

No. 49876-6-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

KEVIN DOLAN, and a class of similarly situated individuals,

Plaintiffs,

v.

KING COUNTY, a political subdivision of the State of Washington,

Defendant-Respondent,

DEPARTMENT OF RETIREMENT SYSTEMS,

Intervenor-Appellant.

**BRIEF OF APPELLANT
DEPARTMENT OF RETIREMENT SYSTEMS**

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I. INTRODUCTION

Non-consenting third parties should not be required to finance King County's settlement of an employment dispute with King County employees. The superior court ordered third party Public Employees' Retirement System (PERS) employers and employees across the state to pay \$50 million of interest owed on late pension contributions King County agreed to give County employees. This ruling should be reversed and the Department of Retirement System's administrative order holding King County responsible for interest due on late pension contributions should be affirmed.

Monthly retirement contributions from PERS employers and employees ultimately pay for approximately 25 percent of the retirement benefit employees receive when they retire. Investment income over time on those contributions pays for approximately 75 percent of PERS employees' retirement benefit. When retirement contributions are not timely made, the PERS fund loses the investment income on those late contributions. Recognizing this reality, the Legislature enacted RCW 41.50.125, which authorizes the Department of Retirement Systems (the Department) to charge PERS employers interest on late pension contributions to make up for the lost investment income.

King County's settlement with the plaintiff class released the

County from liability for non-pension employment claims in return for the County agreeing to pay approximately \$30 million for 35 years of retroactive employer and employee retirement contributions for the class. After the superior court approved the settlement, the Department issued an administrative order, pursuant to RCW 41.50.125, billing the County for over \$64 million in interest due on the decades of late pension contributions. The order notified the County of the process for challenging the Department's invoices under the Administrative Procedures Act, chapter 34.05 RCW (the APA).

King County did not pursue the legal remedies available under the APA. Instead, the County asked the superior court to apply equity to overturn the Department's interest order.

The superior court held the Department has authority under RCW 41.50.125 to bill the County for interest owed on the retroactive contributions the County agreed to give the class. However, instead of applying the APA and deferring to the Department's statutory authority and judgment, the court, in equity, ordered the County to pay only \$10.5 million in interest, with the remaining \$50 million in interest to be paid by third party PERS employers and employees.

The superior court erred by failing to apply the APA, and by applying equity to a matter exclusively governed by pension statutes. Even

if equitable principles applied, they do not support shifting responsibility for interest on late pension contributions from the employer that caused the lost investment returns to other PERS employers and employees who are blameless for the loss.

The Department's decision holding King County responsible for interest due on late pension contributions should be affirmed under APA review standards. The superior court's order applying equity in derogation of statutory mandates and requiring third party PERS employees and employers to pay most of the interest due on the County's late pension contributions should be reversed.

II. ASSIGNMENTS OF ERROR

A. The superior court failed to follow statutory administrative and judicial review processes, erroneously applying equity in derogation of statutes in its October 10, 2016 "Decision regarding Jurisdiction and Assessment of Interest Charges as to Dolan Pension Class," which is incorporated in the court's December 20, 2016 "Order on Jurisdiction and Assessment of Interest Charges and Final Judgment."

B. The superior court failed to follow statutory administrative and judicial review processes, erroneously applying equity in derogation of statutes in its December 20, 2016 "Order on Jurisdiction and Assessment of Interest Charges and Final Judgment."

C. The superior court erred as a matter of law by applying equity to require non-King County PERS employers and employees to pay most of the cost of a King County settlement in its December 20, 2016 “Order on Jurisdiction and Assessment of Interest Charges and Final Judgment.”

D. Even if the superior court had authority to apply equity to review an administrative order, the superior court abused its discretion by misapplying rules of equity in its December 20, 2016 “Order on Jurisdiction and Assessment of Interest Charges and Final Judgment.”

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the superior court err as a matter of law by deciding King County’s challenge to the Department’s order as an equitable matter when the County failed to properly invoke the court’s jurisdiction under APA and state pension statutes governing administrative and judicial review of pension orders? (Assignments of Error A, B and C.)

B. Did the superior court err as a matter of law by failing to apply the standards for judicial review of agency orders set forth in RCW 34.05.570 when reviewing the Department’s order charging King County interest on the late pension contributions? (Assignments of Error A and B.)

C. Did the superior court err as a matter of law by applying

equity to overrule the Department's decision to charge interest on late pension contributions when the County had an adequate remedy at law through statutory hearing and review processes, and Washington law forbids applying equity in derogation of statutory mandates? (Assignments of Error A, B and C.)

D. Did the superior court abuse its discretion by determining equity supports increasing pension contribution rates for all PERS employers and PERS Plan 2 employees to pay for a settlement between King County and the plaintiff class? (Assignments of Error C and D.)

IV. STATEMENT OF THE CASE

A. In 2011, the Supreme Court Held Employees of King County's Public Defender Organizations Gradually Became County Employees Eligible for Membership in PERS

In January 2006, employees of non-profit public defender corporations (the Class) sued King County claiming they were County employees entitled to PERS pension benefits. CP 4-5, 57, 73, 420, 715-18. The Class demanded the County enroll them in PERS and pay all pension contributions, interest, and other costs due. *Id.* The Department was not a party to the lawsuit. *See id.* Neither the Class nor the County alleged any claims or sought any remedies against the Department. *See id.*

The superior court ordered the County to enroll the Class in PERS,

but did not rule on the enrollment date or the County's statute of limitations defense. *See* CP 17-18; *Dolan v. King Co.*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011). The County appealed. *See id.*

On appeal, the Supreme Court held King County gradually extended control over public defender organizations, through a series of contracting and budgeting actions beginning in 1988 and culminating in 2005, which converted those non-profit corporations into public agencies, entitling the Class to enrollment in PERS. *Dolan*, 172 Wn.2d at 303-07, 317-20. The Supreme Court did not specify an enrollment date, did not rule the Class was entitled to retroactive PERS service credit, and did not address the County's statute of limitations defense. *See id.*

B. In 2013, the County and the Plaintiff Class Agreed to a Settlement Requiring the County to Pay Retroactive PERS Contributions, But No Interest, Which the Court of Appeals Rejected in 2014

After remand from the Supreme Court, the County settled with the Class without the Department's knowledge and participation. Among other settlement terms, the County waived statute of limitations and retroactive service credit defenses in exchange for the Class waiving pay parity and other non-pension employment claims against the County. CP 73-74, 77-78. The agreement stated the Class would be retroactively eligible for PERS service credit dating back to 1978 and the County would

pay over \$30 million in late pension contributions for the retroactive credit, but the County would not pay approximately 35 years of interest on the late contributions. CP 69, 74-75, 80. The County also agreed to the Class's prospective enrollment in PERS effective April 1, 2012, at which time the County and the Class began making monthly PERS contributions. CP 19-20, 2166.

After the County and the Class revealed their proposed settlement, the Department moved to intervene on grounds that it had not consented to the settlement and a settlement waiving interest on late pension contributions would impair state pension system interests. *See* CP 167-80, 2166. Interest charges make up for lost investment returns on late contributions. CP 201-02. Investment returns on PERS contributions pay for approximately 75 percent of pension costs when public employees retire, with the remainder coming from regular contributions over time by PERS employers and employees. RP 177-78, 304. The County's settlement thus resulted in significant underfunding of PERS. *See id.*

The superior court granted the Department limited intervention. CP 260-62. The Department objected to court approval of several settlement provisions, including those allowing the County to avoid interest on late pension contributions. CP 167-80, 208-10. Nevertheless, the superior court approved the settlement, and entered an order prohibiting the Department

from charging interest on the late contributions. CP 378-79, 382, 2167.

The Department appealed the order approving the settlement. The Court of Appeals held the Department could not be bound by a settlement agreement to which it had not consented; reversed the order approving the agreement (vacating the settlement in its entirety); and reversed the order granting the Department only limited intervention. *Dolan v. King County*, 2014 WL 6466710 (Wash. Ct. App., Nov. 18, 2014) at *6-8.

In the course of its analysis, the Court of Appeals addressed the Department's argument that the superior court exceeded its jurisdiction by entering the order approving the settlement agreement. *Id.* at *5-6. The Department argued pension eligibility and funding issues must be first decided by the Department, subject to judicial review under the APA. *Id.* The Court of Appeals held the superior court had jurisdiction to enter an order approving the settlement between the County and the Class (but not binding the Department) because no specific Department action or decision was being challenged at that time. *Id.*

C. In 2015, the County and the Class Agreed to a Second Settlement That Did Not Waive Interest Due on the Late Contributions

After the Court of Appeals remand, King County and the Class agreed to a new settlement in June 2015, again allowing retroactive pension service credit from January 1, 1978 to March 31, 2012. CP 425-

30, 2167-68. The County again waived defenses to retroactive service credit in exchange for the Class waiving claims for pay parity and other non-retirement benefits. *See* CP 417-24. At the time the County agreed to this second settlement with the Class, the County knew the Department would consider charging interest on the late contributions paid for retroactive service credit dating back to 1978. RP 55, 57-58, 79-80.

The Department initially opposed entry of an order approving the second settlement on the grounds that a three-year statute of limitations applied and, alternatively, that the Supreme Court had held the Class became eligible for PERS only shortly before they filed suit in 2006. CP 408-15. A favorable ruling on these points would have substantially reduced the retroactive service credit, the amount of late pension contributions, and the interest due on the late contributions. RP 181-82. The Department ultimately withdrew its opposition to the settlement in exchange for provisions in the order requiring the County to pay the retroactive contributions with an acknowledgement the Department would consider seeking interest on the late contributions. CP 425-28, 2168.

D. Exercising the Department's Discretionary Authority Granted by RCW 41.50.125, the Department Ordered the County to Pay Interest on Late Pension Contributions

Following court approval of the County's second settlement

agreement allowing retroactive service credit dating back to 1978, the County provided employment data to the Department so the Department could calculate the precise amount of the retroactive contributions and the interest owed on those late contributions. *See* CP 1631. The Department provided this data to the Office of the State Actuary (OSA) with a request to determine the present value of the cost to PERS of providing up to 35 years of service credit to the approximately 640 Class members. RP 175-76; CP 1434-43.

The Department Director was aware that an unfunded cost or liability greater than \$7 million causes a one basis point increase in pension rates charged to all PERS employers and employees. RP 170-71, 266-67. The Director wanted to know how much liability the settlement added to PERS, and to what extent that added liability would increase future contribution rates to compensate for the added liability if the County did not pay interest. RP 234-35, 254-55; CP 1434-43. Put another way, the Director asked OSA how much money would need to be deposited in PERS now to pay for the Class's future retirement benefits, and how much would future contribution rates need to increase to accumulate that money if interest was not paid. *See id.*

In response to the Department's request, OSA used the same actuarial methods used for OSA's biennial calculation of Washington

State pension fund liabilities. RP 267-68, 307-08. OSA determined the 2015 present value of the *Dolan* retroactive service credit would add \$96.1 million of additional liability to PERS. RP 255-63; CP 1434-43. This additional liability would require a seven basis point rate increase in future monthly contributions by all PERS employers and a six basis point increase by all PERS Plan 2 employees to fully fund the Class members' PERS retirement benefits. *Id.* If King County paid the late contributions of approximately \$30 million, but no interest to replace lost investment returns, the additional pension cost for the County's second settlement would be over \$60 million. *Id.* This liability would require a five basis point rate increase in monthly contribution rates for PERS employers and a four basis point rate increase for PERS Plan 2 employees. *Id.*

In light of this information, the Department had to decide whether to exercise its authority under RCW 41.50.125 to charge the County interest, or to ask the Legislature to raise contribution rates for PERS participants to pay for King County's late pension contributions.¹ *See* RP 180-81, 214-15. In July and August, 2015, the Department's Director discussed the pros and cons of charging interest on the late contributions with legislative pension committee members, pension advisory committee

¹ Contribution rates for PERS employers and employees are set by the Pension Funding Council, largely comprised of legislators (RCW 41.45.100), subject to revision by the full Legislature. RCW 41.45.060(2).

members, employer and employee groups, and King County. RP 179-99; CP 602-03, 677-78, 704-05. The majority view was that other PERS members should not have to subsidize King County's settlement, with a county organization being neutral and King County opposing interest. *Id.* Many of the Director's conversations were with individuals already knowledgeable about the fiscal impacts of the *Dolan* case, having been involved in legislative activities arising from the case. RP 26, 63, 184-87, 219-20; CP 2053-97. As former State Representative Ross Hunter suggested, a janitor in Walla Walla should not have to take a pay cut in the form of increased pension contributions to pay for King County's settlement. RP 185.

On September 17, 2015, the Department issued an administrative order to the County assessing the amount of the retroactive contributions, and the interest due on those late contributions.² RP 174, 177, 199-200; CP 594-600. The Department issued a revised order on October 20, 2015, correcting a calculation error in the original September 2015 order. RP 200-02; CP 624-28. The revised order stated the total amount owed for the retroactive contributions is \$29,260,592.20, and the total amount of

² An administrative "order" is defined in the APA as "a written statement of particular applicability that finally determines the legal rights, duties, ... or other legal interests of a specific person or persons." RCW 34.05.010(11)(a). A "person" includes governmental subdivisions, such as a County. RCW 34.05.010(14).

interest due on those retroactive contributions is \$64,422,596.55.³ CP 594-95, 597, 624. Both the September 17 and October 20, 2015 orders stated the County could seek review of the Department's orders within 120 days of issuance using the Department's hearing process. CP 596, 624-25. *See also* RCW 41.40.068, and .078; WAC 415-04-015, -020, -025, and -050; WAC 415-08-010 through -420 (codifying the Department's two-tiered hearing process).

The primary basis for the Department's interest decision was the State Actuary's calculations showing the retroactive benefits permitted by the County settlement would cause an increase of four to five basis points in contribution rates for PERS employee and employer members. RP 176; CP 595. This was the first time a single employer agreed to a new pension liability in excess of \$7 million, a threshold amount that causes a pension rate increase. RP 74-76, 174-77, 189-90; CP 595-96. The Department concluded the additional cost of the retroactive service credit should be charged to the employer making the late contributions, rather than to other employers and employees in the pension system who received no benefit from the County's settlement with the Class. CP 594-600, 624-28.

³ The Department charged interest at the rate of investment return used by the State Actuary for state pension systems (7.8%). RP 178. This rate is below the long-term average return for state pension investments (over 8.5%). *See* CP 595, 678-79, 687.

E. The Superior Court Failed to Apply the Procedures and Review Standards Required by the Administrative Procedures Act and Pension Statutes

King County did not seek administrative review of the Department's decision to charge interest. RP 201-02. Instead, the County requested a hearing before the superior court to challenge the Department's order assessing interest owed to PERS, claiming it was inequitable to hold the County responsible for interest on the retroactive contributions the County had agreed to pay in settlement. *See* CP 484-506, 2184. The County challenged only the interest portion of the Department's order, not the amount owed for the retroactive contributions. RP 46-47.

Before the hearing began, the Department objected to the superior court's process because the County was now challenging a Department administrative order. CP 1623-25. Specifically, the Department argued that in order to properly invoke the superior court's jurisdiction to review the Department's decision, the County had to proceed under the APA. *Id.* The Department argued RCW 34.05.534 required the County to pursue an administrative hearing to make a proper record before seeking, if necessary, judicial review of the Department's order. *Id.* The Department reiterated these objections at the outset of the hearing and in its post-hearing briefing. RP 5-13; CP 2105-08, 2123-26. The superior court rejected these arguments, ruling the court had original jurisdiction to apply

equity to resolve the case. RP 8-13; CP 2157-58, 2171-72.

The Department next argued the court could only act in its appellate capacity under the APA standards for judicial review of agency actions set forth in RCW 34.05.570, and the County had the burden of overcoming the presumption of correctness attributed to agency actions. RP 9-12; CP 1623-27, 2105-18, 2123-37. The superior court rejected these arguments, concluding that equitable principles governed review of the interest issue and the parties each had the burden of proving their respective positions by a preponderance of the evidence. RP 11-13; CP 2159-61, 2171-75.

F. The Superior Court Reduced the County's Interest Obligation and Ordered Pension Rate Increases for PERS Employers and Employees to Pay the Remaining \$50 Million in Lost Investment Returns

At the hearing, the Department argued pension statutes are not subject to equitable exceptions because equity is unavailable when statutes provide an adequate legal remedy to persons dissatisfied with an administrative order. CP 1623-27, 2105-18, 2123-37. Even if equity applied, the Department argued it would be inequitable to increase other PERS employers' and employees' contribution rates to enable the County to avoid its statutory responsibility for the lost investment returns on the County's late contributions. *Id.*

In support of these legal positions, the Department presented testimony from Marcie Frost, who was then the Department Director, and Lisa Won, the Deputy State Actuary. CP 1674. Ms. Frost explained the process and reasons that led to her decision charging King County interest on the retroactive contributions. RP 174-99; CP 594-600, 602-03, 624-28, 639-48, 677-78, 704-05. Ms. Won explained how OSA calculated (1) the amount of the liability added to PERS due to the retroactive service credit the County granted to the Class; and (2) the impact on contribution rates caused by the added liability. RP 254-68; CP 639-48.

King County called two witnesses at the evidentiary hearing: Dr. Ethan Kra, an actuary hired by the County to offer opinions criticizing OSA's actuarial analysis, and Dwight Dively, the Director of King County's Performance, Strategy and Budget Office. CP 1674. Dr. Kra did not calculate the amount of unfunded liability created by King County's settlement, or the impact this added liability to PERS would have on contribution rates. RP 110, 134, 140-44. He acknowledged that if OSA's 7.8 percent interest rate is used, the amount of interest on the late contributions would be at least \$50 million. RP 146-48. Although Dr. Kra had six criticisms of OSA's calculations of the liability, he admitted that if the liability were recalculated by implementing his criticisms, the amount of the liability would increase in some respects and decrease in other

respects, but he did not know to what extent.⁴ RP 107-09, 144-46. Dr. Kra provided no testimony rebutting the conclusion that the added PERS liability would trigger a significant rate increase if the County did not pay interest on the late pension contributions. *See* RP 110, 134, 140-44.

Mr. Dively testified that King County has about 14,000 employees and an annual budget of \$4.45 billion. RP 64. He said that if the County had to pay the entire amount of interest on the contributions for the retroactive service credit the County gave the Class in settlement, the County would need to issue bonds and incur debt service costs of approximately \$7.5 million each year for the next 10 years. RP 41. The result would be a negative impact on King County's budget for five biennia. *Id.* Mr. Dively also opined the Department has no authority to charge interest to the County and any interest due on the late contributions should be "socialized" to all PERS employers and employees. RP 45, 69, 73.

The superior court held RCW 41.50.125 plainly authorizes the Department to charge a PERS employer interest on late pension contributions and to determine the amount of interest owed. CP 2159, 2172. However, the court also determined it had equitable power to override the Department's statutory authority to decide whether and to

⁴ Ms. Won rebutted Dr. Kra's criticisms of OSA's calculation of the liability. RP 278-88.

what extent King County should be liable to PERS for interest on late contributions. CP 2171-73. Without explaining the equitable principles on which the court based its decision, the court found “it would be equitable to assess King County an additional \$10,500,000.00 (\$10.5 Million), which would reduce the obligation to PERS members by another 1.5 basis points. The balance to be socialized among PERS members and employers.” CP 2162, 2175.

The Department timely appealed this final judgment. CP 2177-91.

V. STANDARDS OF REVIEW

Most of the issues raised in this appeal are questions of law subject to de novo review. Whether the County’s challenge to the Department’s interest decision should have been dismissed because the County failed to pursue administrative remedies is a question of law. Whether the superior court has original jurisdiction to review the Department Director’s interest decision, or appellate jurisdiction under APA and pension statutes, also is a question of law. Whether the superior court can apply equity in derogation of statutes governing appeal and review of administrative orders is likewise a legal issue. Appellate courts review alleged errors of law de novo. *Evergreen Wash. Healthcare Frontier, LLC v. Dept. of Soc. & Health Servs.*, 171 Wn. App. 431, 444-45, 287 P.3d 40 (2012).

One issue is subject to an abuse of discretion standard of review.

Appellate courts review a superior court's application of equity for abuse of discretion. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). An abuse of discretion occurs if a court's ruling is manifestly unreasonable or based on untenable grounds. *Wash. St. Physicians Ins. Exch. and Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). An abuse of discretion also occurs if a court's ruling is based on an erroneous view of the law (*id.*), such as applying rules of equity inapplicable to the circumstances before the court.

VI. ARGUMENT

A. The Exclusive Avenue for Judicial Review of the Department's Interest Decision Was Through the Administrative Procedures Act

The APA "establishes the exclusive means of judicial review of agency action." RCW 34.05.510. The APA defines "agency action" as "licensing, *the implementation or enforcement of a statute, the adoption or application of an agency rule or order*, the imposition of sanctions, or the granting or withholding of benefits." RCW 34.05.010(3) (*italics added*). Before seeking judicial review of an agency action, a challenging party must exhaust "all administrative remedies available within the agency whose action is being challenged." RCW 34.05.534. There are limited exceptions, but King County did not claim, and the superior court did not

find, an exception applied.⁵ *Id.* See also CP 2165-76.

Under RCW 34.05.510, the superior court has only original appellate jurisdiction to review challenges to agency action. *Wells Fargo Bank, N.A. v. Dept. of Revenue*, 166 Wn. App. 342, 360, 271 P.3d 268, review denied, 175 Wn.2d 1009 (2012). While a superior court may have power to hear a case under Article IV, section 6 of the Washington Constitution, that grant “does not obviate procedural requirements established by the legislature.” *Id.* In other words, before the superior court may properly exercise its original jurisdiction, the challenging party must comply with the procedural requirements of the APA. *Id.* Thus, dismissal is appropriate where a party has not properly invoked the superior court’s original appellate jurisdiction as required by the APA. *Id.* at 359-62.

State pension statutes also establish a mandatory administrative process for any person or entity aggrieved by Department decisions. See RCW 41.40.068 (requiring any person aggrieved by any Department decision to file a request for an administrative hearing “before he or she

⁵ RCW 34.05.534(3) provides that exhaustion of administrative remedies is not required upon a showing that: (a) the administrative remedies would be patently inadequate; (b) exhaustion would be futile; or (c) grave irreparable harm would result from having to exhaust administrative remedies, which “would clearly outweigh the public policy requiring exhaustion of administrative remedies.” See also *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997) (listing five policy reasons underlying the exhaustion requirement). The County never alleged that any of these three exceptions applied. See CP 2165-76.

appeals to the courts ...”); RCW 41.40.078 (“Judicial review of any final decision and order by the [Department] director is governed by the provisions of chapter 34.05 RCW.”); WAC 415-04-015, -020, -025, and -050 (describing first of the Department’s two-tiered administrative hearing process); WAC 415-08-010 through -420 (describing second tier of the Department’s administrative hearing process). RCW 34.05.510, RCW 34.05.534, RCW 41.40.068, and RCW 41.40.078 required King County to follow the statutory process for challenging the Director’s order billing the County for interest on late pension contributions. As a matter of law, the superior court erred by failing to dismiss King County’s challenge because the County failed to comply with these statutory procedures.

1. The Court of Appeals’ Previous Decision Did Not Abrogate the Administrative and Judicial Review Procedures for Challenging Agency Action

The Court of Appeals did not previously rule in the prior appeal that the superior court could ignore the APA where the County’s claim is a challenge to an agency action. *See Dolan*, 2014 WL 6466710, at *5-6. To the contrary, this Court made clear that, at that time, no agency action was being challenged. *Id.* The Department’s prior appeal challenged the superior court’s jurisdiction to approve a settlement between the County and the Class when that settlement purported to bind the Department to terms the Department did not agree to (*e.g.*, waiving interest on late

contributions yet to be calculated and assessed). *Id.* The Court of Appeals found the superior court had jurisdiction to approve the settlement because, at the time, there was no challenge to a specific “agency action” or administrative order. *Id.* The Court then vacated the settlement because the superior court could not force the Department to be bound to a settlement to which it was not a party. *Id.* at *6-7.

Following remand, King County and the Class again agreed to a settlement in which the County gave the Class approximately 35 years of retroactive pension service credit in exchange for the Class waiving non-pension employment claims asserted against the County, which the superior court again approved. CP 417-30, 2167-68. In response, the Department issued the Director’s administrative order assessing interest on the almost \$30 million in late contributions. CP 594-600, 624-28.

The circumstances now differ from those at the time of the Department’s prior appeal to this Court. There has now been a specific “agency action” under the APA (the Director’s order assessing interest) and the County has challenged the agency action. In these circumstances, unlike in the prior appeal, the County had to follow the statutes governing administrative and judicial review of administrative orders. *See Wells Fargo*, 166 Wn. App. at 360. The superior court erred by concluding the Court of Appeals held otherwise in the prior appeal. *See* RP 2171.

2. The Superior Court's Other Reasons for Excusing King County's Failure to Comply with Statutory Appeal and Review Requirements Are Erroneous

The superior court gave three reasons, in addition to its misinterpretation of the Court of Appeals' prior decision, for concluding King County was not required to comply with administrative appeal and judicial review procedures. CP 2157-58, 2171-72. Each of these reasons should be rejected.

First, the superior court stated "this administrative action by DRS flows from the Dolan settlement agreement ... [and was] not an administrative action by an aggrieved public employee." CP 2158, 2172. The court also reasoned that "[i]f the Court follows the logic of DRS, the Court would have to transfer jurisdiction on every issue arising from the settlement agreement to jurisdiction under the APA." CP 2158. This reasoning is contrary to the *Wells Fargo* court's holding that subsequent agency action following a settlement does not negate application of the APA.

In *Wells Fargo*, a bank challenged a Department of Revenue (DOR) agency action that flowed from settlement of a tax dispute in which DOR agreed to give the bank a refund. *Wells Fargo*, 166 Wn. App. at 345-49. The challenged agency action was DOR's later refusal to pay interest on the settlement amount. *Id.* The bank sued DOR in superior court. *Id.*

DOR moved to dismiss because the bank did not timely file an administrative appeal challenging the refusal to pay interest before proceeding to superior court. *Id.* The Court of Appeals reversed the superior court's denial of DOR's motion to dismiss, holding the bank had not properly invoked the court's original appellate jurisdiction due to the bank's failure to comply with the APA's exclusive means for obtaining judicial review of agency action. *Id.* at 362-63.

The superior court's ruling here directly conflicts with *Wells Fargo*. The Department's order requiring payment of interest is an agency action independent of the County's settlement with the Class. In addition, interest was an issue specifically reserved for independent resolution in the order approving the County's second settlement with the Class. *See* CP 428. Like in *Wells Fargo*, the agency's interest decision is subject to the APA, the APA provides the exclusive means for judicial review, and the County failed to properly invoke the superior court's original appellate jurisdiction under the APA. As a result, like in *Wells Fargo*, the County's challenge to agency action should be dismissed.

Second, the superior court erred in reasoning the APA was inapplicable because the Department order charging interest did not flow from "an administrative action by an aggrieved employee." CP 2158, 2172. The APA applies to challenges to agency action brought by any

“person.” RCW 34.05.534. A “person” is defined in the APA as including “any individual, ... governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.” RCW 34.05.010(14). The exclusive remedy provisions of the APA plainly apply regardless of whether the person challenging agency action is an “aggrieved employee” or an employer. RCW 34.05.534. The superior court erred by concluding otherwise.

Third, the superior court reasoned the APA was inapplicable because the Department’s order assessing interest “was totally discretionary.” CP 2158. The APA limits on judicial review of agency action extend to the exercise of agency discretion. *E.g.*, RCW 34.05.574(1) (“In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.”). The superior court was incorrect to conclude the Department’s exercise of the discretionary authority granted by RCW 41.50.125 negates APA provisions governing the superior court’s jurisdiction. Contrary to RCW 34.05.574(1), the superior court also erred by exercising the Director’s discretionary authority itself, rather than limiting its appellate review function to ensuring the Director exercised her discretionary authority in

accordance with pension laws, and remanding to the agency if she failed to do so. *See Hillis v. Dept. of Ecology*, 131 Wn.2d 373, 400, 932 P.2d 139 (1997) (courts cannot make discretionary decisions reserved to agencies).

In sum, this Court should apply *Wells Fargo* to conclude the APA provides the exclusive avenue for judicial review of the Department's administrative decision regarding interest due from the County's settlement. Consistent with *Wells Fargo*, the County's challenge to the Department's interest decision should be dismissed for failure to comply with the exclusive APA process for challenging an administrative order.

B. Applying the Proper APA Standard of Review Would Require the Court to Affirm the Department's Interest Decision

The superior court also erred by failing to review the Department's administrative order under the review standards mandated by the APA and pension statutes.⁶ Since each level of the court system reviews an administrative order de novo under administrative review standards, this Court should review the Department's decision without regard to the decision of the lower court in this case. *See Shaw v. Dept. of Ret. Sys.*, 193 Wn. App. 122, 128, 371 P.3d 106 (2016).

Under RCW 34.05.570(1)(a), King County has the burden to

⁶ The Department's October 20, 2015 order billing the County for interest in the amount of \$64,422,596.55 (CP 624-28) became the Department's final order after the County failed to timely seek administrative review of that order. *See* RCW 41.40.068.

demonstrate the Department's order assessing interest is invalid under the review standards in the APA. Review standards are set out in RCW 34.05.570(3)(a):

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

(Underlining added.)

The only standards conceivably applicable to the Director's order are the three underlined above. The County did not present any argument based on these applicable review standards, instead contending the

Director's interest decision should be reviewed under equitable rather than legal rules. *See* CP 481-506. If the APA review standards are properly applied, the Director's interest decision should be affirmed.

1. The Department's Order Assessing Interest Is Not Contrary to Law

The first potentially applicable standard of review is error of law. RCW 34.05.570(3)(d). Agency legal conclusions are reviewed de novo, but appellate courts accord substantial weight to the agency's legal interpretations if the agency has special expertise in the area. *Fox v. Dept. of Ret. Sys.*, 154 Wn. App. 517, 523, 225 P.3d 1018, *review denied*, 169 Wn.2d 1012 (2010).

The Department's order charging the County interest is authorized by RCW 41.50.125, which provides:

The department may charge interest, as determined by the director, on member or employer contributions owing to any of the retirement systems listed in RCW 41.50.030. The department's authority to charge interest shall extend to all optional and mandatory billings for contributions where member or employer contributions are paid other than immediately after service is rendered.

When enacting this statute in 1994, the Legislature found:

Whenever employer or member contributions are not made at the time service is rendered, the state retirement system trust funds lose investment income which is a major source of pension funding. The department of retirement systems has broad authority to charge interest to compensate for the loss to the trust funds, subject only to explicit statutory provisions

to the contrary.

Laws of 1994, ch. 177, § 1 (emphasis added). *See also* RCW 41.50.140(2); WAC 415-114-100, *et seq.* (similarly authorizing interest on late pension contributions).

The superior court correctly ruled that RCW 41.50.125 permitted the Director to charge King County interest on the late contributions. CP 2159, 2172. The County identified no explicit statutory provision prohibiting the Department from charging interest in this case. The error of law standard thus provides no basis for overturning the Director's order assessing interest on late pension contributions.

2. Substantial Evidence Supports the Department's Order

The second potentially applicable standard of review is lack of substantial evidence to support the Director's order assessing interest. RCW 34.05.570(3)(e). "Evidence is substantial if it is of sufficient quantity to persuade a fair-minded person of the truth or correctness of the agency order." *Fox*, 154 Wn. App. at 523. On appeal, "[i]t is not ... [the Court's] function to reweigh the evidence in an effort to reach different conclusions than did the agency." *Providence Hosp. v. Dept. of Soc. and Health Servs.*, 112 Wn.2d 353, 360, 770 P.2d 1040 (1989).

The evidence shows the Director based her decision on the Deputy State Actuary's calculations establishing the retroactive service credit

King County gave the Class would significantly raise pension contribution rates for all PERS employers and PERS Plan 2 employees unless the County paid interest. RP 174-99, 254-68; CP 594-600, 602-03, 624-28, 639-48, 677-78, 704-05. The County conceded the lost investment return on the late contributions amounts to tens of millions of dollars, and contribution rates for all PERS employers and Plan 2 employees would increase if King County did not pay interest to compensate for the lost investment return. *E.g.*, RP 26, 67, 110, 134, 140-48. Thus, substantial undisputed evidence supports the Director's order charging the County interest to compensate for the lost investment return.

3. The Department's Decision to Charge Interest Was Not Arbitrary or Capricious

The final potentially applicable standard of review requires a showing that the Department's order charging King County interest is arbitrary or capricious. RCW 34.05.570(3)(i). The arbitrary or capricious standard of review "is very narrow" and "highly deferential" to the agency. *Alpha Kappa Lambda Fraternity v. Washington St. Univ.*, 152 Wn. App. 401, 418, 422, 216 P.3d 451 (2009). "Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Hahn v. Dept. of Ret. Sys.*, 137 Wn. App. 933, 941, 155 P.3d 177 (2007), *review denied*, 162 Wn.2d 1017

(2008). “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Washington Indep. Telephone Ass’n v. Washington Utils. and Transp. Comm’n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003). “[N]either the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious.” *Rios v. Dept. of Labor & Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2002).

The Director’s order was the result of a deliberative decision process based on a foundation of compelling information and policy opinions provided by the Deputy State Actuary and pension experts, with due consideration of the fiscal effects the decision has on King County’s budget. RP 174-99, 254-68; CP 594-600, 602-03, 624-28, 639-48, 677-78, 704-05. The Director considered her own extensive knowledge of pension systems and the opinions of over a dozen interested individuals (including Mr. Dively on behalf of King County) before reaching her final decision. *Id.* The record shows the Director had a rational basis for applying RCW 41.50.125 as the Legislature intended, based on evidence supporting application of the statute.

If the circumstances of this case do not justify exercise of the Director’s authority to charge interest pursuant to RCW 41.50.125, it is

difficult to imagine another case that would. The Legislature enacted the statute to allow the Department to charge interest on late contributions to prevent losses to pension funds. The Legislature's grant of discretionary authority would have little meaning if it could not be applied to situations where losses are the greatest. King County cannot meet the heavy burden of proving the Director's decision was arbitrary or capricious.

C. The Superior Court Erred as a Matter of Law by Applying Equity to Review the Department's Interest Decision in Derogation of Statutes Governing Pensions and Judicial Review of Administrative Orders

Rather than applying the APA and pension statutes to review the Department's decision, the superior court substituted its judgment for the Department's and applied unidentified equitable principles to decide what would be an equitable amount of interest to charge King County. CP 2172-75. This was error, justifying reversal of the superior court's decision.

1. The Superior Court Applied Equitable Principles Contrary to the Rules of Statutory Interpretation

The superior court's decision using equity to reduce the County's interest obligation to \$10.5 million and "socializing" the remaining \$50 million to third party PERS employers and employees abrogates RCW 41.50.125. The plain language of the statute shows the Legislature intended lost investment return on late payment of pension contributions should be charged as interest to the employer who caused the loss. This

statute cannot be reasonably interpreted as permitting the superior court to unilaterally “socialize” the cost of an employer’s late contributions to other PERS employers and employees by forcing an increase in their contribution rates.

“[I]t is the duty of the court in interpreting a statute to make the statute purposeful and effective.” *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986). “When interpreting a statute, every presumption should favor the act of the Legislature and all doubts should be resolved in support of the act.” *Id.* at 9. Courts are not to “read into a statute matters which are not there nor modify a statute by construction.” *King County v. City of Seattle*, 70 Wn.2d 988, 991, 425 P.2d 887 (1967).

The superior court’s order violates these rules of statutory interpretation by rendering the plain language of RCW 41.50.125 ineffective. The superior court precluded the Department from charging the bulk of the interest to the employer who made late pension contributions, without finding that charging interest was legally improper or factually unsupported.

The legislative findings supporting enactment of RCW 41.50.125 foreclose an interpretation of the statute allowing equitable principles to usurp the Director’s decision to charge an employer interest on late

pension contributions. The legislative findings that led to enactment of RCW 41.50.125 state as follows:

Whenever employer or member contributions are not made at the time service is rendered, the state retirement system trust funds lose investment income which is a major source of pension funding. The department of retirement systems has broad authority to charge interest to compensate for the loss to the trust funds, subject only to explicit statutory provisions to the contrary.

Laws of 1994, ch. 177, § 1 (underlining added). This statement of intent forecloses using non-statutory equitable principles to disallow interest in situations where the Legislature approved interest, subject only to statutory exceptions.

2. The Superior Court Applied Equitable Principles in Derogation of Statutory Mandates that Provide an Adequate Remedy at Law

Under long-established law, “[e]quitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates.” *Rhoad v. McLean Trucking Co., Inc.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984); *see also Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 484-85, 513 P.2d 36 (1973) (the “arbitrary approach” of using equity to “excuse the application of established codes and ordinances” is inappropriate because equity “came to fulfil the law, not to destroy it” and because equitable relief “is usually only appropriate where there are two private parties in dispute within a contractual or propertied relationship”).

Specifically as to pension laws, state and federal courts have long rejected adopting equitable exceptions or applying equitable principles to override statutory provisions protecting pensions. *E.g.*, *Boronat v. Boranat*, 13 Wn. App. 671, 673-75, 537 P.2d 1050 (1975); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376-77, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990).

The Supreme Court's decision in *Mulhausen v. Bates*, 9 Wn.2d 264, 114 P.2d 995 (1941), illustrates the correct analysis rejecting use of equity in derogation of statutory mandates. In *Mulhausen*, the state Employment Security Department (ESD) assessed unemployment contributions for workers claimed to be independent contractors. The business challenged the ESD Commissioner's assessment in an equitable action filed in superior court. The Supreme Court affirmed dismissal of the bill in equity, stating:

[T]he courts will not entertain a bill in equity nor a petition for a declaratory judgment designed to call for decision of a case for the determination of which a special statutory method has been provided. Borchard, *Declaratory Judgments*, 156. *Bradley Lumber Co. v. National Labor Relations Board*, 84 F. (2d) 97. Borchard says:

“Where, however, a *special statutory* method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case, and it was not intended that a declaration should be employed for such a purpose.”

The unemployment compensation act sets up a complete and exclusive statutory procedure for the determination of rights and liabilities arising under it. See *Abraham v. Department of Labor & Industries*, 178 Wash. 160, 34 P.2d 457. The court very properly dismissed appellant's bill in equity and petition for a declaratory judgment.

Id. at 270-71 (underlining added). The Supreme Court then reviewed the administrative record of the ESD Commissioner's decision assessing contributions. The Court affirmed the decision after determining there was no error of law, the decision was not arbitrary or capricious, and the decision was supported by substantial evidence. *Id.* at 271-75.

Mulhausen is a correct application of the principle that equity is unavailable to review administrative decisions made under a "complete and exclusive statutory procedure for the determination of rights and liabilities arising under [the administrative scheme]." *Id.* at 271. *Mulhausen* also implements the related "fundamental maxim that equity will not intervene where there is an adequate remedy at law." *Sorenson*, 158 Wn.2d at 543; *see also City of Lakewood v. Pierce County*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001) ("Equitable relief is available only if there is no adequate legal remedy").

Before the superior court, the County cited two cases purportedly allowing the superior court to apply equity here. CP 1686. The first case, *In re Marriage of Yates*, 17 Wn. App. 772, 565 P.2d 825 (1977), involves

the propriety of denying interest on money owed under a divorce decree, but has no conceivable application to a statute that authorizes charging employers interest on late pension contributions. The second case, *Rabey v. Dept. of Labor & Indus.*, 101 Wn. App. 390, 3 P.3d 217 (2000), involves a very limited equitable exception to the statutory cutoff for workers' compensation claims and appeals (*i.e.*, incompetency of person receiving notice and Department misconduct). Again, *Rabey* is inapposite. See *Kingery v. Dept. of Labor & Indus.*, 132 Wn.2d 162, 172-77, 937 P.2d 565 (1997) (confining the limited equitable exception to filing deadlines in workers' compensation cases solely to situations involving a claimant's incompetency coupled with Department misconduct that deprived the claimant of an adequate remedy at law).

The superior court erred by applying equity in derogation of statutes that provided a legal remedy to redress King County's grievances. This legal error justifies reversal of the superior court's substitution of the court's opinion for the Director's statutory discretion to charge interest to an employer responsible for late pension contributions.

D. Equity Does Not Support Shifting Responsibility for the Costs of King County's Settlement to PERS Employers and Employees Who Received No Benefit from the Settlement

Even if this Court concludes the APA is inapplicable and equity

may supplant pension statutes, no equitable principle supports ordering third parties to pay most of the cost of the County's settlement. This shifting of financial responsibility conflicts with "the well known rule of equity that he who makes a loss possible should suffer the loss." *German American Bank of Seattle v. Wright*, 85 Wash. 460, 471, 148 P. 769 (1915). There is no equity in ordering non-consenting third parties to pay the cost of a settlement between two litigants. *See Dolan*, 2014 WL 6466710, at *7 (reversing the superior court's prior order in this case forcing non-consenting PERS participants to incur liability for millions of dollars in unpaid interest under the County's first settlement).

The interest due on the County's late pension contributions did not arise because a court or Department decision required the County to give the Class retroactive pension service credit dating back to 1978. Neither the appellate courts, nor the superior court, held the Class was entitled to retroactive service credit. Rather, King County agreed to retroactive service credit in return for the Class releasing claims for non-pension employment liabilities, including claims for wage parity, medical benefits, sick and vacation leave, etc. CP 420-23. In reaching this settlement, the County chose not to argue the three-year statute of limitations or that the Supreme Court held the Class became County employees only shortly

before suit was filed in 2006 (*see Dolan*, 172 Wn.2d at 303-07).⁷ *See* CP 410-13.

The County's voluntary settlement agreement should not convert the County's settlement costs for release of the non-pension employment claims from a County obligation to a PERS obligation. The County is, in effect, shifting the costs of its settlement of non-pension claims to the state pension system by having PERS participants pay most of the consideration the Class received for releasing the County from liability for non-pension employment claims. The County is paying the settlement in the form of enriched PERS pensions rather than paying a cash settlement to the Class, enabling the County's mischaracterization of the settlement cost as a pension cost that should be "socialized" to non-King County PERS participants. This is a misuse of the pension system. Application of "the well known rule of equity that he who makes a loss possible should suffer the loss" dictates the County should pay the full costs of the County's settlement with the Class. *See German American Bank*, 85 Wash. at 471.

⁷ The Supreme Court's analysis was not that the Class met the pension system definition of "employee" in the 1970's. The analysis was that the County had converted the Class to employees by incrementally exerting increasing management and budgetary control over a long period of time beginning in approximately 1988 and culminating with a "public defense payment model" the County imposed in 2005. *Dolan*, 172 Wn.2d at 303-07. The Court held no one event converted the Class members to County employees, but the culmination of events did so by 2005. *Id.* at 318-20.

1. The Superior Court Did Not Identify Any Equitable Principle Supporting Payment of King County's Settlement Obligations by Non-Consenting Third Party PERS Employers and Employees

The superior court identified four reasons that supported charging other PERS employers and employees for King County's interest obligation. CP 2160-61, 2173-74. But, the court did not cite to any maxim of equity or otherwise explain how any of its reasons were based on an accepted rule of equity. *See id.* None of the court's reasons support shifting financial responsibility for the County's settlement to third parties.

First, the superior court did not explain how the Supreme Court's rejection of the County's argument (joined by the Department at the time) that the Class members were not County employees now provides a basis in equity for relieving the County of its interest obligation. This reasoning is akin to saying equity precludes a party from being liable for its actions when a court has rejected that party's legal arguments against liability. This is contrary to the maxim that equity follows the law. *See Stephanus v. Anderson*, 26 Wn. App. 326, 334, 613 P.2d 533, *review denied*, 94 Wn.2d 1014 (1980).

Second, the superior court did not explain how the County's alleged good faith negotiation to reach a settlement with the Class provides an equitable basis for shifting costs of the County's settlement to

innocent PERS employers and employees. Shifting the interest costs of the County's settlement to other PERS employers and employees is contrary to the equitable maxim that "he who seeks equity must do equity." *See Goodwin Co. v. Nat'l Discount Corp.*, 5 Wn.2d 521, 529, 105 P.2d 805 (1940).

Third, the superior court did not explain how a negative budget effect from the County's settlement implicates a rule of equity. *See* CP 2174. Application of equity is not driven by the amount of money at stake. *See Eastlake Community Council*, 82 Wn.2d at 484-85. Moreover, the County paid the full cost of the retroactive pension contributions (about \$30 million) and did not ask to have that cost "socialized" to other PERS members and employers. Mr. Dively testified the County planned for this payment by budgeting funds over time to make the expected payment. RP 24-25. The County has not explained why it did not exercise the same budget discipline and prudence on the interest cost created by its decision to settle the non-pension claims. The County also has not explained why it agreed to that settlement while opposing proposed legislation allowing retroactive pension costs to be paid through adjusting future King County contribution rates (*see* RP 63-64), which would have avoided the allegedly draconian short term budget cuts necessary to make the interest payment.

Finally, the superior court did not explain how the unlikely possibility of another lawsuit similar to *Dolan* makes it inequitable for the County to pay the full cost of its settlement of non-pension employment claims. The novelty of a situation or the absence of precedent has no bearing on the application of equity. *See Rummens v. Guaranty Trust Co.*, 199 Wash. 337, 347, 92 P.2d 228 (1939).

In sum, the superior court's equitable ruling is based on untenable grounds. The court failed to identify any maxim of equity or equitable principle that justified shifting the County's settlement costs to non-consenting third parties who received no benefit from the settlement.

2. The Superior Court Did Not Identify Any Equitable Principles Supporting Arguments the Court Adopted from the County's Post-Hearing Brief

The superior court adopted several additional arguments from the County's post-hearing response brief as "equitable" considerations supporting the court's decision. CP 2174 (citing CP 2149-54). The County's arguments are similarly unsupported by any rules of equity.

a. Substantial Evidence Demonstrated This Case Was the First Time a Single Employer's Action Would Cause a General Rate Increase

The County argues it is "wholly unsupported" for the Department to have offered evidence the County's settlement was the first time a single employer action had enough magnitude to cause a general PERS

rate increase. CP 2152. The Department's evidence was provided by Ms. Frost, who occupied top management positions, including Deputy Director and Director, over most of the twenty plus years RCW 41.50.125 has been in effect. *See* RP 163, 174-75. Director Frost has personal knowledge to testify about the existence or non-existence of major pension funding issues during the relevant period of the Department's history. *See id.* She testified twice on this point. RP 174, 176-77. The County did not object to her testimony as speculative or lacking foundation. *See id.*

The County bases its "lack of prior instances" argument on the lack of prior Department requests to the State Actuary to analyze an employer action to determine if the action would cause a rate increase if interest was not charged on late pension contributions. CP 2152. There would be no reason for Department officials to ask for an OSA report if they had not seen any situation that implicated the probability of a rate increase. High-level Department officials have the experience and knowledge to recognize possible rate increase situations, even before actuarial analysis, as shown by Director Frost's testimony that she perceived this issue immediately when King County revealed its now void December 2012 settlement to her. *See* RP 170-71. This was long before the County's second settlement triggered the Department's billing process and the need to verify the resulting liability through formal actuarial

analysis before making the final interest decision. RP 171-72, 175-76.

The County cites two late 1990's cases (*Logan* and *Clark v. King County*) to purportedly show the Department did not previously charge interest in cases similar to *Dolan*. CP 1691, 2152. However, undisputed evidence submitted by the County showed the County paid approximately \$1.5 million in retroactive contributions in the *Logan* case, and approximately \$4.3 million in contributions in the *Clark* case. CP 1549-51. These cases did not come close to the minimum \$7 million liability that triggers a rate increase. *See* CP 595-96; RP 170-71, 176-77, 266-67.

Without conceding the propriety of the County's "unfairness" argument, the County would have a factual basis for its argument only if it showed the Department made dissimilar interest decisions in similar cases involving late contributions of sufficient magnitude to trigger a rate increase if interest is not paid. The County presented no evidence of any similar case supporting such an argument, and the Department is likewise unaware of any.

b. The County Knew the Department's Position on Interest Years Before the County Settled with the Class

The County complains the Department did not have "guidelines" for applying RCW 41.50.125. CP 2152. The County's unfairness argument apparently is the County did not know the Department would

charge interest when it decided to settle the non-pension employment claims alleged by the Class, implying the County was misled into a settlement it otherwise would have rejected. *See id.*

This is disingenuous because the County admits it was well aware of the Department's position on interest before it agreed to the March 2015 settlement that led to the Director's order assessing interest. RP 57-58, 79-80. Indeed, the County admits it also was aware before finalizing the first settlement in 2013 that the Department would likely charge interest on the retroactive contributions. RP 55-57. Thus, the County has no claim for detrimental reliance on the alleged failure of the Department to adopt guidelines for applying RCW 41.50.125.

c. The County Failed to Prove Any Legislators or Other Stakeholders Were Misled When Asked Their Views on the Interest Issue

The County complains about questions the Department Director chose to ask interested pension officials and organizations as part of her fact and opinion gathering when considering her interest decision. CP 2153. The County points to nothing that limits or defines the questions and topics the Director should raise when conducting such information gathering, and nothing that shows her questions were improper, other than the County's view that she could have asked different questions favoring the County. *See id.*

In any event, the questions asked by Director Frost in her consultations make no difference, absent some showing the interviewees would have expressed different opinions if asked different questions, and those opinions would have caused Director Frost to make a different decision.⁸ The County called no interviewees as witnesses to testify they would have advised the Director differently in response to the County's desired questions. The County also points to no evidence showing answers to the County's proposed questions would have caused the Director to make a different decision. The County's speculative concerns about the questions the Director asked stakeholders provide no equitable basis for shifting most of the financial costs of the County's settlement to innocent PERS participants.

d. The County Presented No Actuarial Analysis Showing the Increased Pension Liability Caused by the Settlement Was Too Slight to Trigger a Rate Increase

The County uses the testimony of Dr. Kra to assert Deputy State Actuary Lisa Won did not apply alleged actuarial principles that might have increased or decreased the extra pension liability. CP 2153. Ms. Won disagreed with Dr. Kra and emphasized her actuarial calculations use the

⁸ Most of the individual stakeholders interviewed by Director Frost were legislators and other people already knowledgeable about pension issues, who were previously briefed on the *Dolan* litigation issues, and had been involved in previous legislative efforts to address the effect of *Dolan*. RP 186-87, 211, 214-15, 218-20.

same audited methodologies OSA uses annually to value all Washington State pension fund liabilities. RP 276-88, 309, 318-20.

Regardless, Dr. Kra's testimony is immaterial to the real issue of whether interest should be charged to compensate for lost investment returns on late pension contributions and, if so, the amount of that interest. Dr. Kra did no actuarial analysis of the cost of giving the Class retroactive service credits and no calculation of whether the extra liability would cause a rate increase. RP 110, 134, 140-46. Dr. Kra's testimony offers no support to the County's challenge of the Director's decision, on fairness or any other ground. Dr. Kra ultimately provided no actuarial testimony countering the conclusion the added *Dolan* liability would trigger a PERS rate increase, the foundation for the Director's decision to charge interest. *See id.*

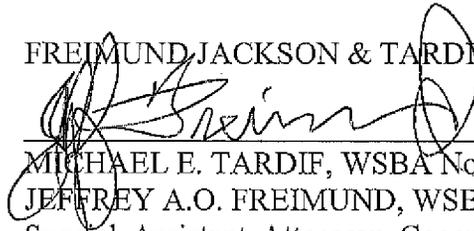
In sum, even if equity is applied in derogation of the APA and pension statutes, neither the superior court nor the County articulated a legitimate equitable basis for shifting most of the cost of the County's settlement to innocent third parties. No maxim of equity supports ordering non-consenting PERS employers and employees to pay most of the costs of the County's settlement of the non-pension employment claims alleged by the plaintiff Class.

VII. CONCLUSION

The Department respectfully asks the Court to reverse the superior court and affirm the Department's decision on the amount of interest due from King County for the late pension contributions the County agreed to give the Class in a settlement. The superior court erred as a matter of law by disregarding the APA's limits on judicial review of agency actions. The court further erred as a matter of law by applying equity in derogation of statutory mandates that provide an adequate remedy at law and place responsibility for interest on the employer responsible for late pension contributions, not on other PERS participants. Finally, even if equity applied in this context, the superior court abused its discretion by holding equity supports ordering non-consenting third parties to pay the costs of the County's settlement, an outcome rejected by the Court of Appeals in the prior appeal of this case. For any of these reasons, the Department's decision billing the County for interest on late pension contributions should be affirmed, and the superior court's decision holding non-consenting third parties responsible for most of those interest charges should be reversed.

RESPECTFULLY SUBMITTED this 25th day of May, 2017.

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CERTIFICATE OF SERVICE

I certify that the foregoing was served by the method indicated below to the following this 25th day of May, 2017.

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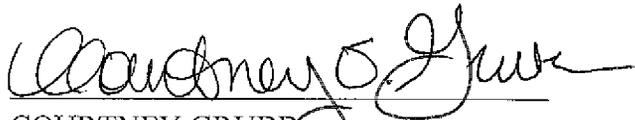
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of May, 2017, at Olympia, WA.


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