mr. Fox’s burden-shifting theory plainly does not apply.

Likewise, whether Mr. Fox supported his claims “by just and reasonable inference” (Appellant Brief at 17-18) is irrelevant. The cases upon which Mr. Fox relies are federal district court cases addressing overtime compensation claims under the federal Fair Labor Standards Act; the “just and reasonable inference” standard in those cases does not apply here.

Rather, as with original civil actions in the superior court, the appellant, in an administrative proceeding under the Washington APA, must carry his burden by a preponderance of the evidence. *Thompson v.*

Dep't of Licensing, 138 Wn.2d 783, 797, 982 P.2d 601 (1999) (standard in administrative proceedings is preponderance of the evidence unless otherwise mandated by statute or due process of law).

In turn, the legislatively mandated standard for this Court's review of the Presiding Officer's Findings of Fact is whether the findings are supported by substantial evidence. RCW 34.05.570(3)(e). Accordingly, this Court should reject Mr. Fox's invitation to substitute legal standards from other sources for the standards set forth by the legislature in the APA and recognized by the courts in numerous decisions under that Act.

2. This Court's Review of the Presiding Officer's Legal Conclusions Is Governed by the Error-of-Law Standard

When the petitioning party has challenged an agency's conclusions of law or otherwise raised a question of law under RCW 34.05.570(3)(d), the error-of-law standard applies. The court must review the law *de novo* and apply it to the facts in the record. The court may substitute its judgment for that of the agency only if the agency's interpretation or statement of the law is incorrect. *Franklin Cy. v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

Although issues of law are clearly within the court's province to decide, courts accord substantial weight to an agency's interpretation when an agency is interpreting the law it administers. *Renton Educ. Ass'n*

v. Public Empl. Relations Comm'n, 101 Wn.2d 435, 441, 680 P.2d 40 (1984); *Dana's Housekeeping v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 605, 886 P.2d 1147 (1995). This is especially true, where, as here, the agency has expertise in a special field of law. *Chancellor v. Dep't of Retirement Sys.*, 103 Wn. App. 336, 343, 12 P.3d 164 (2000). See also *Grabicki v. Dep't of Retirement Sys.*, 81 Wn. App. 745, 752, 916 P.2d 452 (1996).

B. The Presiding Officer's Decision Is Correct and Should Be Affirmed

1. The Presiding Officer Properly Weighed the Evidence in Light of the Specific Statutory Requirements for Establishing Eligibility for PERS Membership

Mr. Fox claims that the Presiding Officer committed an error of law by "treating the same quantum of evidence as substantial and non-substantial, depending on the fact at issue." Appellant Brief at 19. Specifically, Mr. Fox argues that if the "quantum of evidence" that he produced persuaded the Presiding Officer that he worked as a janitor while a student-athlete at the UW, then the same quantum of evidence was sufficient to show that he was employed in a PERS-eligible position. Appellant Brief at 3, 11, 16-20. This is not the case.

The retirement statutes governing membership eligibility contain precise requirements for establishing eligibility. Although the Presiding

Officer found that Mr. Fox's testimony, corroborated by the testimony of his former gymnastics coach and his letter of recommendation, was sufficient to show that he performed some janitorial work while a student-athlete at the UW, the testimony was not sufficiently specific and accurate to prove that he had been regularly compensated by the UW for working 70 or more hours in each of 5 consecutive months over two consecutive years, as required by the statute. COL 12. The Presiding Officer did not err in this regard, but instead required Mr. Fox to prove the facts with the specificity required by the PERS membership statute. COL 12.

As the Presiding Officer emphasized, "particularly crucial elements" of the PERS eligibility statute required Mr. Fox to prove not only the number of hours he worked with exactitude but also that he was regularly compensated by a PERS employer. COL 12. Mr. Fox failed to provide sufficient evidence to prove that he was regularly compensated by a PERS employer; that is, Mr. Fox failed to provide sufficient evidence to establish the UW was his employer.

The Presiding Officer did not find the UW was Mr. Fox's employer, nor did the Presiding Officer make any findings as to who might have been Mr. Fox's employer. However, the record did contain evidence showing that during the early 1970s, the UW's Athletic Department operated independently from the UW and had a practice of

compensating student athletes for work they did at the University. R. 282-288, 289-308. Such compensation was arranged through UW alumni and athletic “boosters,” apart from the UW’s established payroll system. *Id.*

Accordingly, it is possible that Mr. Fox did work as a janitor at the UW but was paid outside the UW’s budget by another source. This possibility is underscored by the fact that, immediately before the period of time at issue, Mr. Fox had been reported in the UW’s payroll system as a Student Assistant but then “disappeared” when he began working as a janitor. R. 724-25. The sudden absence of UW payroll records – coinciding with the janitor position arranged by his gymnastics coach – suggests something more than mere inadvertence. It is at least possible that he was paid from a separate source of compensation for student athletes at the time. R. 282-288, 289-308.

Mr. Fox acknowledged that it was possible that he was compensated from an athletic “slush fund,” and that while he did not know one way or another, he had always wondered whether that was the case. R. 725-26. Likewise, Coach Hughes acknowledged that, although he was not involved with positions that were “set aside for athletes,” he allowed that such employment was possible at the UW. R. 748-49.

Payment from another source could explain how Mr. Fox might have worked as a janitor at the UW without leaving a trace of employment

evidence. More specifically, such an arrangement would account for the lack of payroll records from the UW, missing Social Security and income tax evidence, and the absence of any Department record of Mr. Fox's claimed enrollment in and contributions to PERS Plan 1.

The Presiding Officer did not err in concluding that Mr. Fox had not met his burden of establishing by a preponderance of the evidence that he was employed as a Janitor in 1970-72 by a PERS employer (the UW).

2. Even if Mr. Fox Had Produced Sufficient Evidence That the UW Was His Employer, His Evidence Was Insufficient to Establish That His Hours Met the Statutory Requirements for Eligibility

One hour of service can make the difference between qualifying and *not* qualifying for PERS membership. If a person's job required 5 consecutive months of 70 hours in each of two consecutive years, it was an eligible position. If the person's job required 4 months of 70 hours and one month of 69 hours, it was not an eligible position. The fact that the Presiding Officer required Mr. Fox to produce *objective* records showing that he had worked 70 hours each month, not 69, does not mean that she improperly weighed the evidence.⁶

⁶ Mr. Fox claims that the Department has arbitrarily changed its policy regarding the evidence it will accept to establish membership. Appellant Brief at 12-13. Contrary to Mr. Fox's assertion, today, as in the past, the Department allows a member to present whatever evidence he has to establish membership. R. 870-75. The Department reserves the right to decide in any given case whether the evidence is sufficient to allow it to conclude that the member met the strict service requirements for membership. *Id.*

The New York courts recently addressed a nearly identical question in *DeLuca v. New York State & Local Emp. Retirement Sys.*, 48 A.D. 876, 850 N.Y.S.2d 715, 2008 N.Y. Slip Op. 01281 (2008). In *DeLuca*, the petitioner also sought membership in a retirement system based on claimed employment more than 30 years earlier. The petitioner produced testimony of co-workers and his former superintendent to support his allegation that he had worked the requisite number of hours, but produced no objective employment records to corroborate these claims. The Court held:

Due to the lack of evidence presented by petitioner that would enable an *accurate calculation* of petitioner's earnings and length of service, we find the Comptroller's determination that petitioner not be credited for employment during the time in question to be rational and supported by substantial evidence.

Id. at 878 (emphasis added).

Like the Court in *DeLuca*, the Presiding Officer simply required sufficiently specific, objective evidence of Mr. Fox's compensation and hours of employment to convince her, as a fair-minded trier-of-fact, of the truth of his factual assertions. Mr. Fox failed to produce sufficiently specific evidence of hours or compensation by a PERS employer. As a result, the Presiding Officer correctly concluded that Mr. Fox had not met the statutory requirements for establishing PERS eligibility. That the

same “quantum of evidence” was sufficient to convince the Presiding Officer that Mr. Fox did some janitorial work while a student at the UW does not mean the Presiding Officer erred in concluding that the evidence was not sufficiently specific to meet the crucial elements (namely, compensation by a PERS employer and sufficient hours during the specified periods) of the eligibility statute. This was not error but straightforward application of the statutory terms.

3. Mr. Fox Did Not Work in an Eligible Position From 1970 to 1972

Between 1970 and 1972, an eligible position was an employment *position* that “normally required” its incumbent to work 5 or more consecutive months, each with 70 or more hours of compensated service. Between 1970 and 1972, as today, the Department interpreted the term “normally required” to mean that *the position* required its incumbents to work 70 or more hours per month in each of 5 consecutive months in each of two consecutive years.⁷

By rule, the Department has indicated that “position-eligibility” may be established in one of two ways. WAC 415-108-690(1). An employee may prove that he occupied an eligible position by proving that

⁷ Assume that an employer’s Position X required 70 or more hours per month in each of 5 consecutive months. Even if Position X were filled by a different individual each calendar year, Position X, *as a position*, would be an “eligible position.”

the position was an existing eligible position on the date he was hired into the position. Alternatively, an employee may prove that he occupied an eligible position by entering a position that was previously not eligible and then working in that position 70 hours or more in each of 5 consecutive months for two consecutive years. WAC 415-108-690(3).

The Department found no evidence that the position into which Mr. Fox was hired in 1970 was an existing “eligible position.” Indeed, Mr. Fox “did not know, nor did any other witnesses [know] how this position was funded, filled, or scheduled, or even whether it existed, before or after he had it.” COL 13; R. 741. This conclusion is undisputed.

The Presiding Officer also correctly concluded that Mr. Fox’s janitorial work did not “create” an eligible position. COL 14-16. This conclusion was based on Findings of Fact regarding the hours Mr. Fox worked. The Presiding Officer had substantial evidence that Mr. Fox did not work 70 or more hours in each of 5 consecutive months in each of two consecutive years. COL 17-19.

To show that he worked 70 or more hours in each of 5 consecutive months in each of two consecutive years, Mr. Fox relied on (1) his own testimony that he worked *exactly* 80 hours in each of 24 consecutive

months;⁸ and (2) the statement of his supervisor in a letter of recommendation that he worked “half-time” as a janitor.⁹ The Presiding Officer found Mr. Fox’s testimony “not sufficiently reliable” to establish, with the specificity required by the retirement statute, that he worked 70 hours or more in each of 5 consecutive months during his last two years as a student-athlete at the UW. COL 12, 16. Given Mr. Fox’s interest in the outcome of the proceeding, she could not reasonably find, in the absence of objective employment records, that each of two consecutive calendar years between 1970 and 1972 contained a period of 5 consecutive months in which Mr. Fox worked 70 or more hours; the preponderance of the evidence did not convince her that *no* month within any given 5-month period represented less than 70 hours of service, *e.g.*, 69.5 hours.

⁸ Initially, Mr. Fox could remember no month in which he worked less than 80 hours. R. 723-24, 730. Similarly, he could remember no month in which he worked more than 80 hours. *Id.* His testimony was that he worked exactly 80 hours in each of 24 consecutive months. *Id.*

Mr. Fox later testified that he remembered his hours being calculated weekly, rather than monthly. R. 822. The new formulation would allow for more than 80 hours in certain months. The latter testimony was given only after the Director of the UW’s Benefits Office testified that “half-time” employment at the UW required at least 87.5 hours per month. Mr. Fox appeared to change his testimony so that he could continue to assert that he worked “half-time” at the University. The latter testimony contradicts his earlier testimony in which he *emphasized* that his hours were calculated monthly and consistently totaled 80 hours per month, no more, no less. R. 723-24, 730.

⁹ Mr. Caldwell wrote that Mr. Fox “augmented” Mr. Caldwell’s “regular crew” and “did many special projects for me due to his special hours he was allowed to work as a half-time employee.” R. 224.

Further, the Presiding Officer found that there was “no official or disinterested corroborating record that Mr. Fox fulfilled the specific statutory requirements. . . .” COL 14. The statements of Mr. Fox’s supervisors, though perhaps sufficient to establish that Mr. Fox did some janitorial work at the UW while a student-athlete there, were insufficient to establish that he worked the hours required to create a retirement-eligible position. COL 12-15. The Presiding Officer concluded that neither supervisor’s statement provided “meaningful or specific corroboration that [Mr. Fox] actually worked the requisite number of hours in his janitorial position” COL 15.

Indeed, the passing reference to “half-time” employment in Mr. Caldwell’s short letter of recommendation was far from the level of specificity required to convince a fair-minded reasonable person that Mr. Fox had worked 70 or more hours in each of 5 consecutive months in each of two consecutive years. Although the term may have painted a general feel for Mr. Fox’s work, far greater numerical accuracy is required in the determination of retirement eligibility.

Set against Mr. Fox’s evidence was the testimony of the Director of the University of Washington’s Benefits Office, Kati Dwyer, and the Social Security records for January 1969 through December 1970. As explained by the Benefits Director, Ms. Dwyer, all “half-time” positions at

the UW are salaried positions. FOF 8; R. 756-58. If an employee is paid hourly, the necessary conclusion is that the employee is employed on *less* than a half-time basis. By his own testimony, Mr. Fox was paid on an hourly basis.¹⁰ The necessary conclusions are that: (1) Mr. Fox was not employed by the UW in a half-time position; and (2) even if Mr. Fox had been employed as he recalls, in an hourly position as he recalls by the UW (which the Presiding Officer did not find, and the Department does not concede), it would have been on a less-than-half-time basis.

Furthermore, Mr. Fox's Social Security records for the fourth quarter of 1970 indicate that Mr. Fox had worked 30 hours for Bethlehem Steel in the fall of 1970 (the fall quarter of his junior year at the UW). Finding the Social Security records reliable, the Presiding Officer was unable to believe Mr. Fox's testimony that he had, concurrent with his work for Bethlehem Steel: (1) attended classes full-time; (2) trained and competed in gymnastics events as a member of the UW gymnastics team; (3) taught gymnastics extension courses to high school students; (4) participated in reserve officer activities; and (5) performed janitorial tasks 20 hours a week. COL 17-20. Similarly, she was unable to believe

¹⁰ Indeed, the University had an incentive not to hire students on a half-time, salaried basis. When a department hired a student on a half-time, salaried basis, the department was required to pay a higher "overhead loading rate" to the Benefits Office to fund any employment benefits. R. 757-58.

his testimony that for 24 consecutive months Mr. Fox had *never* dropped below 70 hours of janitorial work, even in those months during which students often leave campus for winter and spring breaks. *Id.*

The Presiding Officer found that Mr. Fox's testimony was not sufficiently credible. She was not persuaded that Mr. Fox could *actually remember* his work in *each* of 24 months of his student-athlete career, to testify with certainty that he worked 70 or more hours in each of 5 consecutive months, as he testified. COL 16, 20. Rather, his testimony was prone to being colored by self-interest. COL 18.

Weighing the disinterested testimony of the Director of the Benefits Office and the force of the documentary evidence found in the Social Security records against evidence potentially colored by interest, the Presiding Officer found that Mr. Fox did not work 70 or more hours in each of 5 consecutive months over two consecutive years. COL 8, 15-21. The finding is based on substantial evidence. In turn, the Presiding Officer correctly applied the law to conclude that Mr. Fox, through his janitorial work, had not created an eligible position for retirement purposes.¹¹ COL 15-21.

¹¹ At the Superior Court, Mr. Fox sought to introduce a new basis for determining Mr. Fox's hourly schedule from 1970-72 by submitting copies of "Higher Education Personnel Board Rules." He also attached these rules to his Notice of Appeal and Opening Brief in this Court. These were not made a part of the administrative record, as they were not presented to nor considered by the Presiding Officer. No

Consistent with the APA standard for review, this Court should not substitute its own assessment of the evidence and witness credibility for that of the Presiding Officer as fact finder, who was present to evaluate the evidence firsthand.

C. Even if He Could Establish That the Position Was PERS-Eligible, Mr. Fox Was Barred From PERS Membership by the Statutory Exclusion for Student Employment

If this Court affirms the Department's Final Order concluding that Mr. Fox did not work in a PERS-eligible position in the 1970s, the Court has no reason to consider the exclusion for student employment. However, if the Court reverses the Presiding Officer's conclusion on this issue and concludes that Mr. Fox did work in a PERS-eligible position (which the Department does not concede), the Court must go on to consider whether the Presiding Officer erred in concluding that Mr. Fox was excluded from PERS membership under the statutory exception for student employment.

In 1970, a regularly compensated employee who worked in a PERS-eligible position became a member of PERS, unless that employee fell into one of the statutory exceptions to the general provision. Former

testimony was given as to how the rules applied to student employment in the 1970s, and the rules shed no light on Mr. Fox's janitorial job when there is no way to determine how many hours he actually worked and how he was actually paid and by whom. This Court should not consider these rules. On review, the Court is confined to the Administrative Record. RCW 34.05.558.

RCW 41.40.120 (Laws of 1969, ch. 128, § 5(12)) (recodified in 1991 as RCW 41.40.023). One exception was the statutory exclusion for student employment. Employees in eligible positions and otherwise qualified for PERS membership were barred from membership if they were “employed by an . . . institution of higher learning or community college . . . primarily as an incident to and in furtherance of their education or training.” Former RCW 41.40.120.

In 1970, when Mr. Fox began his janitorial work at the UW, the Department determined whether a student’s employment was “incident to and in furtherance of the student’s education” based on an objective evaluation of the student’s employment. This objective determination of whether a student’s employment was incident to and in furtherance of the student’s education was based on the plain meaning of the statute, as explained in the Petition Decision issued by the Department in a similar case involving a student’s hourly employment at the UW in the mid-to late-1960s:

Webster’s New World Dictionary, second college edition defines “incident” as “likely to happen as a result or concomitant.”

Webster’s New World Dictionary, second college edition defines “furtherance” as “a furthering, or helping forward; advancement; promotion.” The question of whether Petitioner’s student employment was in furtherance of his

education or training does not rest upon whether or not it was part of his degree program but whether it *helped forward, advance or promote his education or training.*

The purpose of the student positions administered by the UW is to provide financial aid to students, whether the positions are specifically tagged as part of [a] financial aid package or not. The positions are reserved for students in order to provide students with the income they need in furtherance of their education. . . .

In re Petition of Duane E. Phinney (Petition Decision Jan. 19, 1993) at p. 5 (attached hereto as Appendix B) (emphasis added).

The *Phinney* decision, which demonstrates the Department's use of an objective standard when construing how the student exclusion applied in 1970, is consistent with Ms. Dwyer's testimony regarding the UW's treatment of student employment in light of the student exclusion, namely that student employment is presumed to be incident to and in furtherance of the student's education, and the student cannot override that presumption. R. 754-60, 783-84.

Twenty years after Mr. Fox's attendance at the UW, the Department adopted a rule that permits students to make a subjective determination as to whether their employment is "incident to and in furtherance of" their education. WAC 415-108-520. The rule contains no provision for retroactive application. *Id.* The Presiding Officer concluded that the rule did not apply retroactively. COL 28 (noting that the rule,

adopted nearly 20 years after Mr. Fox's employment, does not apply to Mr. Fox).

The Presiding Officer also noted that even if the rule applied, it would lead to the same result. COL 28. This is because the only evidence upon which Mr. Fox relied to show his subjective election into PERS was his testimony that he completed a PERS enrollment form, but the form itself was not produced as evidence. *Id.*

Mr. Fox contends that the student exclusion did not operate to bar him from PERS membership in 1970. Specifically, he argues that: (1) in 1970, as today, each student had the right to make a *subjective* determination as to whether his employment was incident to and in furtherance of his education; and (2) his own subjective determination in 1970 was that his janitorial work was not incident to and in furtherance of his education. Put differently, Mr. Fox claims that the subjective standard in WAC 415-108-520 should be applied retroactively.

1. The Presiding Officer Properly Considered the 1970s Objective Standard, Which Presumed Student Employment Was Not PERS-Eligible

The Presiding Officer correctly applied an objective standard to conclude that, if Mr. Fox was employed in a PERS-eligible position, he was nonetheless barred from PERS membership by the statutory exclusion of full-time students whose employment was “incident to and in

furtherance of” their education. COL 22-27; RCW 41.40.120. Indeed, to determine in 2008 whether Mr. Fox was eligible for membership in PERS in 1970, the Presiding Officer was required to use the law that was in effect in 1970, and that was the objective standard described in *Phinney* and in Ms. Dwyer’s testimony.

Substantial evidence in the record, explained in detail in the Final Order, supported the Presiding Officer’s objective conclusion that Mr. Fox’s janitorial work was incident to and in furtherance of his education. COL 25. By his own testimony, Mr. Fox sought janitorial employment because he needed the money to continue school. *Id.*; R. 694. Indeed, only when his employment as a gymnastics instructor in the UW’s extension program proved insufficient did Mr. Fox ask his coach to help him locate something to bring in some extra income.

With a major in business administration, Mr. Fox planned to pursue future employment in athletic management, R. 689, or law enforcement, R. 688; he was not contemplating custodial work as a future career. Rather than a career in its own right, Mr. Fox’s work as a janitor was specifically tailored to allow him to go to class, to practice and compete in gymnastics, to participate in police reserves activities, and otherwise to be a college student. He squeezed in the janitorial hours where he could and had the flexibility to work some of his hours in the

morning, some in the afternoon, and even finish up at midnight, so as not to interfere with his academic and athletic endeavors. R. 738.

Rather than working as a member of the regular janitorial staff at the UW, Mr. Fox “augmented the regular crew,” taking on “special projects” as his schedule permitted. FOF 15; COL 25; R. 224. In short, Mr. Fox’s janitorial work was not to become a janitor but merely to earn money toward his college education. As such, it was “incident to and in furtherance of” his education, and the student-employment exclusion applied.

2. The Presiding Officer Correctly Concluded That Even if the Subjective Standard Is Used, It Leads to the Same Result: Exclusion From PERS Membership

Even if the Department should have applied a subjective standard, based on a rule adopted 20 years after the fact, to determine whether Mr. Fox’s employment was incident to and in furtherance of his education (which the Department does not concede), Mr. Fox did not convince the Presiding Officer that he had, at the time he began employment, specified that his employment was not incident to and in furtherance of his education.

To show that he made a subjective determination that his employment was not incident to and in furtherance of his education, Mr. Fox relied exclusively on his own testimony that: (1) he had submitted

a form through which he enrolled in PERS; and (2) after his submission of the enrollment form, employee PERS contributions had been deducted from his paycheck. FOF 18. Completion of the PERS enrollment form, he claims, was tantamount to a subjective determination that his employment was not incident to and in furtherance of his education, and he claims that he therefore was eligible to participate in PERS. Appellant Brief at 28.

Set against this testimony was the testimony of the UW's Benefits Director and the testimony of the PERS Plan Administrator. Neither the UW nor the Department had any record that Mr. Fox had filed a PERS enrollment form. FOF 34, 38; COL 27. Nor did the Department have any record of receiving retirement contributions, either employee or employer contributions, on Mr. Fox's account from 1970 to 1972, FOF 38, COL 27, despite Mr. Fox's testimony that he specifically recalls PERS contributions withheld from his paychecks. FOF 18; COL 27; R. 698-99. If these contributions had been made, the Department would have a clear record of an account containing Mr. Fox's retirement contributions for the period in question. It does not. *Id.*

The Presiding Officer weighed the evidence and concluded that Mr. Fox's testimony did not establish that he had affirmatively elected to join PERS by completing an enrollment form, when the form itself was

not in evidence. COL 27. Mr. Fox testified that he completed an enrollment form and turned in the form to a Benefits Office in the UW hospital building the next day. R. 737. UW Benefits Office Director Kati Dwyer testified that benefits documents were never accepted at such a location, and that no Benefits or Human Resources offices were ever located anywhere other than the one centralized location from which Human Resources, Payroll and Benefits personnel operated. R. 761-63. Ms. Dwyer was aware of no instance in which their functions were performed at other offices or buildings on campus. *Id.*

The Presiding Officer based her Findings and Conclusions on the disinterested testimony of the UW's Director of Benefits and the PERS Plan Administrator, whose testimony did not support Mr. Fox's recollection of events 35 years ago. FOF 8, 34-35; COL 12, 16, 28. Weighing the absence of the purported enrollment form, along with the disinterested testimony of the Director of the UW Benefits Office and the PERS Plan Administrator, the Presiding Officer found that Mr. Fox never made a subjective determination that his employment was not incident to and in furtherance of his education. COL 28.

The Presiding Officer's finding is based on substantial evidence. In turn, the Presiding Officer correctly applied the law to conclude that Mr. Fox's employment *was* incident to and in furtherance of his education,

and that he was therefore barred from PERS membership by the student exclusion. Accordingly, even if the subjective determination allowed under WAC 415-108-520 were retroactively applied, Mr. Fox still did not prove he had made such a determination to join PERS decades earlier.

D. If the Court Has Not Affirmed on the Bases the Presiding Officer Ruled On, the Court Should Remand for Further Determination by the Presiding Officer as to Whether Mr. Fox Was Excluded by the Temporary-Employment Exclusion

The Presiding Officer did not consider whether Mr. Fox would also have been excluded from PERS membership based on the statutory exclusion of employees in temporary positions. Former RCW 41.40.120 (Laws of 1969, ch. 128, § 5), recodified by RCW 41.40.023 (Laws of 1990, ch. 274, § 10).

The Presiding Officer stated that consideration of the temporary-employment exclusion was not necessary because she had resolved Mr. Fox's appeal by finding that Mr. Fox had not been employed in a PERS-eligible position in the first instance, and that if he had occupied a PERS-eligible position, he would have been excluded from membership by the student-employment exclusion. COL 29.

If this Court affirms the Department's Final Order on either of the two bases the Presiding Officer considered, this Court has no reason to consider the temporary-employment exclusion. However, if the Court

concludes that Mr. Fox *did* work in a PERS-eligible position and was *not excluded* based on student employment (which the Department does not concede), the Court should remand this matter to the Presiding Officer to resolve whether Mr. Fox was excluded from PERS membership based on temporary employment. *See* RCW 34.05.574(1)(b) (reviewing court may “remand the matter for further proceedings”); *Safeco Ins. Co.’s. v. Meyering*, 102 Wn.2d 385, 394-95, 687 P.2d 195 (1984).

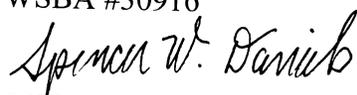
V. CONCLUSION

For the above reasons, the Department of Retirement Systems respectfully requests that this Court affirm the Presiding Officer’s Final Order.

RESPECTFULLY SUBMITTED this 22nd day of May, 2009.

ROBERT M. MCKENNA
Attorney General


KATHRYN WYATT
Assistant Attorney General
WSBA #30916

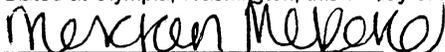

SPENCER W. DANIELS
Assistant Attorney General
WSBA #6831

APPENDIX A

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 7th day of March, 2008.



Morgan Moreno, 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. 07-P-001
)
GARY FOX)
)
for PERS membership and service credit) FINAL ORDER

STATEMENT OF THE CASE

Gary Fox requested a hearing before the Department of Retirement Systems because the Department has refused to allow him to become a member of PERS (Plan 1).

Paul A. Neal, Attorney at Law, represented Mr. Fox in this appeal. Sarah E. Blocki and Kathryn Wyatt, Assistant Attorneys General, represented the Department of Retirement Systems. Presiding Officer Ellen G. Anderson held a hearing in Olympia and Seattle, Washington, on September 17 and 18, 2007, at which Mr. Fox, Mr. Neal, and Ms. Blocki and Ms. Wyatt appeared. The parties filed post-hearing submissions through January 10, 2008.

The Presiding Officer, having considered the administrative record, including the testimony and evidence presented at hearing, and the arguments of the parties, now enters this Final Order for the Department of Retirement Systems.

ISSUE

Whether Mr. Fox established, or is entitled to establish, membership and service credit in PERS (Public Employees' Retirement System), Plan 1?

RESULT

Mr. Fox cannot establish membership and service credit in PERS Plan 1.

FINDINGS OF FACT

Background – DRS, LEOFF and PERS

1. The Public Employees' Retirement System (PERS), is a statewide retirement benefit program for employees of Washington State government and local government entities. Before 1977 a board of trustees administered PERS, then a single system with a single set of requirements.
2. In 1976, the Washington State Legislature (legislature) substantially revised PERS, with different terms governing contributions and benefits for those who became members on or after October 1, 1977. The original plan then became known as PERS Plan 1, and the revised plan as PERS Plan 2.

Plan 1 was closed to new members with the implementation of Plan 2; only persons who first entered PERS, or were eligible to enter PERS, before October 1, 1977, can be members of Plan 1.

3. The legislature created the Washington State Law Enforcement Officers' and Fire Fighters' retirement system (LEOFF) in 1969, to take effect March 1, 1970.¹ As of that date, all full time, fully compensated law enforcement officers and firefighters were to be members of LEOFF.²

In 1976, the legislature created a substantially revised plan within LEOFF, LEOFF Plan 2,³ also effective October 1, 1977. The original 1970 plan then became known as LEOFF Plan 1. Plan 1 was closed to new members with the implementation of Plan 2; only persons who first entered LEOFF, or were eligible to enter LEOFF, before October 1, 1977, continued as members of Plan 1.

4. Also in 1976, the legislature created the Washington State Department of Retirement Systems (DRS or the Department), which by statute became the agency responsible for administering LEOFF and PERS, and other statewide public retirement systems.⁴ The legislature directed that all powers, duties and functions of those systems and their boards be transferred to the new agency, and that all records for administration of the systems be made available to DRS.⁵

¹ Laws of 1969, ch. 209, § 4(1).

² RCW of 41.40.010(2), .020, 41.50.030, .050, .055, .060

³ Originally the two plans in PERS and LEOFF were designated by Roman numerals, "Plan I" and "Plan II." Effective September 1, 2000, the Legislature directed the Code Reviser to use Arabic numerals in place of the Roman. Laws of 1998, ch. 341, §§ 709, 714.

⁴ Laws of 1975-76, 2nd Ex. Sess., ch. 105, § 4.

⁵ RCW 41.50.020-.030(1),(3), .090(1), .802.

5. As part of the same 1976 enactment creating DRS, the legislature broadly prohibited membership participation in more than one DRS-administered retirement system. One subsection, which took effect March 19, 1976,⁶ expressly prevents a person retired for disability from one system, such as LEOFF, from becoming a member of another system, such as PERS.
6. In order to administer PERS and other public retirement systems, DRS relies on reports from employers detailing employee information such as employment status, dates of employment, retirement system membership status, compensation paid, hours or days worked, and so forth. DRS also relies on retirement system employers to determine for their reports which of their employee positions are eligible for participation in a retirement system. DRS exercises authority to correct an employer's reporting should it turn out later to be incorrect.

Mr. Fox's Claim

7. Gary Fox is an investigator for the Office of the Washington State Attorney General (AGO). A former member of LEOFF, Plan 1, he retired from that system in 1990 with work-related disability benefits. He seeks membership and participation in PERS for his post-retirement state employment with the AGO. He bases this claim that he is eligible for PERS membership on a job he performed in 1970-72 at the University of Washington while he was a student there.

Mr. Fox's UW enrollment and employment history 1966-1972

8. The University of Washington (University or UW), a public university, has been an employer participant in PERS since 1954, primarily for its non-faculty staff employees. Its full-time staff participate in PERS. In 1970-72, its classified staff working half-time to full-time were paid on a salaried basis.
9. Mr. Fox enrolled at the University in the fall of 1968, and attained a Bachelor of Arts degree in business administration in June 1972. The University operated on a quarter system then, as it does today. Students register and earn academic credit within any of four academic quarters in a calendar year, designated fall, winter, spring and summer. Mr. Fox entered the University in the fall quarter of 1968 and finished his undergraduate degree work at the end of spring quarter 1972.
10. The summer before he enrolled at the UW, Mr. Fox started work as a shipping clerk with Bethlehem Steel Corporation. He worked there full-time during the summers of 1968, 1969 and 1970, and at times during the school years, into the 4th quarter of 1970. He earned \$3.28 per hour.
11. Mr. Fox met Dr. Eric Hughes, Ed.D., when Mr. Fox was a gymnast in high

⁶ Later codified as RCW 41.04.270(1)(c). See Conclusion of Law 5.

school. Dr. Hughes coached the gymnastics program at UW and also made community gymnastics classes available through the University's extension services. Mr. Fox took community gymnastics classes from Dr. Hughes, and as a high school junior and senior progressed to teaching or assisting in these classes once per week in exchange for his own class fees.

12. During his undergraduate years Mr. Fox was a member of the University's gymnastics team under the direction of Dr. (Coach) Hughes. From the fall quarter of 1968 through the spring quarter of 1972 Mr. Fox worked as a physical education student assistant, assisting with the same kinds of extension program gymnastics classes that he had taken before he entered the University. When these classes were in session, he typically worked six to seven hours a week, at the rate of \$1.90 per hour. Dr. Hughes was responsible for recording Mr. Fox's hours worked and submitting reports of student work hours to the extension services administrative office.
13. Over many years of coaching and teaching, Dr. Hughes assisted many gymnastics students in finding campus employment to help pay their education and living expenses. In or about the spring of 1970, Mr. Fox asked Dr. Hughes for help finding additional work to earn money he needed so he "could continue going to school."

In approximately late May 1970, Dr. Hughes became aware of a part-time job with Environmental Services (also referred to in this record variously as "buildings and grounds," "custodial services," and "the janitorial department") on campus. Dr. Hughes contacted M. B. Byrd, a manager with Environmental Services, to arrange an interview for Mr. Fox and to verbally recommend that he be hired. Dr. Hughes brought the opening to Mr. Fox's attention by giving him a copy of an advertisement for the job from an unidentified newspaper, taken from a bulletin board for job postings in the gym. Mr. Byrd interviewed and hired Mr. Fox.

14. Mr. Fox remembers filling out employment-related forms when he began his janitorial work around June 1, 1970. He recalls an "enrollment form" and a "waiver form" for PERS being among them. A "wavier form" would have allowed him to "waive" participation in PERS by declaring his employment to be incidental to his education. Mr. Fox wanted to participate in PERS, and he recalls completing this PERS "enrollment form" to make his wish clear.
15. At the time Mr. Fox was hired for this janitorial work, M. B. Byrd oversaw nine crews of janitorial staff maintaining buildings in different locations on the UW campus, each of which had its own supervisor or "group leader." Mr. Fox began work at the Health Sciences complex June 1, 1970. By the beginning of July 1970 his job duties were transferred to a different complex of buildings (at the electrical and mechanical engineering department) where his immediate supervisor was Joseph Caldwell. He worked in that location that summer and continued through June 1972.

The janitorial crew for the electrical and mechanical engineering department buildings had several full-time staff members. Although the Environmental Services department "often hired student athletes,"⁷ Mr. Fox was the only student, and the only part-time staff member, in this group. Mr. Fox performed many of the same cleaning and supply stocking tasks that the full-time staff did, "augmenting [the] regular crew,"⁸ and he also performed "special projects," such as inventorying and stocking supplies for the other janitorial staff. He was not aware of any need to re-authorize this position each quarter, nor does he recall being required to complete forms or perform other tasks for any re-authorization.

16. Mr. Fox, Mr. Byrd and Mr. Caldwell all referred to Mr. Fox's position as "half time."⁹ According to Mr. Byrd, "half time" meant that he was "scheduled to work 80 hours per month;" Mr. Fox saw it as 80 hours per month or 20 hours per week; he testified that he typically performed his janitorial duties four hours a day, five days a week. Within these minimum requirements, he could perform his assigned tasks at different times, including evening and night hours, to accommodate his class and activity schedule. He and Mr. Caldwell set up a new work schedule each quarter.
17. Mr. Fox was paid for his janitorial work by the hour. \$2.05 was the highest hourly rate he was paid, in June 1972. Mr. Caldwell kept track of the hours he worked, and distributed paper pay checks to him and the other staff in his unit. Coach Hughes continued to supervise and report Mr. Fox's student assistant work, but had no involvement in his performance of janitorial duties or reporting of his hours for that employment.
18. After June 1970, Mr. Fox recalls receiving one monthly pay check for both the Physical Education assistant hours and the janitorial hours. He recalls deductions being taken against his janitorial pay for social security and PERS contributions.
19. Mr. Fox resigned his janitorial position at the end of June 1972, the month he graduated with his bachelor's degree.
20. While Mr. Fox was still an undergraduate at UW, he served as a volunteer reserve officer with the Seattle Police Department as a means to gain experience in the law enforcement field.

Mr. Fox's LEOFF employment/retirement

21. In 1974, after a time of intermittent employment during which he continued his reserve service with the Seattle Police Department, Mr. Fox accepted

⁷ Exhibit A-30, Declaration of M. B. Byrd.

⁸ Exhibit A-4, letter of J. Caldwell.

⁹ M. B. Byrd stated that he hired Mr. Fox "as a half time custodian scheduled to work 80 hours per month." Exhibit A-30. Mr. Caldwell, in a 1974 letter of recommendation, said Mr. Fox "did many special projects for me due to his special hours he was allowed to work as a half time employee." Exhibit A-4.

his first paid employment as a police officer, with the City of Tukwila. The Department records the starting date for this employment as June 1, 1974. He signed his Employee's Permanent Record form for LEOFF on May 28, 1974, became a member of LEOFF, and continued as a member of Plan 1 after the implementation of Plan 2.

22. In February 1987 Mr. Fox began work as a patrol officer for the Kent Police Department. Through December 1989 he remained an active contributing member of LEOFF Plan 1.
23. After he sustained a serious shoulder injury in the course of his police work, Mr. Fox retired for disability under LEOFF Plan 1 effective January 7, 1990. DRS has paid him a monthly retirement allowance through the LEOFF system continuously since then.

Mr. Fox's post-retirement employment

24. In 1991,¹⁰ Mr. Fox began his current work as an investigator for the AGO. He has continued to work full time in that PERS-eligible position. However, he has not been allowed to become a member of PERS because he has been receiving a retirement allowance from LEOFF Plan 1.
25. Since November 1993 the AGO has reported Mr. Fox's employment and earnings to DRS as though he were a member of PERS Plan 2. The AGO has done this to comply with legislative requirements that public employers document and report their employment of persons who return to work after retiring from DRS-administered retirement systems.
26. DRS has accepted the AGO's reporting of Mr. Fox's employment and earnings, also to comply with a legislative mandate for reporting retiree employment; PERS Plan 2 is the only system in which DRS could process the required reporting for Mr. Fox. DRS has not used this reporting of his AGO employment to give Mr. Fox membership or service credit in PERS; DRS has not required or collected PERS contributions from Mr. Fox or from the AGO.

Claim for PERS Plan 1-eligible employment

27. In August of 1995, the Department adopted an administrative rule, WAC 415-108-725, implementing the exclusion statute RCW 41.04.270 (Finding of Fact 5) for PERS. The 1995 rule expressly authorized PERS membership for persons who had "established membership" in PERS before March 1, 1976, even after retirement from another DRS-administered system. The rule stated:

¹⁰ Mr. Fox testified that he began his employment with the AGO in July of 1991. TR 74-76. AGO and Department records show his starting date as November 1, 1993, after new reporting requirements took effect for retirees in public employment. Exhibits A-12, D-39. This decision does not require that the inconsistency be resolved; Mr. Fox's testimony has been adopted.

If I have retired from another retirement plan or am eligible to retire, am I excluded from participating in PERS?

(1) If you have retired or are eligible to retire from another retirement system authorized by the laws of this state you cannot participate in PERS membership unless:

- (a) You established membership in PERS prior to March 1, 1976; or
- (b) You accrued less than fifteen years of service credit in the other retirement plan.

(2) If you are receiving a disability allowance from any retirement system administered by the department you can not [sic] participate in PERS unless you established membership in PERS prior to March 1, 1976. . .

28. In August 1998 the AGO requested that DRS re-evaluate Mr. Fox's eligibility for membership in PERS, and submitted a PERS enrollment form and beneficiary designation form to DRS on his behalf. The Department responded by letter dated September 10, 1998, advising that under WAC 415-108-725 Mr. Fox was not eligible for PERS membership because he was a LEOFF retiree who had not established membership in PERS prior to March 1, 1976.
29. In or about 2005 Mr. Fox repeatedly contacted the Department requesting that his 1970-72 janitorial employment at the UW be considered as a basis for pre-1976 membership in PERS. Eventually his requests were referred for decision to Michelle Hardesty, then the plan administrator for PERS. On October 27, 2005, Ms. Hardesty notified Mr. Fox by letter that his request for membership and service credit in PERS for "July 1970 through June 1972" was denied for lack of "valid proof of employment in an eligible position."
30. On January 29, 2007, after further investigation and review, the DRS petitions examiner also denied Mr. Fox's request. The petitions examiner accepted that Mr. Fox was employed in a janitorial position as he claims, but did not find sufficient reliable evidence that his work was in a PERS-eligible position, or that he was personally eligible, to support his claim for PERS membership in 1970.
31. Mr. Fox has not asked that DRS consider his Physical Education student assistant employment at UW a basis for his claim for PERS membership in 1970-72.

Records and Efforts to obtain records

32. Mr. Fox has no records of his employment or pay from his undergraduate years.
33. Beginning in about 1996, Mr. Fox made persistent, comprehensive, but ultimately unsuccessful, attempts to document the janitorial employment he remembers.

34. He made numerous requests to the University of Washington for records relating to his work there in 1970-72. The University's public records, benefits office and payroll staff have searched its employee and payroll records extensively but have found no record of his janitorial employment in locations where such records would be expected to be. The University has no record of paying hourly wages to Mr. Fox except for a small portion of his student assistant pay in 1969 and 1970. The University has no record of a PERS enrollment form, or a PERS "waiver form," for Mr. Fox.
35. Between 1970 and 1972, the University paid its employees, including student employees, through one computerized payroll system. The system created a record of each payroll "run" in the form of a comprehensive alphabetical check register. The university maintains copies of the register in two locations, and the records center copies are retained for 75 years. In January 2005 the University represented to Mr. Fox in a "Verification of W-2" notice that it had records of his earning \$120.00 in 1970, not attributed to any dates or department. No other record of payroll disbursement to Mr. Fox between 1970 and 1972 has appeared in the University's payroll register despite an extensive search.

The University has consistently refused to acknowledge Mr. Fox's janitorial employment in the absence of any official payroll or other personnel records regarding it.

36. Mr. Fox was unable to obtain records of any federal income tax returns from the Internal Revenue Service for 1968 through 1972, though he believes that he would have filed returns for the years he worked at Bethlehem Steel.
37. In or about 2002 Mr. Fox's request for records of earnings reported to the Social Security Administration, for the period January 1968 through December 1970, also produced nothing related to his employment at the UW. The SSA report did show his earnings from Bethlehem Steel, and small amounts of earnings through the YMCA of Greater Seattle and the City of Seattle. The detail report stated, "There are no other earnings recorded under this social security number for the period(s) requested."
38. In response to Mr. Fox's requests, the Department has also searched its records for any employer reporting of PERS employment and any PERS contributions paid for Mr. Fox. The records searched included his member file in the electronic document imaging management system (EDIMS), the computerized Member Information System, and physical ledgers of employees reported to the Public Employees' Retirement System in 1970 to 1972, before the PERS Board's functions were transferred to DRS (in or about 1976). DRS personnel have found no PERS enrollment form for Mr. Fox, no record of any PERS contributions by him or by the University on his behalf, and no record of his employment with any PERS employer for any time prior to 1993.

The earliest record the Department has of Mr. Fox's participation in any state retirement system is his 1974 LEOFF enrollment form (Employee Permanent Record) from his employment with the City of Tukwila.

39. Mr. Fox has been able to produce only two documents concerning his janitorial employment in 1970-72. One, a copy of a 1974 letter of recommendation from his former janitorial supervisor to the chief of the Police Department of the City of Tukwila, stated, in part,

I am Joseph Caldwell, Gary's former supervisor while employed at the University of Washington. I have know[n] Gary since he came to work for me as a custodian in July of 1970. He held that position until he graduated in June of 1972. His duties not only included augmenting my regular crew with cleaning and maintaining the classrooms, labs and bathrooms, but did many special projects for me due to his special hours he was allowed to work as a half time employee.

Exhibit A-4.

The second, a 2005 declaration of M.B. Byrd stated, in part,

3. In June of 1970 Gary Fox was referred to me for possible employment by Coach Eric Hughes. Our Department often hired student athletes. I remember interviewing and hiring Gary in June of 1970 as a half-time custodian scheduled to work 80 hours per month. I assigned Gary to group leaders Spencer Porter and Joseph Caldwell. Gary was assigned to work with them in the Electrical and Mechanical Engineering buildings.
4. Gary held his half-time custodial position from June of 1970 until he left in June of 1972.

Exhibit A-30.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The undersigned Presiding Officer enters this Final Order for the Department. RCW 41.50.060, RCW 34.05.425(1)(b), RCW 34.05.461(1)(b).
2. The Department has jurisdiction over the parties and the subject matter of this appeal. RCW 41.40.068; chapters 41.40 and 41.50 RCW; WAC 415-08-020(1).
3. Mr. Fox has the burden of proof in this appeal. WAC 415-08-420(2).

Analysis

A. Governing Law for PERS Membership

4. The Department of Retirement Systems is a legislatively-created agency of the State of Washington, charged with the administration and management of the Public Employees' Retirement System and with the responsibility for implementing the provisions of chapter 41.40 RCW (the PERS authorizing statutes).
5. Persons who receive disability retirement allowances from any DRS-administered retirement system generally may not become members of any other of the DRS-administered retirement systems. RCW 41.04.270 states:

(1) Except as provided in [sections omitted], on and after March 19, 1976, **any member or former member who** (a) receives a retirement allowance earned by the former member as deferred compensation from any public retirement system authorized by the general laws of this state, or (b) is eligible to receive a retirement allowance from any public retirement system listed in RCW 41.50.030, but chooses not to apply, or (c) **is the beneficiary of a disability allowance from any public retirement system listed in RCW 41.50.030 shall be estopped from becoming a member of or accruing any contractual rights whatsoever in any other public retirement system listed in RCW 41.50.030: PROVIDED, That** (a) and (b) of this subsection shall not apply to persons who have accumulated less than fifteen years service credit in any such system.

(Bold emphasis added.)

6. However, under certain circumstances, Department rules expressly permit former PERS members to re-enter PERS membership, even if they have retired from another DRS-administered retirement system. WAC 415-108-725 states, in pertinent part,

If I have retired from another retirement plan or am eligible to retire, am I excluded from participating in PERS?

(1) If you have retired or are eligible to retire from another retirement system authorized by the laws of this state you cannot participate in PERS membership unless:

- (a) You established membership in PERS prior to March 1, 1976; or
- (b) You accrued less than fifteen years of service credit in the other retirement plan.

(2) If you are receiving a disability allowance from any retirement system administered by the department you can not [sic] participate in PERS unless you established membership in PERS prior to March 1, 1976. . .

7. RCW 41.04.270(1)(c) would bar Mr. Fox's participation in PERS as a LEOFF disability retiree, but the exception articulated in WAC 415-108-725 allows him to show that he was entitled to PERS membership before that

bar took effect. For his case the focal point in the rule is that the retiree have "established membership in PERS before March 1, 1976." The Department considers that an individual has "established membership" for the application of this rule where he can demonstrate that he met all statutory requirements for membership, even if he was not earlier enrolled as a member, under *City of Pasco v. Department of Retirement Systems*, 110 Wn. App. 582 (2002).

8. Thus Mr. Fox, who has been working in a PERS-eligible position since the early 1990's, seeks to show that he met all statutory requirements for membership in PERS before March 1976. To do so he must show that the job he claims to have had for two years between 1970 and 1972 was a PERS-eligible position, and that he was at that time personally eligible to be a member of that system. The Department applies the law in effect in 1970 to determine whether he was eligible for PERS membership when this employment began.
9. In 1970, the PERS Board had not adopted regulations addressed to PERS membership. Membership in PERS was governed by RCW 41.40.120,¹¹ which read as follows (in pertinent part):

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

- (1) Persons in ineligible positions; . . .
- (7) Persons employed by an institution of higher learning or community college operated by an employer, primarily as an incident to and in furtherance of their education or training, or the education or training of a spouse; . . .
- (12) Persons hired in eligible positions on a temporary basis for a period not to exceed six months: PROVIDED, That if such employees are employed for more than six months in an eligible position they shall become members of the system.

10. In June 1970, the following related terms were defined in RCW 41.40.010:

- (4) "Employer" means every branch, department, agency, commission, board and office of the state and any political subdivision of the state admitted into the retirement system; . . .
- (5) "Member" means any employee included in the membership of the retirement system, as provided for in 41.40.120.

¹¹ The original PERS membership statute, RCW 41.40.120, and its recodified version, RCW 41.40.023, have been amended numerous times since 1970. (Recodification: Laws of 1991, ch. 35, § 10.)

(8) "Service" means periods of employment rendered to any employer for which compensation is paid, . . . Full time work for ten days or more or an equivalent period of work in any given calendar month shall constitute one month of service. Only months of service shall be counted in the computation of any retirement allowance or other benefit provided for in this chapter. Years of service shall be determined by dividing the total number of months of service by twelve. . . .

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

(26) "Eligible position" means:

(a) Any position which normally requires five or more uninterrupted months of service a year for which regular compensation is paid to the occupant thereof;

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

(27) "Ineligible position" means any position which does not conform with the requirements set forth in subdivision (26)[all sic]. . . .¹²

11. To restate these requirements, in 1970 (after July 1, 1965), a person who was otherwise personally eligible could be a member of PERS if he worked for a PERS employer in an eligible position; an eligible position was one that normally required five or more consecutive months of regularly compensated service in a calendar year; and a month of service in turn constituted a minimum of 70 compensated hours of service to an employer in a calendar month.¹³ RCW 41.40.120, 41.40.010(26)(a).

B. Eligible Position

12. The evidence in this record is sufficient to accept that Mr. Fox worked as a janitor on a regular basis at the University, in a particular area of the UW campus, between June 1970 and June 1972. It is not sufficient to prove that the position in which Mr. Fox worked was an eligible position for PERS. This record does not contain enough reliable evidence to establish particularly crucial elements of a PERS-eligible position in 1970, that Mr. Fox actually worked the requisite number of regularly compensated hours for the University in the minimum number of uninterrupted months as

¹² For simplicity this decision uses the 1970 version of RCW 41.40.010, disregarding amendments made in the 1971 and 1972 sessions. Of the subsections listed above, only the language of (4) was affected, and that change, expanding the definition of "Employer," would have no bearing on the issues in this case. Laws of 1971, 1st Ex. Sess., ch. 271, § 2; Laws of 1972, Ex. Sess., ch. 151, § 1.

¹³ In 1970, the statutory requirement for a month of service credit was "ten days or more or an equivalent period of work" per month (RCW 41.40.010(9)); by then the PERS Board and DRS had long accepted 70 hours of work per month as meeting the ten-day requirement. Exhibits D-42-44, D-47. In 1979, the legislature expressly adopted the 70-hour minimum as the standard for a month of service credit in PERS Plan 1. Laws of 1979, 1st Ex. Sess., ch. 249, § 7, now RCW 41.40.010(25)(a).

specified in RCW 41.40.120 including subsection (1).

13. In RCW 41.40.010(26)(a), a PERS 'eligible position' is defined first in terms of what a position "normally" requires. Mr. Fox could offer no evidence on this point. He did not know, nor did any other witnesses, how this position was funded, filled, or scheduled, or even whether it existed, before or after he had it. The "normal" requirements of his position, if indeed there were any, are unknown now.
14. The position would still be considered eligible for PERS, regardless of its "normal" requirements or history, if while in it Mr. Fox was paid for at least 70 hours of work in each of five consecutive months and into a sixth month without a break. There is no official or disinterested corroborating record that Mr. Fox fulfilled these requirements, and particularly no record of any compensation paid for this position on comprehensive UW payroll check registers. Mr. Fox asks the Department to accept his testimony and his former supervisors' statements as adequate proof of these elements.
15. The statements by former supervisors are less than needed for this purpose. Mr. Caldwell's 1974 recommendation letter stating that Mr. Fox had worked "as a half-time employee" was written not to document his work hours in 1970 but to communicate in general terms the extent of the writer's familiarity with Mr. Fox's work and performance. Mr. Byrd's 2005 statement that he was "scheduled to work 80 hours per month," is no more than a statement of what Mr. Byrd remembers Mr. Fox's schedule generally was. Neither provides meaningful or specific corroboration that he actually worked the requisite number of hours in his janitorial position each month from June into November of 1970.
16. The undersigned does not question the credibility of Mr. Fox's testimony, in terms of his honesty or truthful recounting of his recollection. His testimony about his janitorial employment was essentially uncontradicted, except by evidence of the general lack of records. Nonetheless, where the claimed qualifying employment occurred during college terms, more three decades ago, his testimony does not provide a sufficiently reliable basis for a conclusion that his work was in a PERS-eligible position or one that became eligible.
17. Mr. Fox testified without qualification or challenge that he worked for Bethlehem Steel during the summers of 1968 and 1969, and that his employment there ended in 1969, prompting him to seek a campus job with Dr. Hughes' assistance in 1970. TR 62, 112. The earnings report from the Social Security Administration from January 1969 through December 1970 (Exhibit A-3) shows that his Bethlehem Steel employment extended well into 1970. It displays earnings from Bethlehem Steel in the 1st quarter of 1970 representing approximately 110 hours of work at \$3.28 per hour; in the 3rd quarter of 1970 (summer) representing approximately 442 hours of work at \$3.28 per hour, an amount slightly greater than his earnings there in the summer of 1968; and in the 4th quarter earnings representing

approximately 30 hours of work at \$3.28 per hour. Where Mr. Fox's testimony from his memory is not congruent with the SSA records of his earnings, the business records held by SSA would be the more reliable indicator of his employment and compensation in 1970, over 35 years ago. Those records support the inference that Mr. Fox's employment with Bethlehem Steel continued into the fall of 1970 in a pattern similar to his employment there in 1968 and 1969, in contrast to his testimony that the job ended in 1969. See Finding of Fact 10.

18. This is set out not to question Mr. Fox's credibility, but to illustrate why memory of particular employment circumstances some decades in the past does not form a sufficiently reliable basis for proof that particular statutory elements are met. The concern about reliability is generally greater where the memory in question is that of a person interested in the outcome.
19. In this case, the summer and fall of 1970 is the time that must be examined carefully for the elements of a statutory PERS-eligible position at the University. Mr. Fox's memory of his 1970 employment situation during this time could reasonably be questioned on his other employment even where his earnings are independently documented. Around his janitorial employment, he testified only that he worked his janitorial job 20 hours per week (or 80 hours per month) year-round, without detail concerning his daily schedules in that time period that would place his paid work in the context of his class schedules, competitive gymnastics activities, reserve officer activities, and school breaks. The SSA records taken together with Mr. Fox's testimony mean that he was working two jobs in the summer of 1970 (one full-time at Bethlehem Steel and one part-time at the University), and, since he was also teaching community gymnastics classes, three part-time jobs in the fall quarter of 1970.
20. In the end Mr. Fox's testimony from his memory and his former supervisors' statements are not enough to demonstrate that he was regularly compensated in his janitorial job for a minimum of 70 hours per month during each of the consecutive months June 1970 into November 1970, in a position that would normally require particularly those hours over that time. He has not proved that he held a PERS-eligible position as defined by RCW 41.40.120 including subsection (1).
21. Mr. Fox protests the Department's failure to give his testimony greater weight, where he has exhausted every avenue a person could be expected to use to find corroborative records, and he argues that it was the University's responsibility, not his, to properly report and maintain records of his work and earnings. However that may be, in an appeal before this agency, an individual seeking PERS system membership bears the burden to prove that his particular employment met all the elements necessary for that membership. In this case, the claim is also presented against a background legislative policy that disapproves multiple-system participation in Washington state retirement systems. The undersigned remains unpersuaded that the Department should place Mr. Fox in PERS Plan 1

where he has been unable to supply elemental details from his own knowledge, and has been unable to corroborate his own memory by reference to any disinterested source with respect to the details of dates and compensation in the position at issue.

C. "Student Exception"

22. Even were Mr. Fox' s evidence sufficient to prove that the position at issue was PERS-eligible, however, in 1970 he would have been barred from PERS membership by the "student exception" in RCW 41.40.120(7), a statutory provision of long standing in PERS.
23. The system now known as PERS was organized as the State Employees' Retirement System in 1947. Then its membership included "all monthly salaried employees . . . of the various departments, commissions, institutions and other agencies of the state, . . ." so long as the potential member worked at least 1,000 hours per year.¹⁴ In the next legislative session, in 1949, students working at state-supported schools were expressly excluded from membership.

Membership in the retirement system shall consist of all regularly compensated employees and appointive and elective officials of Employers as defined in this [act] who have served at least six months without interruption, **with the following exceptions: . . .**

7. Persons employed by an employer or serving in an institution operated by an employer, primarily as an incident to and in furtherance of their education or training; . . .¹⁵

RCW 41.40.120 (1949) (bold emphasis added).

24. In 1965 and 1967 the legislature refined and expanded the exception, to expressly include students and spouses of students at institutions of higher learning and community colleges.

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

(7) Persons employed by an employer or serving in an institution of higher learning or community college operated by an employer, primarily as an incident to and in furtherance of their education or training, or the education or training of a spouse; . . .¹⁶

RCW 41.40.120 (1967). (Underlined emphasis indicates (7) language

¹⁴ Laws of 1947, ch. 274, §§ 1, 13.

¹⁵ Laws of 1949, ch. 240 § 13.

¹⁶ Laws of 1965, ch. 155 § 2; Laws of 1967 ch. 127, § 3.

added with these amendments.) This version of the statute was in effect in 1970.

25. With regard to the janitorial employment on which Mr. Fox bases his claim for PERS membership, the evidence of record shows the following.

At the time that the janitorial job became available, Mr. Fox was a full-time undergraduate student at the University. He was not a PERS member. Up to the time he began the janitorial work, his only employment at the University had been as a student assistant teaching extension classes in gymnastics, about 6 hours per week.

Mr. Fox was a member of a team or teams that competed in gymnastics for the University. Dr. Hughes, his gymnastics coach, greatly assisted Mr. Fox in obtaining the janitorial work at issue, as he had helped many other gymnastics students find employment on campus.

Mr. Fox was the only student and only part-time worker on the crew at the electrical and mechanical engineering department buildings. He was able to vary his work schedule around his class schedule, which changed quarterly, and his gymnastics schedule, including the extension classes. He performed "special projects" for his supervisor different from those assigned to the regular crew (though he performed many of the same tasks they did). He was paid by the hour, not on salary as were classified University staff, even half-time staff.

Mr. Fox took the job to pay certain living expenses, so that, in his own words, he "could continue going to school."

Mr. Fox worked as a janitor only as long as he was an undergraduate. He resigned this work when he graduated in June 1972. He obtained a degree in business administration and had worked in a large corporation not affiliated with the University. He entered a career in law enforcement within two years of graduation. There is no evidence he ever worked as a janitor or in any similar type of employment before or after this work at the UW.

26. These facts demonstrate that when Mr. Fox was working as a janitor at the University, he was serving in an institution of higher learning primarily as an incident to and in furtherance of his education there. RCW 41.40.120(7) applied to bar his membership in PERS.
27. This is a straightforward application of the statutory provisions to the evidence of record in this proceeding. There is no basis for any other analysis. Any potential mitigating effect of the enrollment form Mr. Fox recalls filling out is lost here because the form itself is lost. Further, the contributions to PERS he recalls making through payroll deduction have never shown up in either the University's or the Department's business records.

28. Nearly 20 years after Mr. Fox graduated from the University, the Department adopted a rule concerning the student/student spouse exception to PERS membership. WAC 415-108-520 does not play a role in applying the student exception in this case because it was adopted much later and was not made expressly retroactive. It is only noted that the result here appears to be consistent with current law under this rule even had Mr. Fox proven that he worked in a PERS-eligible position in 1970.

29. Mr. Fox's claim having been resolved on other grounds, it is not necessary to address in any further detail the question whether the temporary employment exclusion in RCW 41.40.120(12) also would have applied to Mr. Fox's claim.

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ORDER

Mr. Fox's request that the Department grant him membership and service credit in PERS Plan 1 for employment at the University of Washington in 1970-72 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 7th day of March, 2008.



ELLEN G. ANDERSON
Presiding Officer
Department of Retirement Systems

APPENDIX B

**BEFORE THE DIRECTOR
DEPARTMENT OF RETIREMENT SYSTEMS**

In re the Petition of)
)
Duane E. Phinney) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
SS# [REDACTED]) AND DECISION
)
for Service Credit)

This matter comes before the Retirement Petition/Appeals Examiner pursuant to Chapter 415-04 WAC (Washington Administrative Code).

The Petitioner, Duane Phinney, requests a determination that he was employed in an eligible position by the University of Washington from March 1963 through June 1968 and that he is entitled to service credit for that time.

On or about September 24, 1992, Petitioner filed a notice of appeal pursuant to WAC 415-04-020(1) through (4). The appeal is sufficiently in compliance with Chapter 415-04 WAC and, accordingly, is hereby accepted as a Petition.

The Retirement Petition/Appeals Examiner, having reviewed the Petition and the records of the Department of Retirement Systems (DRS) and being otherwise fully advised in the premises, makes the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. Petitioner worked in a variety of positions for the University of Washington (UW) during the summer of 1957, the summer of 1958, and for various periods between June of 1963 and June of 1968. According to documentation supplied by the UW, none of the various positions that petitioner held were eligible. Petitioner was not entered into membership in either the Public Employees' Retirement System (PERS) or the UW retirement system. See Exhibit 1.
2. On June 19, 1968, Petitioner became a member of PERS Plan I. See Exhibit 2.
3. In an undated letter received by DRS on April 16, 1987, Petitioner inquired as to whether the time he had worked with UW was eligible for PERS I service credit. See Exhibit 3.
4. Eleanor Wagner, Chief of Eligibility, responded with a letter dated April 21, 1987. Ms. Wagner stated that she could not conclude that the employment in question was eligible without verification of actual hours worked and compensation earned. The correspondence previously provided by the UW (Exhibit 1) did not contain this information. Ms. Wagner stated in part:

The resume of service from the University of Washington, dated February 10, 1987, documents temporary employment and also indicated you were a student at the University of Washington. Membership in PERS is required unless an employee is exempted or did not meet the qualifications to become a member. For example, prior to July 1, 1965 an employee was required to work six uninterrupted

calendar months in an eligible position to qualify for membership. The individual became a member on the first of the seventh qualifying month of employment. Persons who were attending the University of Washington and employed at the University of Washington, were exempted from membership and still are. There is no provision to reestablish service that was exempted or ineligible. Temporary employment and employment in an ineligible position was also exempted.

See Exhibit 4.

5. In a letter dated March 11, 1992, Petitioner again wrote to the Department asking to establish credit for some or all of his employment with the UW. See Exhibit 5.

6. In response, Retirement Benefit Specialist, Lois Ward sent a form letter dated March 30, 1992 to the University of Washington payroll department requesting information on Petitioner's employment. Kathleen Dwyer, Benefits Program Manager, completed and returned the form on May 28, 1992. Attached to the form was a memo, also dated May 28, 1992, from Ms. Dwyer stating in part:

Your periods of summer employment with the UW were never sufficient to establish PERS eligibility, and the student status of your additional UW pay rendered it excepted by definition.

See Exhibit 6.

7. On June 4, 1992, Retirement Benefit Specialist, Janet O'Leary, wrote to Petitioner informing him that he was not eligible for PERS Plan I service credit for his service with the UW. See Exhibit 7.

8. On June 30, 1992, Petitioner appealed Ms. O'Leary's decision to Jack Bryant, Membership Administrator. See Exhibit 8.

9. In response, Mr. Bryant wrote a letter dated July 7, 1992, stating in part:

The information provided in your letter does not agree with the information provided by the University of Washington (UW). We basically rely on the information provided by the employer to make eligibility determinations. I would suggest that you contact the UW and attempt to reconcile the differences between your records and theirs. Hopefully you can obtain a resolution with the UW.

See Exhibit 9.

10. On July 10, 1992, Petitioner called Jack Bryant to discuss Mr. Bryant's decision. Mr. Bryant suggested that Petitioner call the UW and inquire as to whether he had signed a membership waiver for the time in question. On July 13, 1992, Petitioner called Mr. Bryant back again with the information that the UW did not have such a waiver on file. Mr. Bryant then called the UW. His written record of the conversation states:

... spoke to Katy D. She said these are student aide positions only available to students. The pay type and positions were considered not eligible.

See Exhibit 10.

Mr. Bryant conveyed this information to Petitioner in a letter dated July 15, 1992. See Exhibit 11.

11. On September 24, 1992, the Department received a Petition for reversal of Mr. Bryant's decision from Mr. Phinney. As part of his petition, Mr. Phinney enclosed a letter from Dr. Robert L. Burgner, Professor Emeritus of the University of Washington Fisheries Research Institute. Dr. Burgner stated in part:

Your employment was not a requirement for your BS in Fisheries and the Institute was not involved in the undergraduate curriculum.

See Exhibit 12.

12. On October 13, 1992, I wrote to Kathleen Dwyer at the UW requesting further information on the position or positions that Petitioner had held at the UW. See Exhibit 13.

13. On November 24, 1992, Ms. Dwyer responded. She stated in part:

... All of these positions are student appointments. These appointments are dependent on being a student and are not available to the general public. They are granted by the academic departments and the Office of Student Affairs as a form of financial aid to the student.

The student employee may fulfill a wide variety of functions while receiving the financial aid that student hourly and teaching assistantships provide. The exact duties are not relevant. ...

It is my understanding that student pay types have always been distinct from other types of pay. It is not available to regular employees of the University, only to students. As we previously discussed, I do not know the criteria applied at the time for eligibility to use those funds. Mr. Phinney's pay type excludes him from eligibility for PERS. **He could have the job only if he were a student.** (Emphasis added)

See Exhibit 14.

14. On December 15, 1992, DRS received a letter from Petitioner in response to Ms. Dwyer's letter of November 24, 1992. Petitioner summarized his arguments in support of his application for membership as follows:

1. I worked continuously for the University from March 1963 through June 1968. I was given different job titles at different times of the year, but was employed with one continuous set of duties.

2. I was employed by the Fisheries Research Institute, which at least at the undergraduate level is analogous to a private research firm and has nothing to do with the University's curriculum.

3. The research project I worked on was funded by the Alaska salmon industry. Neither the contractor's interest nor the contract had anything to do with the academic functions of the University.

4. The Director of the Fisheries Institute at the time of my employment submitted a letter in which he agreed completely with my contention that at least while I was an undergraduate that my being hired had nothing to do with my student status or the furtherance of my education. Both must be conditions for the position to be excluded from eligibility under RCW 41.40.023.

5. The University seems to be retroactively applying conditions presently associated with the special funding and the student financial aid aspect of student appointments. Such was not the case in the mid-1960's. I did not apply for nor did I receive any such financial aid from the University.

6. The exception for students found in RCW 41.40.023(7) is in the context of "persons". I therefore do not believe it is appropriate for the University to make broad-brush generalizations to entire job classes, but must examine each person's situation on its own merits.

See Exhibit 15.

CONCLUSIONS OF LAW

The Department of Retirement Systems has jurisdiction in this matter pursuant to Chapter 41.50 RCW (Revised Code of Washington).

In order to evaluate Petitioner's claim it is necessary to determine whether he was in an eligible position as defined in RCW 41.40.010(25).

(25) "Eligible position" means:

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

If Petitioner is in a position that is otherwise considered eligible, he may also be exempted from membership under RCW 41.40.023. Petitioner's claim focuses on the contention that he was not entitled to the exemption from membership provided by RCW 41.40.023. The relevant statute states:

Membership in the retirement system shall consist of all regularly compensated employees and appointive and elective officials of employers, as defined in this chapter, with the following exceptions:

(1) Persons in ineligible positions;

...

(7) Persons employed by an institution of higher learning or community college,

primarily as an incident to and in furtherance of their education or training, or the education or training of a spouse;

In characterizing the positions held by employees, DRS relies upon the information provided by the employer. In Petitioner's case, the UW has stated and maintained that he cycled between different positions while working for the UW. During the summer Petitioner worked in temporary appointments as a Fisheries Aide, Fisheries Technician or Fisheries Biologist. These positions did not normally require five or more months of work at 70 or more hours per month. Accordingly, those positions were not eligible and Petitioner is not entitled to service credit for service performed in those positions.

Petitioner argues that he was employed in one continuous position, the hours of which apparently fluctuated based upon whether he was enrolled in classes or not. The UW states otherwise. In some cases there was a break in service between Petitioner's summer employment and his student employment. During the 1964-65 school year, Petitioner worked only in the summer temporary position and did not work for the University during the school year. In some years Petitioner terminated one type of employment and began the different type of employment on the next day. This does not affect the UW's contention that these were different positions. It is within the UW's authority to make such designations. Accordingly, Petitioner's summer employment with the UW was not in an eligible position and therefore does not qualify him for membership or service credit.

In contrast, Petitioner's employment during the school year usually lasted more than five months. If Petitioner worked sufficient hours during that period, the position may be eligible.^[1] Petitioner is exempted from membership for such periods, however, if his employment was incident to and in furtherance of his education or training.

Petitioner correctly points out that there are two parts to the exemption from membership, both of which must be satisfied before RCW 41.40.023(7) will operate to exclude the person from membership. The position must be incident to and in furtherance of the Petitioner's education or training.

Webster's New World Dictionary, second college edition defines "incident" as "likely to happen as a result or concomitant". The positions filled by Petitioner while a student were available only to students. His student status was a necessary condition precedent to his employment in that position. His employment was concomitant to his student status and therefore incident to his education.

The next question to be resolved is whether Petitioner's employment was in furtherance of his education. Petitioner argues that a position is in furtherance of a person's education only if it is a requirement for a degree or somehow otherwise involved in the University's curriculum or academic function. Such a construction would restrict the exemption almost to the point of nonexistence.

Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided. *State v. Richardson*, 81 Wn.2d 111, 499 P.2d 1264 (1972).

State v. Stannard, 109 Wn.2d 29, 742 P.2d 1244 (1987).

Petitioner's recommended construction would mean that the exemption from PERS membership found in RCW 41.40.023(7) would apply only in those cases where employment by a higher education institution was part of a program's curriculum. This would mean that the exemption would be unavailable to undergraduates who received employment from the University as part of a financial aid package. Most, if not all, jobs made available to undergraduates by higher education institutions are at best tangentially related to the University's curriculum, much like Petitioner's student employment. Under Petitioner's interpretation, one of the few positions that would qualify for exemption from PERS membership under RCW 41.40.023(7) would be a teaching fellowship required for completion of a graduate degree. This narrow interpretation leads to a strained result that improperly limits the scope of the exemption.

Petitioner's interpretation would not only narrow the scope of the exemption almost to nonexistence, it would render a portion of the exemption meaningless. In addition to students, RCW 41.40.023(7) exempts the spouses of students from PERS membership where the person's employment with a higher education institution is incident to and in furtherance of the education or training of a spouse. Under Petitioner's construction of the statute, a person's employment could never be in furtherance of their spouse's education, since it would never be part of their spouse's curriculum or degree requirement. The membership exemption for spouses of students would therefore be meaningless.

We are to construe a statute in such a manner as to avoid rendering meaningless a word or portion thereof.

Estate of O'Brien, 109 Wn.2d 913, 749 P.2d 154 (1988).

We are required, when possible, to give effect to every word, clause and sentence of a statute.

Cox v. Helenius, 103 Wn.2d 383, 693 P.2d 683 (1985).

The construction of the phrase "in furtherance of" urged by Petitioner would severely limit part of RCW 41.40.023(7) and would render the final clause of the exemption inoperative. Such a construction would violate established common law requirements for interpreting statutes and is therefore inappropriate. Having decided what the phrase does not mean, it is now necessary to turn to a consideration of what the phrase means.

Webster's New World Dictionary, second college edition defines "furtherance as "a furthering, or helping forward; advancement; promotion". The question of whether Petitioner's student employment was in furtherance of his education or training does not rest upon whether or not it was part of his degree program but whether it helped forward, advance or promote his education or training.

The purpose of the student positions administered by the UW is to provide financial aid to students, whether the positions are specifically tagged as part of financial aid package or not. The positions are reserved for students in order to provide students with the income they need in furtherance of their education. This construction gives effect to the exemption from PERS membership contained in RCW 41.40.023(7). It allows students and the spouses of students to receive the maximum amount possible of their wages in order that they may support themselves as much as possible while moving forward toward their educational goals.

The record indicates that Petitioner was exempted from PERS membership for employment with the UW both as an undergraduate and as a graduate student. Even under Petitioner's restrictive interpretation, his employment as a graduate student was in furtherance of his education. According to the letter from Robert Burgner submitted by Petitioner, Petitioner developed his graduate thesis as part of his graduate employment.

Petitioner's undergraduate employment was also in furtherance of his education. He was in a position reserved for students, the purpose of which was to provide financial support to Petitioner while he pursued his studies. Petitioner was properly excluded from PERS membership while employed as a student at the UW.

DECISION

Based on the above-referenced Findings of Fact and Conclusions of Law, Petitioner's employment at the UW was incident to and in furtherance of his education or training and does not qualify him for PERS membership service for these periods. Therefore, the Petition of Duane Phinney, SS# [REDACTED] for membership service for his employment with the University of Washington is **DENIED**.

Done this [19th] day of January, 1993.

Paul Neal
Retirement Petitions/Appeals Examiner

[1] / DRS has not been able to obtain information from the UW regarding the number of hours worked by Petitioner in his student positions.

