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COURT OF APPEALS  
DIVISION II

No. 43865-8-II

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STATE OF WASHINGTON

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

BY   
DEPUTY

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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

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REPLY BRIEF OF  
DOUGLAS AND KAY MERINO, APPELLANTS

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**TABLE OF CONTENTS**

	<b><u>Pages:</u></b>
Table of Authorities .....	ii, iii
I. INTRODUCTION .....	1
II. ARGUMENT .....	2
A. <u>Merino’s Disability Retirement Benefits Are Vested</u> .....	2
B. <u>It is Not Necessary to Be An Employee of the Patrol         To Receive Disability Benefits</u> .....	8
C. <u>Washington State Constitution Article I, §15</u> .....	12
III. CONCLUSION .....	13

## TABLE OF AUTHORITIES

<b><u>WASHINGTON CASES:</u></b>	<b><u>Pages:</u></b>
<i>Bakenhus v. Seattle</i> , 48 Wn.2d 695, 296 P.2d 536 (1956) . . . . .	2, 3, 4, 10, 11
<i>Callecod v. Washington State Patrol</i> , 84 Wn.App. 663, 929 P2d 510 (1997) . . . . .	10,11
<i>Knudson v. City of Ellensburg</i> , 832 F.2d 1142 (9 <sup>th</sup> Cir., 1987) . . . . .	2, 8, 9, 11
<i>Leonard v. Seattle</i> , 81 Wn.2d 479, 503 P.2d 471 (1972) . . . . .	12, 13
<i>Newlun v. Department of Retirement Systems</i> , 53 Wn.App. 809, 770 P.2d 1071 (1989) . . . . .	2, 4, 8, 11
<i>Shurtliff v. Retirement Systems</i> , 103 Wn.App. 815, 15 P.3d 164 (2000) . . . . .	7, 8
<i>State ex rel Johnson v. Funkhouser</i> , 52 Wn.2d 370, 325 P.2d 297 (1958) . . . . .	2, 4, 6, 7, 8, 9, 10, 11
<b><u>RULES, STATUTES AND OTHERS:</u></b>	<b><u>Pages:</u></b>
Wash. Const. Art. I, §15 . . . . .	1, 12, 14
RCW 41.20.060 . . . . .	5, 6
RCW 41.20.070 . . . . .	5
RCW 41.20.110 . . . . .	6, 12
RCW 41.20.120 . . . . .	5
RCW 41.26 . . . . .	8, 10
RCW 43.43 . . . . .	9, 10, 11

RCW 43.43.040 .....	1, 6, 7, 10
WAC 446-40-030 .....	7
WAC 446-40-050 .....	7

## I. INTRODUCTION

Much of the Washington State Patrol's ("Patrol") responsive argument is based on the contention that the disability retirement benefits provided for by RCW 43.43.040 are not a vested benefit. The Patrol cites no authority for that proposition.

In Merino's opening brief, authority was cited directly on point, holding that disability benefits vest at the time of injury. This issue will again be addressed in this Reply.

The argument made by the Patrol that it is necessary to be an employee of the Patrol to receive disability retirement benefits is again dependent on the character of the benefit. If it is vested, it endures after the termination of employment.

Similarly, the Patrol's argument that Merino did not suffer a forfeiture of estate under Article I §15 of the Washington State Constitution is also dependent on whether his disability benefits were vested.

Finally, the Patrol argues that Merino's loss of disability retirement benefits was not a result of his felony conviction. Yet in the notice of disciplinary charges, the conclusion clearly stated was, "As it is, you are a convicted felon and no longer qualify for employment with the WSP."

(CP 143)

There is no legal basis from the undisputed facts of the *Merino* case to terminate his disability retirement benefits. All authority is to the contrary, and Merino's benefits should be reinstated.

## II. ARGUMENT

### A. Merino's Disability Retirement Benefits Are Vested.

Of significant importance to the present case is the characterization of Merino's disability benefits. He has argued that the benefit is a vested benefit, as that term has been used in *Newlun v. Department of Retirement Systems*, 53 Wn.App. 809, 770 P.2d 1071 (1989); *Johnson v. Funkhouser*, 52 Wn.2d 370, 325 P.2d 297 (1958); and *Knudson v. City of Ellensburg*, 832 F.2d 1142 (9<sup>th</sup> Cir. 1987).

Analysis of whether pension and disability benefits become a "vested right" begins with the landmark case of *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). In the *Bakenhus* case, the plaintiff, as part of his compensation at the time of hiring, was eligible to receive a pension after twenty-five years of service equal to one half the salary attached to the rank held by him for the year preceding retirement. *Bakenhus* was hired in 1925, and he retired in 1950. In 1937, the legislation that granted his pension was amended such that pension benefits could not exceed \$125.00 per month, an amount less than half the

\$370.00 he received per month for the year prior to retirement. The amendment was applied to *Bakenhus* to reduce his pension.

*Bankenhus* sued. The Court outlined the position of the parties as follows:

It is the position of the plaintiff and the view adopted by the trial court that the first proviso heretofore quoted from the 1937 amendment impaired the obligation of Mr. Bakenhus' contract with the city and the pension fund board and is void as to him (and all who became members of the police department prior to the 1937 enactment).

The defendants contend that, under the rule adopted by the majority of courts in this country, the existence of legislation making pension and retirement provisions for members of a police department and the acceptance or retention of employment does not establish a contract between the employee and the city; and that until the employee has fulfilled all of the conditions necessary to entitle him to a pension, he has acquired no vested right which can be impaired by intervening legislative changes in the pension system.

The plaintiff concedes that this is the majority rule, but urges that the modern trend is otherwise and more in accord with reason and justice. He relies particularly on a number of cases decided by the courts of California.

The Washington Supreme Court agreed with *Bakenhus* and rejected the majority rule stating that:

. . . the rule which we adopt here, the employee who accepts a job to which a pension plan is applicable contracts for a substantial pension and is entitled to receive the same when he has fulfilled the prescribed conditions.

The *Bakenhus* ruling, which gave an employee a contractual right to receive a pension that vested when the necessary conditions had been fulfilled, has been followed consistently by legions of cases within the state. Additionally, the principle outlined in *Bakenhus* has been extended from retirement benefits to disability benefits, as set forth below.

In the case of *Newlun v. Department of Retirement Systems*, 53 Wn.App. 809, 770 P.2d 1071 (1989), the court had before it a narcotics detective that became addicted to cocaine. After the Chief of Police told Newlun that it had no job for him, he resigned. Shortly following, Newlun applied for a disability pension. In opposing his application, the City of Spokane contended that when Newlun resigned, he gave up any right he may have had to a disability pension. The Court of Appeals disagreed holding that *Newlun*, though no longer a member of the police department, could receive a disability pension as his contract of employment included disability rights, and those rights became vested at the time of injury. His continuing membership in the department did not affect his vested rights to disability benefits. In so holding, the court embraced the holding of *State ex rel Johnson v. Funkhouser*, 52 Wn.2d 370, 372-373, 325 P.2d 197 (1958).

The facts in the *Funkhouser* case were outlined by the court as follows:

In March 1954, Clyde Johnson, who had been a patrolman in the police department of the city of Bellingham continuously since November 1945, injured his right knee while in the performance of his police duties. Later, the injury was so seriously aggravated that he could not continue his work, and has not since been able to perform the duties of a patrolman. The pension board granted Johnson full pay sick leave benefits, as provided by RCW 41.20.120, for a period of six months ending December 17, 1954.

June 15, 1954, while still disabled, charges of misconduct were filed against Johnson before the civil service board of the city of Bellingham. A hearing was held and on August 13, 1954, the civil service board delivered to the city comptroller its findings and conclusions that Johnson be dismissed from the police department. No appeal was taken from these proceedings. On the same day, August 13<sup>th</sup>, Johnson filed an application for a permanent disability pension, in conformity with the provisions of RCW 41.20.060 and 41.20.070. The pension board did not act upon the application until December 10, 1954, when, at its request, two doctors examined Johnson and determined that he was still suffering from 'a permanent disability of the right knee as a result of the injuries described. December 17, 1954, the pension board summarily discontinued Johnson's sick leave benefits and denied his application for a pension.

The statutory language providing disability retirement benefits for Johnson contained in RCW 41.20.060 provided:

Whenever any person, while serving as a policeman . . . becomes physically disabled by reason of any bodily injury received in the immediate or direct performance or

discharge of his duties as a policeman, or becomes incapacitated for service . . . the board may . . . retire such person from the department.

From the foregoing, the court held:

The only statutory condition precedent to the allowance of the disability benefit is the *fact* of disablement resulting from the performance of police duties.

. . . When ones 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. [Emphasis Added]

Regarding the effect of Johnson's termination from the department, the court held as follows:

Pensions granted because of disability can be terminated only by the pension board, as provided by RCW 41.20.060 and 41.20.110. The statutory jurisdictions of the civil service board and the pension board are separate and distinct. The action of the civil service board terminated Johnson's employment as a policeman, but did not affect his vested right to disability benefits, over which the pension board has exclusive jurisdiction.

The facts in the *Funkhouser* case are almost identical to the Merino case.

In the *Merino* case, RCW 43.43.040 provides that the chief:

- (1) . . . shall relieve from active duty Washington State Patrol officers who, while in the performance of their duties . . . have been or hereafter may be injured or incapacitated to such an extent as to be mentally or physically incapable of active service.

- (2) Officers on disability status shall receive one half of their compensation at the existing wage, during the time the disability continues in effect . . .

As is evident, the only precondition to disability benefits is disablement in the line of duty, substantially similar to the language in *Funkhouser*. Further, in accordance with *Funkhouser*, once the precondition of disablement is met, the disability rights become vested and continued employment is not a precondition to receipt of those benefits. As echoed in the case of *Shurtlift v Retirement Systems*, 103 Wn.App. 815, 15 P.3d 164 (2000), a vested right is a right that “endures despite the member leaving and not returning to his or her employment.”

The principle that disability benefits continue beyond employment is consistent with RCW 43.43.040(2)(a) requiring payment of compensation during that time the disability continues in effect, and WAC 446-40-030 and 050 limiting termination of disability benefits to those circumstances where the disability has ceased.

It is the above line of cases that the Patrol, citing no authority, asks the Court to overturn and rule that Merino had no vested right to his disability benefits, although the Patrol does not dispute that they were part of the compensation package at hiring. Further, the Patrol argues that continued status as a patrol officer is necessary for continued benefits.

B. It is Not Necessary to Be An Employee of the Patrol to Receive Disability Benefits.

The Patrol argues that only an officer or employee of the Patrol is entitled to disability retirement.<sup>1</sup> Consequently, because the Patrol terminated Merino, it was proper to terminate his disability retirement.

Because the right to receive disability benefits is vested, and that right vested at the time of injury, Merino is entitled to retain that vested benefit notwithstanding his separation from the Patrol. Again, a vested right is a right that “endures despite the member leaving and not returning to his or her employment.” *Shurtlift v. Retirement Systems*, 103 Wn.App. 815, 15 P.3d 164 (2000).

The necessity of maintaining the status of an employee was addressed, and rejected, in both the *Newlun* and *Funkhouser*, *supra*, cases. The same result was arrived at in *Knudson v. Ellensburg*, 832 F.2d 1142 (1987). Knudson was a police officer for the City of Ellensburg. She was awarded a disability retirement under RCW 41.26. The State of Washington paid her disability pension and Ellensburg paid her medical benefits. After 6 years on disability, Knudson was convicted of a felony.

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<sup>1</sup> The Patrol’s argument is incorrect. Benefits are provided to widows and surviving minor children who clearly are not members of the Patrol. RCW 43.43.270.

Ellensburg discharged her from employment. The court framed the issues as follows:

The City maintains that Knudson has no legitimate claim to the benefit because it is conditioned on her employment and she is no longer employed. The City argues that Knudson forfeited the benefit by committing a felony. Knudson contends that her medical benefit is a component of her LEOFF disability retirement package. Once vested, she argues, the benefit cannot be cancelled until she is no longer disabled.

. . . 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 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 discharge.

. . . We conclude that Knudson's medical benefit vested at the time of her disablement. Despite her discharge from active service and her conviction of a crime, she is entitled under Washington law to receive the benefit so long as she remains disabled and complies with the other requirements of LEOFF. She thus has a property interest in the benefit protected by the Fourteenth Amendment.

In accord with the *Knudson* case, Merino should not lose his disability benefits despite his discharge from employment.

The Patrol, again without any authority, argues that the benefit provided the troopers under RCW 43.43 is a “contingent benefit” characterized as “disability wages.” Nowhere in RCW 43.43 or the applicable administrative code sections are the terms “contingent benefit” or “disability wages” used. Nor can those terms be found in case law governing state or municipal pensions. Further, the Patrol argues that RCW 43.43 “does not authorize the vesting of disability compensation.” While this is true, it is neither relevant nor material. In none of the many cases cited after *Bakenhus* for the proposition that there is a vested, contractual right to disability and retirement benefits, did the relevant statutes authorize the vesting of those benefits. The courts found the employees received vested rights based upon the benefits available and provided at the time of hiring. The right to those benefits was contractual and vested by case law, not by statute. *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). The only question was, did the contract of employment include service-connected disability rights. *State ex rel Johnson v. Funkhouser*, *supra*. Pertinent to Merino’s case, RCW 43.43.040 did include service-connected disability rights.

The Patrol relies upon *Callecod v. Washington State Patrol*, 84 Wn.App. 663, 929 P2d 510 (1997) in an attempt to distinguish the above-

cited cases from the *Merino* case, urging that RCW 43.43 cannot use LEOFF (RCW 41.26) cases to interpret the State Patrol disability system. That is not what *Callecod* held.

The issue in *Callecod* was whether a patrolman could use LEOFF's definition of disability under RCW 41.26 to determine disability under RCW 43.43. Resolving this issue, the court held:

Thus, a police officer or firefighter governed by the LEOFF retirement system may receive disability retirement when he or she is incapable of performing strenuous activity although still capable of performing desk work, but a trooper of the Washington State Patrol may be required to assume desk duty in lieu of taking disability retirement when incapable of performing line duty. Accordingly, we reject *Callecod's* contention that the Board and the Chief misinterpreted or misapplied the law governing WSP disability retirements by failing to grant *Callecod* a disability retirement upon finding that he was currently unfit for line duty. So long as the decision that *Callecod* was fit for active service, though for line duty, is supported by substantial evidence, the decision properly applies the law governing WSP disability retirements. [Emphasis Added]

Nothing in the *Callecod* case prevents the application of the principles announced in *Bakenhus* and its progeny.

As stated earlier, there is nothing in RCW 43.43 that speaks to vesting of benefits. Nor are there vesting provisions in the statutes governing the *Bakenhus*, *Funkhouser*, *Newlun* or *Knudson* cases. The

vested benefit analysis was developed by case law beginning with *Bakenhus*. To use the *Callegod* case to attempt to exclude the vested benefit analysis on the basis that other statutes were involved is without support. If a benefit was promised at hiring, regardless of the statute involved, the benefit vests when preconditions are met. In the Merino case, the precondition was disability and that precondition was met.

C. Washington State Constitution Article I §15.

The Patrol's response to Merino's constitutional claim under Article I §15 of the Washington State Constitution is two-fold. First, the Patrol claims no estate existed as the disability benefits were not vested, and no constitutional protection applied. The question of vesting has been dealt with above.

In connection with the constitutional protections, the case of *Leonard v. Seattle*, 81 Wn.2d 479, 503 P.2d 471 (1972) is directly in point. In the *Leonard* case, the court held that vested benefits could not be forfeited based upon conviction of a crime. The court stated:

We must, therefore, conclude that plaintiff's right to a pension vested completely on his retirement; that, although these rights had developed in a continuing process of vesting through a continuing contract of employment in the public service and were contractual in nature, they completely vested upon his retirement; that, having fully vested upon retirement, they constituted valuable property of his estate; and that a take this property away from him 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 retirement, it is unconstitutional and without effect.

While the Patrol has attempted to make a distinction between retirement benefits and disability benefits, no authority is provided suggesting those benefits should be treated differently. To the contrary as set forth above, both disability and retirement benefits are vested.

The second argument made by the Patrol is that the felony conviction was not the reason for Merino's dismissal. The facts are otherwise. The notice of disciplinary charges states in relevant part:

You have maintained you were simply trying to aid your good friend of over 20 years to obtain a loan from a bank by providing your car title and signature to documents you claimed were filled out for you. This assertion is fantastic. Officials from the Thurston County Sheriff's Office, Thurston County Prosecuting Attorney, and most importantly, a jury of 12 peers all concluded beyond a reasonable doubt that you were guilty of attempting to defraud Farmers Insurance of \$60,000.00 and thereby committed two felonies.

If for whatever reason criminal charges had not been brought against you, or even if you were found not guilty by the jury on a beyond a reasonable doubt standard, I would nevertheless conclude by a clear preponderance of the evidence that you indeed violated departmental policy. As it is, you are a convicted felon and no longer qualify for employment with the WSP. [Emphasis Added] (CP 143)

Based upon the above, Merino's position with the Patrol ended and his disability retirement benefits stopped. His loss of benefits is indistinguishable from that in *Leonard* and the same constitutional protection should apply to restore those benefits.

### III. CONCLUSION

The disability benefit provided Merino at the time of his hiring clearly vested at the moment he became disabled. His disability has not ceased. By case authority, Merino's vested disability benefit is not dependent on employment or continued classification as a Patrol officer. A vested benefit endures after the employment relationship ceases. His criminal conviction and resultant discharge does not form a basis to terminate Merino's benefits.

Merino's disability benefits constitute a property right and are part of his estate. By the Washington State Constitution, Article I, §15, his criminal conviction cannot form the basis for terminating his disability retirement benefit.

Merino asks the Court to restore his disability retirement benefits and remand this case to the Superior Court on the issue of damages, costs and attorney's fees.

DATED at Kirkland, Washington this 15<sup>th</sup> day of February, 2013.

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

**DECLARATION OF SERVICE**

I, Kathleen Johnsen, declare under penalty of perjury under the laws of the State of Washington that on February 15, 2013, I caused to be served on the persons listed below the following:

Reply Brief of Appellants

By way of:

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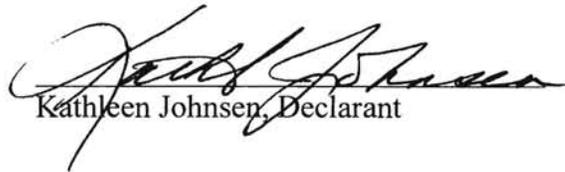
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The original of the Reply Brief of Appellants is being filed with the Court of Appeals, Division II.

DATED at Kirkland, Washington this 15<sup>th</sup> day of February, 2013.

  
Kathleen Johnsen, Declarant