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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  No. 43865-8-II
DEPUTY

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DOUGLAS MERINO and KAY
MERINO, husband and wife and the
marital community composed thereof,

Appellants,

v.

THE STATE OF WASHINGTON and
ITS AGENCIES; THE WASHINGTON
STATE DEPARTMENT OF
RETIREMENT SYSTEMS; THE
WASHINGTON STATE PATROL and
JOHN R. BATISTE, Chief Thereof, and
DAVID J. KARNITZ, Deputy Chief
Thereof,

Respondents

BRIEF OF
DOUGLAS AND KAY MERINO, APPELLANTS

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A. INTRODUCTION

Douglas Merino¹ had been receiving a disability retirement allowance from the Washington State Patrol² for fourteen years when his retirement allowance was cancelled. The reason for the cancellation was not that his disability had ceased, but rather, because of a felony conviction.

In cancelling Merino's disability retirement, the Patrol acted contrary to statutory language and against clearly established case law. The Patrol's action was also a violation of Wash. Const. Art. I, §15, declaring that a criminal conviction shall not work a forfeiture.

B. ASSIGNMENTS OF ERROR

1. Assignments of Error.

(a) The trial court erred in granting the motion for summary judgment filed by the Patrol and John Batiste, the Chief thereof.

(b) The trial court erred in denying the motion for summary judgment filed by Merino that would have restored his disability retirement benefits.

¹ Where appropriate, the appellants will be collectively referred to as "Merino."

² Where appropriate, the Washington State Patrol will be referred to as "Patrol" or "the Patrol."

2. Issue Pertaining to Assignments of Error.

The single issue relating to both assignments of error is whether a disabled State Patrol Trooper may have the vested rights to his disability retirement terminated because of his discharge from employment following a felony conviction.

C. STATEMENT OF THE CASE

1. Procedural History.

The Merino case was presented to the trial court by both sides as a question of law based upon the issue set forth above. Both sides moved for summary judgment. The court granted the defendant's motion, dismissing Merino's complaint. The court denied Merino's motion for summary judgment on his claim for declaratory relief to reinstate his disability retirement. (CP 310-311)³

2. Statement of Facts.

The parties do not dispute the facts. Merino was hired by the Washington State Patrol on August 14, 1978. (CP 172-173). He served as a member of the Patrol until February 10, 1994, when he was placed on job-related disability status by Chief Roger W. Bruett. (CP 172-173). Merino continued on disability status from

³ This appeal does not include the dismissal of David Karnitz or the Department of Retirement Systems.

1994 until August of 2008. During that time, he received disability compensation in an amount equal to one half his salary. (CP 172-173).

By “Notice of Disciplinary Charges” on August 6, 2008, Merino was fired from the State Patrol. (CP 137-145, 170-171). The basis for his discharge was his conviction for attempted theft in the first degree and conspiracy to commit theft in the first degree. (CP 172-173).

While Merino’s physical disability continues, once he was fired by the Patrol, the Patrol stopped paying his disability retirement benefits. (CP 228-233, 172-173). Merino seeks reinstatement of those benefits.

D. SUMMARY OF ARGUMENT

There are three bases upon which the court should reverse the trial court and grant Merino relief that reinstates his disability retirement.

First, the statute, RCW 43.43, and the regulations, WAC 446-40, require payment of disability benefits until such time as the disability ceases. Nothing in the statute permits the termination of benefits while the disability continues. Similarly, the

regulations only allow for termination when the disability ceases.

In the Merino case, his disability continues.

The second basis for reversal is the very well settled case law within the state of Washington, holding that pension and disability benefits vest at hiring and may not thereafter be terminated by discharge from employment. Disability benefits are a form of deferred compensation constituting a property right to the recipient and do not cease when employment is ended.

The last basis for reversal argued by Merino is the Washington State Constitution, Article I, §15 that prevents the forfeiture of estate for conviction of a crime.

E. ARGUMENT

(1) Standard of Review. Questions of law are reviewed de novo by the appellate court. *Hanson Industries v. Kutschkau*, 158 Wn.App. 278, 239 P.3d 367 (2010); *Anderson v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006).

(2) The Statute and Regulations Governing State Patrol Disability. Analysis of the issues must begin with the statute governing the Patrol, RCW 43.43. With regard to disability of members of the Patrol, RCW 43.43.040 provides in relevant part as follows:

(1) The chief of the Washington state patrol shall relieve from active duty Washington state patrol officers who, while in the performance of their official duties, or while on standby or available for duty, have been or hereafter may be injured or incapacitated to such an extent as to be mentally or physically incapable of active service: PROVIDED, THAT:

(a) Any officer disabled while performing line duty who if found by the chief to be physically incapacitated shall be placed on disability leave for a period not to exceed six months from the date of injury or the date incapacitated. During this period, the officer shall be entitled to all pay, benefits, insurance, leave and retirement contributions awarded to an officer on active status, less any compensation received through the department of labor and industries. No such disability leave shall be approved until an officer has been unavailable for duty for more than forty consecutive work hours. Prior to the end of the six-month period, the chief shall either place the officer on disability status or return the officer to active status . . .

(c) An officer injured while engaged in willfully tortious or criminal conduct shall not be entitled to disability benefits under this section; and . . .

2 (a) Officers on disability status shall receive one-half of their compensation at the existing wage, during the time the disability continues in effect, less any compensation received through the department of labor and industries. They shall be subject to mental or physical examination at any state institution or otherwise under the direction of the chief of the patrol at any time during such relief from duty to

ascertain whether or not they are able to resume active duty. [Emphasis added]

The provisions of RCW 43.43.040 are clear and unambiguous. Once an officer is placed on disability, the statute requires that disability compensation is to be paid during the time the disability continues in effect. In the Merino case, his disability continues as should his benefits.

In addition to the above, it is noteworthy that RCW 43.43.040 is not silent with respect to criminal conduct. As quoted above, subparagraph (1)(c) disqualifies an officer from disability retirement if the injury was caused while engaged in willfully tortious or criminal conduct. While there is no suggestion that Merino's disability arose from criminal conduct, the disqualifying language does lend support to Merino's argument.

This conclusion is rendered necessary by the familiar rule of statutory construction that the express mention of one thing will be taken to imply the exclusion of another thing, *expressio unius est exclusion alterius*. *Ramsay v. Department of Labor and Industries*, 36 Wn.2d 410, 218 P.2d 765 (1950). This rule stems from the belief that where a statute specifically lists the things upon which it operates, there is a presumption that the legislating



body intended all omissions. *In Re Personal Restraint of Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1999).

As the legislature only exempted a patrolman from disability compensation if the disability arose because of criminal conduct, criminal conduct that occurs 14 years after the disability would not be a disqualifier. Had the legislature meant that post-disability conduct would cause a forfeiture of disability benefits, it would have said so.

Consistent with the statutory analysis is the regulatory scheme. Initially, WAC 446-40-030 specifically limits the manner in which a disability may be terminated, requiring that it can only be accomplished according to the regulations. The pertinent regulation states:

No member shall be placed in or removed from disability retirement status by application of the member, the department, or the personnel officer except in accordance with this regulation.
[Emphasis Added]

The only acceptable procedure for removal is contained in WAC 446-40-050 providing:

When the chief determines pursuant to RCW 43.43.040 and based upon available medical history, reports, doctors' analyses and the like that a member in disability retirement status should be returned to active service status, he may so order the

member to active service status pursuant to RCW 43.43.040. The member shall not be prejudiced by failure to report if, within seven days after receipt of the order, he requests a formal hearing as provided for in WAC 446-40-070, et seq.

There is no question in the Merino case that his disability continues and that his disability retirement was not terminated according to the regulations implementing RCW 43.43.040. As those regulations are the only permissible manner of terminating a disability allowance, Merino should not have been removed from disability status.

(3) Public Pension Case Law. Washington follows the rule that pension rights vest upon commencement of employment or when the pension statute becomes applicable to the employee. Pensions are in essence deferred compensation. *Tembruell v. Seattle*, 64 Wn.2d 503, 392 P.2d 453 (1964); *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). With regard to disability benefits, in the case of *Newlun v. Department of Retirement Systems*, 53 Wn.App. 809, 770 P.2d 1071 (1989), the court held that those benefits vest at the time of injury, stating:

When one's contract of employment includes service connected disability rights, those rights become vested at the instant the employee is injured in the course of his employment . . .

Merino's employment carried a right to receive disability benefits explicitly set forth in RCW 43.43.040. Following *Newlun*, those rights vested at the time of his on-the-job injury. From this point, the remaining issue is whether his vested rights to disability benefits can be terminated because of criminal conduct that causes discharge from employment.

To begin the analysis, the case of *Shurtliff v. Retirement Systems*, 103 Wn.App. 815, 15 P.3d 164 (2000) defined a vested right as a right that "endures despite the member's leaving, and not returning to his or her employment." It is "a title, legal or equitable, to the present or future enjoyment of property." *Wells v. Miller*, 42 Wn.App. 94, 708 P.2d 1223 (1985).

In the case of *Johnson v. Funkhouser*, 52 Wn.2d 370, 325 P.2d 297 (1958), the court applied the vested right analysis and resolved the issue of whether a disabled police officer, fired by the municipality, could subsequently be deprived of his vested rights to disability compensation. The governing statute provided that:

Whenever any person, while serving as a policeman . . . becomes physically disabled by reason of bodily injury received in the immediate or direct performance or discharge of his duties as policeman, or becomes incapacitated for service, such incapacity not having been caused or brought on by dissipation or abuse . . . the board may, upon

his written request filed with the secretary, or without such request . . . retire such person from the department.

Finding from the above that disability rights were part of the employment, the court echoed the holding in *Newlun* and held that while the municipality could terminate Johnson's employment, it could not terminate his disability compensation on the basis that he was fired.

Similarly, in the case of *Knudson v. City of Ellensburg*, 832 F.2d 1142 (9th Cir., 1987), the court had before it the following factual situation:

Knudson began working as a police officer for the City in 1968. In 1975 she applied for and was awarded disability retirement under the Law Enforcement Officers' and Fire Fighters Retirement System Act (LEOFF), *Wash. Rev. Code 41.26.010 to -.921*. In accordance with LEOFF, the State of Washington paid her a disability pension and the City paid for her medical expenses. In August 1981 she was convicted of a narcotics felony. After determining that the conviction would bar Knudson from further employment, the City discharged her from the police force effective May 1, 1982. Knudson notified the Civil Service Examiner that she did not intend to appeal her discharge. Without a hearing the City found that Knudson's status as a former member of the force relieved it of its duty to pay the medical benefit. The City then notified her that it would not pay for her medical expenses incurred after May 11, 1982. The state continues to pay the disability pension.

Knudson argued that her medical benefits were part of her disability retirement package, and once vested, the benefit could not be cancelled until she was no longer disabled.

The *Knudson* court held:

The Washington Supreme Court has held that a disabled police officer discharged for misconduct may not be denied his vested LEOFF disability pension. *State ex rel. Johnson v. Funkhouser*, 52 Wash. 2d 370, 325 P.2d 297 (1958). Since the only statutory condition for the receipt of the disability pension is the occurrence of disability, the right to the pension vests at the time of disablement and is not lost due to later discharge from employment. *Id.* at 372-74, 325 P.2d at 299-300. Knudson's statutory right to the disability medical benefit likewise vested when she suffered disabling injury while employed by the City. Once vested, her benefit could not be cut off by her work discharge . . .

Nor did Knudson forfeit her disability benefit because of her felony conviction. A regular LEOFF retirement pension – once vested – is not forfeited upon the retiree's conviction of a felony unrelated to work performance or contribution to the pension fund.

The *Knudson* case is directly on point. While Merino could be fired by the Patrol, such firing should not deprive him of his disability compensation rights, those vesting at the time of his injury and continuing post-employment discharge.

(4) Washington State Constitution, Article I,

§15. The third argument requiring restoration of Merino's disability compensation is based upon Wash. Const. Art. I, §15 stating:

No conviction shall work corruption of blood, nor forfeiture of estate. [Emphasis Added]

Analysis of Article I, §15 in connection with the forfeiture of pension benefits was first mentioned in *Tembruell v. City of Seattle*, 64 Wn.2d 503, 392 P.2d 453 (1964). In the *Tembruell* case, the court had before it the statutory language that provided for discontinuance of a pension on conviction of a felony.

Tembruell retired with a disability pension on July 31, 1949. In 1957, Tembruell entered a plea of guilty to grand larceny for knowingly receiving stolen property. He received a suspended and deferred sentence for 3 years. When the pension board learned of his plea of guilty, it ordered his pension payments stopped.

In addressing the right to continued pension payments, the court stated:

Before looking into the effect of the plea of guilty upon collateral rights, we ought first inquire into the nature of the rights petitioner acquired under the pension statutes. A pension granted to one in the public service or employment is not a mere gratuity, bonus or expectancy nor simply a

promissory commitment to a future obligation. Rather, it is a form of deferred compensation for services rendered and the right in and to it commence to vest with the first day of employment or service, and continue to vest with each day's service thereafter. *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536; *Benedict v. Board of Police Pension Fund Com'rs*, 35 Wn.2d 465, 214 P.2d 171, 27 A.L.R. 2d 992; *Luellen v. Aberdeen*, 20 Wn.2d 594, 148 P.2d 849. Pension rights thus vesting from the inception become a property right and may not be divested except for reasons of the most compelling force. [Emphasis Added] Thus the statute (RCW 41.20.110) providing for discontinuance of the pension when the recipient has been convicted of any felony must be considered in connection with the rule that the right to the pension is a vested right in the nature of a property; and interpreted so as to avoid working a forfeiture of estate for conviction of a crime. Since nether party brought into question the constitutionality of this statute as working a possible forfeiture of estate for conviction of a crime (Const. Art. 1, §15), we save that question for another day.

The question reserved by the *Tembruell* court was shortly thereafter taken up in the case of *Leonard v. City of Seattle*, 81 Wn.2d 479, 503 P.2d 741 (1972). Again the court dealt with the issue of forfeiture of a pension based upon conviction of a felony.

Leonard was retired and had been receiving a pension for 4 years when he was convicted of a felony. His retirement pension was discontinued under the same terms contained in RCW 41.20.110 used in *Tembruell*, providing:

Whenever any person who shall have received any benefit from said fund shall be convicted of any felony, or shall become an habitual drunkard, or shall fail to report himself for examination for duty as required herein, unless excused by the board, or shall disobey the requirements of said board, then such board shall order and direct that such pension or allowance that may have been granted to such person shall immediately cease, and such person shall receive no further pension or allowance or benefit under this chapter.

The court, addressing the constitutional protection contained in Article 1, §15, stated:

. . . to take this property away from him [Leonard] as a consequence of his conviction of a felony after fully vesting would unconstitutionally work a forfeiture of estate prohibited by Const. Art. I, §15, for conviction of a crime. To the extent, therefore, that RCW 41.20.110 purports to deprive a retired police officer of his pension for conviction of a felony occurring after his retirement, it is unconstitutional and without effect.

The only distinguishing characteristic between the Merino case and *Leonard* is that in *Leonard*, there was statutory authority allowing the termination of pension benefits. In the Merino case, RCW 43.43 provides no such authority. The absence of authority would not make the forfeiture any more constitutional. It was and continues to be a deprivation of Merino's estate for his conviction in violation of Article I, §15.

C. CONCLUSION

There is nothing in the statute, the regulations or the case law that grants, compels or allows the Patrol to terminate Merino's vested right to disability benefits for a felony conviction - quite to the contrary. The statute governing State Patrol disability, RCW 43.43.040, provides that compensation shall be paid while the disability continues. Nothing in the statutory scheme allows for discontinuance of disability compensation when fired from the Patrol. The only circumstance where a disability is forfeited is when the injury causing the disability resulted from a willfully tortious or criminal conduct. RCW 43.43.040 (1)(c). Consistent with the statute, the regulations provide the only method for removing an individual from disability status. Those regulations were not followed.

Even in those cases where there was statutory authority permitting the forfeiture of a pension based upon a criminal conviction, the courts have struck down that authority as violative of Article I, § 15 of the Washington State Constitution. *Tembruell v. City of Seattle*, 64 Wn.2d 503, 392 P.2d 453 (1964); *Leonard v. City of Seattle* 81 Wn.2d 479, 503 P.2d 741 (1972). The State Patrol's action is no more constitutional when acting without

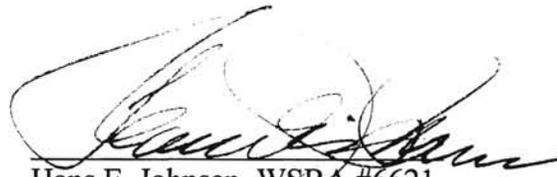
statutory authority than it would have been had legislative authority been granted.

In addition to the foregoing, Washington case law has been consistent since the landmark case of *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 540 (1956). Vested rights of a public employee to pension and disability benefits are a property right for which deprivation is prohibited. Where disability rights are a part of the statutory scheme, those rights vest at the time of disability and continue following discharge from employment.

Merino's vested right to his disability compensation is protected by statute, by case law and by the Washington State Constitution. There being no factual issues, his disability compensation should be reinstated.

DATED at Kirkland, Washington this 14th day of November, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Hans E. Johnsen", written over a horizontal line.

Hans E. Johnsen, WSBA #6621
Attorney for Merino

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DECLARATION OF SERVICE OF BRIEF OF
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DECLARATION OF SERVICE

I, Kathleen Johnsen, declare under penalty of perjury under the laws of the State of Washington that on November 14, 2012, I caused to be served on the persons listed below the following:

Appellant's Brief

By way of:

- Federal Express Standard Overnight
- By Legal Messenger
- By Facsimile Transmittal

To:

Matthew T. Kuehn
Assistant Attorney General
1250 Pacific Avenue, Suite 105
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The original of the Appellant's Brief is being filed with the Court of Appeals, Division II.

DATED at Kirkland, Washington this 14th day of November, 2012


Kathleen Johnsen, Declarant