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Division II
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NO. 53054-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DONALD SLOMA,

Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Mr. Sloma began this action to compel the Department of Retirement Systems (DRS) to calculate his pension, as it had promised.

Mr. Sloma retired from state service in 2004. He was granted a Public Employees Retirement System (PERS) pension. In 2012, Mr. Sloma accepted a job with Thurston County. At that time, he believed the higher salary of his County employment would enable him to rebase his PERS retirement, when he re-retired. DRS told him, in writing, the calculation of his benefits would use the higher County salary as his Average Final Compensation (AFC).

In June of 2015, Mr. Sloma and his wife were in a good position. He was going to retire from the County. They had been looking to purchase a waterfront home, for a long time. In June, they had located a property which they could purchase and carefully reviewed their finances, including the pension benefit Mr. Sloma would receive when he retired again, later in 2015. DRS told Mr. Sloma, in telephone conversations, that his Thurston

County salary would be used in the calculation of his new retirement benefit. He was told the new benefit would be \$6,110.00 per month.

Then, DRS contacted him and told him that instead, his retirement benefit would only be \$3,895.68 per month. DRS told Mr. Sloma he had given up his right to use the higher County salary in 2004, because, when he first retired, he had elected to receive a contribution refund of \$902.60. Mr. Sloma had no idea the 2004 election could affect future PERS benefit calculations. Due to the \$2,214.00 monthly pension benefit reduction, Mr. Sloma and his wife were forced to cancel the purchase of the house they had planned to buy, after years of looking. Mr. Sloma's re-retirement from three and one-half years of PERS covered work did not change his retirement benefit.

Mr. Sloma was angry and disappointed, because he had been assured, in writing, before he rejoined PERS in 2012, that his Thurston County salary would be included in the calculation of his AFC, when he re-retired. Mr. Sloma began this case to compel DRS to live up to its word and provide him with the pension he was promised.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Affirming the DRS Order.
2. The trial court erred in determining the DRS Order did not violate RCW 34.05.570(3).
3. The trial court erred in not finding the DRS Order violated Mr. Sloma's constitutionally protected pension rights on its face or as applied, pursuant to RCW 34.05.570(3)(a).
4. The DRS Order erroneously interpreted or applied the law, as described in RCW 34.05.570(3)(d).
5. The DRS Order was not supported by evidence that is substantial, when viewed in the light of the entire record before the court, as described in RCW 34.05.570(3)(e).
6. The DRS Order was not consistent with DRS rules and applicable statutes, as described in RCW 34.05.570(3)(i).
7. The DRS Order was arbitrary and capricious, as described in RCW 34.05.570(3)(i).

8. The DRS Order and the trial court erroneously failed to find DRS was estopped to deny Mr. Sloma the recalculation of his AFC, as required by RCW 34.05.570(3)(d).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

RCW 41.40.023 and RCW 41.40.037(3) allow a PERS 1 retiree, who is reemployed in an eligible position, to elect to return to PERS membership and authorizes recalculation of the former retiree's retirement allowance, using the salary of the new position to which the member returned. Does RCW 41.40.191 make these provisions inoperative? (Assignments of Error 1, 2 and 3).

WAC 415-108-710(6) governs a PERS retiree's return to PERS membership and authorizes recalculation of the former retiree's retirement allowance using the salary of the position to which the member returned. Does RCW 41.40.191 make this provision inoperative? (Assignments of Error 1, 4 and 6).

Doubt in construing pension legislation must be resolved in favor of the retirement system member. Did DRS apply that rule in this case? (Assignments of Error 1, 4 and 6).

Does applying RCW 41.40.191, as urged by DRS, impair the constitutionally protected pension rights of Mr. Sloma. (Assignments of Error 1, 2 and 3).

Where an authorized representative of DRS assured Mr. Sloma that he could re-retire using his Thurston County salary as a basis, is DRS estopped to deny Mr. Sloma the recalculation he was assured would occur? (Assignments of Error 1, 5 and 8).

III. STATEMENT OF THE CASE

Mr. Sloma was a Plan 1 PERS member.¹ (Certified Agency Record (CAR), Finding 11, p. 0004). On January 15, 2004, Mr. Sloma completed a form irrevocably electing to utilize RCW 41.40.191 to receive a refund, when he retired, of the contributions he had made to PERS after attaining 30 years of service. (CAR, Finding 14, pgs. 0004-0005). DRS enrolled Mr. Sloma in the post-30-year program, effective February 1, 2004. (CAR, Finding 16, p. 0005). He retired one month later and received a refund of \$920.60. (CAR, Finding 17, p. 0005).

¹ Plan 1 is limited to those who became PERS members prior to October, 1977. RCW 41.40.010(27).

Eight years later, in 2012, Mr. Sloma considered becoming employed in a PERS covered position with Thurston County. (CAR, Finding 23, p. 0006). Mr. Sloma thought returning to PERS membership would allow him to use his higher county salary as a basis for pension benefits, when he re-retired.² (CAR, Finding 29, pgs. 0007-0008). Before completing the forms necessary to rejoin PERS, Mr. Sloma contacted Ms. Johnson of DRS. (CAR, Finding 32, p. 0008). She assured him, in writing, that he could return to service and his new compensation would be used in calculating his AFC for re-retirement. (CAR, Finding 32, pgs. 0008-0009). Minutes after receiving Ms. Johnson's advice, Mr. Sloma rejoined PERS membership (CAR, Finding 34, p. 0009).

In late June or early July of 2015, DRS again advised Mr. Sloma that DRS would include his County salary, when calculating his re-retirement benefits (CAR, Finding 38, pgs. 0009-0010).

In late July 2015, DRS informed Mr. Sloma it would not use his County salary to recalculate his pension benefits

² His other option was to remain in retired status and receive benefits for five months of each year until re-retirement. RCW 41.40.037(3).

(CAR, Findings 39 -41, p. 0010). Mr. Sloma retained counsel and asked DRS to reconsider. (CAR, Finding 42, p. 0011). DRS reiterated its earlier decision (CAR, Finding 42, p. 0011).

Mr. Sloma then requested a hearing, before DRS, asking his benefits be increased by using the higher County AFC. (CAR, p. 0001). After considering motions and filings by the parties, the Presiding Officer granted DRS' Motion for Summary Judgment, by entering a Decision and Order on Motion for Summary Judgment (Order). (CAR, p. 0020).

Mr. Sloma petitioned the Thurston County Superior Court to review the DRS Order. (CP 1-24). The matter was briefed and argued and the Superior Court affirmed the DRS decision. (CP 111-112). Mr. Sloma timely appealed that decision to this Court. (CP 113-116).

IV. SUMMARY OF ARGUMENT

RCW 41.40.191 allows a PERS 1 member to make an election after 30 years of service, to retire and receive a refund of the contributions he or she has made, plus seven and one-half percent interest.³ If the election is made, retirement benefits are

³ Years of service after 30 are not used in the calculation of benefits because benefits cannot exceed 60 percent. RCW 41.40.185(3).

calculated upon the AFC the member had at the time of obtaining 30 years of service credit. We believe an election, pursuant to that statute, is irrevocable until the member retires.

After the member retires, if the member rejoins PERS, RCW 41.40.023, RCW 41.40.037(3), and WAC 415-108-710(6) authorize re-retirement based an AFC calculated upon the salary of the position held just before re-retirement.

Construing the statutes to deny Mr. Sloma the recalculation violates the requirement that doubt is to be resolved in favor of the member of the retirement system. Bowen v. Statewide City Employees Retirement System, 72 Wn.2d 397, 433 P.2d 150 (1967).

Construing the statutes, as DRS has, violates the Contract Doctrine established by Bakenhus v. City of Seattle, 48 Wn.2d 695, 296 P.2d 536 (1956) and its abundant progeny. There was no meeting of the minds to support waiver of Mr. Sloma's constitutional rights.

Equitable or promissory estoppel should prevent DRS from renegeing on the assurances it gave Mr. Sloma, before his

return to membership in PERS, that his pension, on re-retirement, would be calculated using his Thurston County salary.

V. ARGUMENT

A. Factual Background

With the exception of Finding 10 (CAR, p. 0003), which should be considered a Conclusion of Law, Mr. Sloma agrees with the Findings of Fact, contained in the Order.⁴ We will not repeat all the facts which can be reviewed in the Order, but will quote those which supply necessary context for this appeal.

11. Mr. Sloma became a member of PERS in 1973. As a member who joined the system before October 1, 1977, his membership continued in Plan 1, the original plan, after Plan 2 took effect. By the end of September 2003 he had earned 30 years of service credit in PERS. (CAR, p. 0004).

13. In January 2004 Mr. Sloma was planning to take his PERS [Public Employees Retirement System] retirement, being dissatisfied with the direction of state government and seeing little chance that continuing to work in PERS-covered employment would have any positive effect on his retirement benefit. He was aware of the post-30-year program. He reviewed the January 2002 version of the *PERS Plan 1 Member Handbook* published by DRS, which stated, in response to

⁴ The factual findings, except Finding 10, are verities on appeal. Fuller v. Employment Security Department, 52 Wn.App. 603, 762 P.2d 367 (1988).

the question, 'Can I obtain a refund of contributions paid after 30 years of service?'

. . . If you participate in the [post-30-year] program, your monthly retirement benefits will be based on earnings made prior to the date DRS received notice of your election to participate. Election to participate is irrevocable and must be made within six months after earning 30 service credit years. . . (CAR, p. 0004).

14. On January 15, 2004, Mr. Sloma completed and signed a form, *Notice of Election for Post 30-Year Program*, and submitted the form to the Department.

The first line of text in this form stated,

This is an IRREVOCABLE ELECTION.
Once you have submitted this election to DRS, you cannot reverse your decision.

(Emphasis in capitals in original.)

In Section 2, the Election Statement and Signature, just above the member's signature line, the form text specified,

I hereby elect to have my retirement contributions after 30 years of service posted to a separate account that is refundable at my retirement. I understand that contributions will be posted to the refundable account beginning the month after I submit this election form and I have accumulated at least 30 years of service credit *Furthermore, I understand that my Average Final Compensation (AFC) will be based on earnings prior to DRS*

receiving this election. (The AFC is used in the retirement benefit calculation to determine the amount of your monthly retirement benefit.)

(Italic emphasis added.) (CAR, pgs. 0004-0005).

15. In early 2004 Mr. Sloma was extremely busy managing the transition to a new director at the Department of Health and his own transition to part-time post-retirement employment. He paid only cursory attention to his choice to enroll in the post-30-year program, which was just one piece of paperwork among many. He saw the election as simply a way to obtain a refund of a few months' PERS employee contributions. He does not recall discussing any other effect of the post-30-year election with anyone or receiving any advice that his choice could affect his benefit after future re-employment. He noticed the 'irrevocable election' language, but since he was planning to retire in the immediate future, he thought it only might bar him from buying back service credit or salary for the months between his 30-year-service anniversary and his retirement (in the past he had withdrawn PERS contributions, then later restored (bought back) the lost service credit by restoring the withdrawn contributions). (CAR, p. 0005).

16. The Department enrolled Mr. Sloma in the PERS post-30-year program effective February 1, 2004. The PERS employee contributions withheld from his pay were then posted to a post-30-year account for later refund. (CAR, p. 0005).

17. Mr. Sloma retired from the Department of Health effective March 1, 2004, at 54 years of age. The Department calculated his PERS AFC

at \$6,492.80 monthly, yielding a gross monthly retirement benefit of \$3,895.68, and began paying his retirement benefit in that amount. The Department refunded to him the PERS employee contributions he made after his choice of the post-30-year program became effective, in a lump sum totaling \$920.60. (CAR, p. 0005).

19. Thurston County (the County) is a PERS employer. The County is governed by a three-member board of commissioners. The commissioners also serve as the County's Board of Health (the Board), which oversees the County's Public Health and Social Services Department (PHSS) and appoints its director. (CAR, p. 0006).

24. In thinking about whether to apply for the PHSS director position with the County in late 2011 and early 2012, Mr. Sloma considered how taking a full-time PERS-covered position might affect his PERS retirement benefit and his Social Security benefits. In his years working for the legislature, he had observed legislators who were PERS members take higher-paid positions late in their careers where the increased salary factor would increase their resulting retirement benefits, a strategy he refers to as 're-basing' their benefits. He thought that the County PHSS director position might also offer an opportunity for him to "re-base" his benefit, which at the end of 2011 was the same as it had been when he retired in 2004. (CAR, pgs. 0006-0007).

26. The County re-published its recruitment announcement for the PHSS director, and Mr. Sloma applied for the position on January 30, 2012, shortly after receiving his PERS-record

message from Ms. Johnson. Though not the only consideration, the ability to re-base his PERS retirement benefit was a motivating factor in his decision to apply. He was 'fairly sure' at that point that he would be able to re-base his PERS retirement benefit, from his contacts with DRS, his observations of individuals who had re-based their benefits while he was working for or with legislative bodies, and from conversations with his wife, whose opinion he regarded highly because of her lengthy service as a state employee with experience in employee compensation and benefits. (CAR, p. 0007).

28. Mr. Sloma and the County did not extensively negotiate concerning salary and benefits. The County offered a salary that would 'make it worth his while', at a level nearly identical to what he had been earning part-time with CHEF. The benefits offered were mostly those that were standard for County employees, including participation in PERS. (CAR, p. 0007).

29. In deciding whether to accept the County's offer, Mr. Sloma considered again how taking the PHSS director's position would affect his PERS retirement. He saw this as a significant financial decision. He made County personnel department staff aware of his concerns and inquired how his PERS retirement benefit would be affected if he were to accept the position. County personnel staff responded with general information, but referred him to DRS for specific questions about PERS.

From conversations with County personnel staff, earlier contacts with DRS, and the 1012 DRS publication *Thinking About Working After Retirement?*, he understood that if he accepted

employment with the County he could either continue to receive his retirement benefit for five months of each year, or he could re-enter active PERS membership and retire again from PERS in the future. He viewed the later as the better choice when he considered that it would allow him to re-base his pension (have his new PERS retirement benefit increased, using the considerably higher salary he would earn working for the County when he retired again). (CAR, pgs. 0007-0008).

30. After meetings with the commissioners and PHSS staff to ascertain that he would have the support he needed for the changes he intended to implement, Mr. Sloma accepted the offered position.

* * *

Mr. Sloma began work for the County on May 1, 2012. (CAR, p. 0008).

31. Mr. Sloma accepted the PHSS director position believing that the higher salary in his new employment with the County would enable him to re-base his PERS retirement benefit when he later retired again. Shortly after he began work with the County he needed to make decisions in order to complete forms required for his new position, and he again contacted the Department. (CAR, p. 0008).

32. On May 2 Mr. Sloma spoke with Ms. Johnson by telephone, and on May 3 and 4 they exchanged emails. Mr. Sloma sought written confirmation from DRS that he would be able to re-base his pension if he took the PHSS director position with the County and re-entered active PERS membership. Ms. Johnson wrote that her research, and consultation with her team leader

and other experienced retirement analysts, had produced answers to two of his concerns. First, he would have to work a minimum of 24 months in a new PERS-covered position in order to change the payment (survivor) option for a future retirement benefit. Second, 'any compensation you earn after returning to membership will be reviewed when determining your 24- month AFC at time of retirement'. Ms. Johnson included in her message text quoted from two DRS publications, a Department rule, WAC 415-108- 710, and a statute, RCW 41.40.037.

Mr. Sloma responded with a query attempting to clarify further that there was no minimum amount of time he needed to work in his new job to have his new earnings included in any new AFC. Ms. Johnson reiterated in her response message,

Summary; after returning to active membership it doesn't matter how long you work and then re-retire to have the new compensation and service credits counted towards re-calculating your new AFC for re-retirement. But if you decide that you want a different retirement option when you re-retire you have to work at least 24 months before you re-retire.

Mr. Sloma appreciated Ms. Johnson's efforts, feeling she had taken an interest in his situation and made an effort to get clear answers for him. (CAR, pgs. 0008-0009).

33. In their 2012 interactions, neither Mr. Sloma nor Ms. Johnson considered or discussed the post-30-year election he made in 2004. Mr. Sloma had forgotten about it, and it never occurred to him that it might be relevant to his

post-retirement employment. Ms. Johnson was not aware that he had made the election, having never opened a 'screen' in his electronic member file where his election was recorded. She did not recall ever having been made aware that a Plan 1 post-30-year election could affect a PERS retiree's return to PERS-covered employment. (CAR, p. 0009).

34. On May 4, 2012, within an hour of acknowledging Ms. Johnson's last message, Mr. Sloma e-mailed DRS, advising that he was employed with a PERS employer, was in a PERS retirement-eligible position, and wanted to start contributing to his PERS Plan 1 retirement again. (CAR, p. 0009).

35. DRS instructed the County to begin reporting Mr. Sloma to DRS as an active PERS member, as of May 1, 2012. Mr. Sloma resumed contributing six percent of his pay to PERS. (CAR, p. 0009).

36. Shortly after he began working for the County Mr. Sloma was able to arrange to stop receipt of his Social Security benefits, repay some already received, and start making employee contributions to Social Security through his County employment to eventually qualify for a higher monthly Social Security benefit. (CAR, p. 0009).

38. While Mr. Sloma was working for the County he and his wife were actively seeking to purchase a waterfront home, working for a lengthy time with a real estate agent in Tacoma. In approximately June of 2015 they located a property that they could purchase on favorable terms. Mr. Sloma and his wife carefully reviewed their finances, including his anticipated post-retirement income,

and applied for a mortgage to purchase this long-sought property. Because of this major pending purchase commitment, Mr. Sloma again sought assurance from DRS that his PERS benefit would be re-based using his County salary. He understood from telephone conversations in late June or early July 2015 with Department representative Mark Muller that the Department would count his County salary in its calculation of his new retirement benefit, estimated at \$6,110 per month. (CAR, pgs. 0009-0010).

39. On or about July 9, 2015, Mr. Sloma requested a written estimate of his PERS benefit if he retired from his position with Thurston County in October 2015. Department staff preparing Mr. Sloma's requested benefit estimate became aware of his 2004 enrollment in the PERS Plan 1 post-30-year program. The resulting estimate of his new retirement benefit did not include his County salary in the AFC factor. Instead, that factor reverted to the AFC that had been used for his 2004 retirement benefit. (CAR, p. 0010).

40. On July 10, 2015, DRS Plan Administrator Seth Miller called Mr. Sloma to discuss the July 9 benefit estimate and his retirement options.

Mr. Sloma was extremely angry that his PERS retirement benefit would not reflect his County salary. Without the expected \$2,214 monthly increase to his expected retirement benefit, he and his wife felt forced to cancel the purchase of the house they had planned to buy after years of looking. (CAR, p. 0010).

41. In a follow-up letter to Mr. Sloma of July 13,

2015, Mr. Miller confirmed that DRS would not include his County salary in its calculation of AFC for his PERS retirement benefit when he retired again. The letter reviewed Mr. Sloma's enrollment in the post-30-year program and 2004 retirement benefit calculation, his 'numerous phone conversations' with DRS representatives in early May 2012, and his May 4, 2012 decision to re-enter PERS membership. Mr. Miller pointed out the text from WAC 415-108-710 that had been included in Ms. Johnson's May 3, 2012 e-mail message, and that DRS had never provided Mr. Sloma with an estimate of what his PERS retirement benefit would be based on projected future salary if he returned to membership. Mr. Miller related that when Retirement Specialist Team Leader Mark Muller began to prepare an official benefit estimate on July 9, 2015, Mr. Sloma's 2004 post-30-year program enrollment "was brought to his [Mr. Muller's] attention", so the benefit estimate showed only a small increase over his original PERS Plan 1 benefit, due solely to a projected cashout of unused leave. Mr. Miller advised,

DRS does not have the authority to provide you with a benefit that is greater than the statutes allow. With your selection to enter the Post 30-year program in January 2004 DRS is required to calculate your AFC only with earnings prior to this selection (excluding cash outs).

In the body of the letter Mr. Miller recounted two options he had offered Mr. Sloma in the July 10 telephone call. The first option would be to proceed with his planned retirement, using the value of cashed out leave in his AFC to increase the retirement benefit from \$3,895.68 per month to \$4,050.88 per month. The Department would pay

him the amount of his 2012-2015 PERS employee contributions plus statutory interest, approximately \$26,000, either a cash payment in a lump sum 'or rolled over'.

The second option would be for Mr. Sloma to undo his return to PERS membership during his employment with the County. The Department would still pay him the amount of his 2012-2015 PERS employee contributions plus interest, approximately \$26,000. It would also pay him a lump sum equivalent of five months per year of his original PERS Plan 1 retirement benefit, approximately \$77,913. (CAR, pgs. 0010-0011).

42. Mr. Sloma retained counsel and requested that DRS review its actions in his case. By letter of October 9, 2015, Mr. Miller advised Mr. Sloma that the Department could not continue to offer the first option outlined in his letter of July 13, 2015, citing advice from tax counsel. Mr. Miller further advised that the department would implement the second option in his earlier letter, that is, refunding Mr. Sloma's PERS employee contributions with interest and paying him the lump sum equivalent of five months per year of his original PERS Plan 1 retirement benefit. Acknowledging Mr. Sloma's concern about potential tax liability if he received a lump sum distribution in 2015, Mr. Miller offered to work with him to have the distribution allocated to 2016. (CAR, p. 0011).

43. Mr. Sloma retired from his position with the County effective October 31, 2015. He has not chosen either of the options offered in Mr. Miller's letter of July 13, 2015, and has not received any payments from the Department other than his

PERS retirement benefit. That benefit does not include any value for the unused leave he was paid by the County when he retired.

* * *

(CAR, p. 0011).

B. Legal Basis For Reversal Of DRS Order

Since this Court sits in the same position as the Superior Court, in reviewing actions under the Administrative Procedure Act, no deference is given to the Superior Court's decision. Darkenwald v. Employment Security Department, 183 Wn.2d 237, 350 P.3d 647 (2015); Timberline Mobile Home Park v. Washington State Human Rights Com'n, 122 Wn.App. 896, 95 P.3d 1288 (2004).

The basis for reversing the Order is contained in the Administrative Procedure Act at RCW 34.05.570(3), because:

(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. RCW 34.05.570(3)(a);

(b) DRS has erroneously interpreted or applied the law. RCW 34.05.570(3)(d);

(c) The DRS Order is not supported by evidence that is substantial when viewed in light of the entire record before the Court. RCW 34.05.070(3)(e);

(d) The DRS Order is inconsistent with DRS rules and especially WAC 415-108-710(6) and RCW 34.05.570(3)(i);

(e) The DRS Order is arbitrary and capricious. RCW 34.05.570(3)(i);

(f) DRS was estopped to deny Mr. Sloma the recalculation of his average final compensation. RCW 34.05.570(3)(d).

Mr. Sloma requests the Court to reverse the decision appealed from and direct the Department of Retirement Systems to recalculate his PERS Plan 1 retirement benefit, with a AFC reflecting the higher salary he earned over more than three years after his return to PERS-covered employment.

C. PERS Statutes Support Mr. Sloma

This case requires harmonizing several confusing statutes governing PERS. If statutes appear to be in conflict, courts attempt to harmonize their respective provisions. City of Pasco v.

(2002).

RCW 41.40.191 provides as follows:

A member may make the irrevocable election under this section no later than six months after attaining thirty years of service. The election shall become effective at the beginning of the calendar month following department receipt of employee notification.

(1) The sum of member contributions made for periods of service after the effective date of the election plus seven and one-half percent interest shall be paid to the member at retirement without a reduction in the member's monthly retirement benefit as determined under RCW 41.40.185.

(2) Upon retirement, the member's benefit shall be calculated using only the compensation earnable credited prior to the effective date of the member's election. Calculation of the member's average final compensation shall include eligible cash outs of sick and annual leave based on the member's salary and leave accumulations at the time of retirement, except that the amount of a member's average final compensation cannot be higher than if the member had not taken advantage of the election offered under this section.

(3) Members who have already earned thirty years of service credit prior to July 25, 1999, may participate in the election by notifying the department in writing of their intention by December 31, 1999.

The department shall continue to collect employer contributions as required in RCW 41.45.060.

(Emphasis supplied)

It is clear that RCW 41.40.191 governs retirement for the first time, after one has accumulated 30 years of service.⁵ In other words, once you make the election, it is irrevocable until you retire. There is no mention of or suggestion of any effect beyond that. RCW 41.40.191 says nothing about what happens if you retire and then rejoin membership and subsequently re-retire. That situation is governed by other statutes.

RCW 41.40.023 provides, in relevant part, as follows:

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

(12) Retirement system retirees: PROVIDED, That following reemployment in an eligible position, a retiree may elect to prospectively become a member of the retirement system if otherwise eligible;

(Emphasis in original)

⁵ RCW 41.40.180(2) provides as follows:

(2) Any member who has completed thirty years of service may retire on written application to the director setting forth at what time the member desires to be retired, subject to war measures.

Mr. Sloma rendered three and one-half years of service, so his retirement formula and survivor options could change. (CAR, Finding 30, p. 0008; CAR, Finding 43, p. 0011, footnote 20).

RCW 41.40.037(3) provides as follows:

If the retiree opts to reestablish membership under RCW 41.40.023(12), he or she terminates his or her retirement status and becomes a member. Retirement benefits shall not accrue during the period of membership and the individual shall make contributions and receive membership credit. Such a member shall have the right to again retire if eligible in accordance with RCW 41.40.180. However, if the right to retire is exercised to become effective before the member has rendered two uninterrupted years of service, the retirement formula and survivor options the member had at the time of the member's previous retirement shall be reinstated.

(Emphasis supplied)⁶

RCW 41.40.010(6)(a) provides as follows:

'Average final compensation' for plan 1 members, means the annual average of the greatest compensation earnable by a member during any consecutive two year period of service credit months for which service credit is allowed; or if the member has less than two years of service credit months then the annual average compensation earnable during the total years of service for which service credit is allowed.

⁶ DRS urges you to read this statute as if it began: "Except as provided in RCW 41.40.191."

When Mr. Sloma became employed with Thurston County, he elected to exercise his rights under RCW 41.40.023 and RCW 41.40.037(3). Mr. Sloma filled out the form used by DRS to reenroll retired members in PERS. That form has no area where one is asked to or can alert DRS that they had once chosen the post 30-year program. (CAR, Exhibit 12, p. 0165).

Mr. Sloma became a PERS member and employer and employee contributions were made on his behalf, during his employment with Thurston County. Since the employer and Mr. Sloma made contributions, based upon a percentage of his new salary with Thurston County, his re-retirement at a higher rate of pay is consistent with that of every other retiree who elects to return to PERS membership, pursuant to RCW 41.40.023(12). In short, DRS suffers no harm if Mr. Sloma is allowed to rebase his ultimate re-retirement, and Mr. Sloma is greatly harmed if he is not allowed to do so.

Ms. Johnson advised Mr. Sloma of another "irrevocable" decision that can be changed after returning to PERS employment and re-retiring. Her email to Mr. Sloma and to a representative of Thurston County said, in relevant part:

When a member retires they have to choose one of the four retirement options and this decision is an irrevocable decision. (Option #1 No Survivor, Option #2 Joint and 100% Survivor, Option #3 Joint and 50% Survivor or Option #4 Joint and 66.67% Survivor). The exception to this irrevocable decision is, 'if you go back to work and complete two or more years as a contributing member, you can retire again and select a new benefit option and/or survivor.' (Emphasis supplied). (CAR, Exhibit 7, p. 0153).

D. PERS Administrative Code Provision Supports Mr. Sloma

Mr. Sloma's re-retirement, at the higher rate, is also required by WAC 415-108-710(6), which provides as follows:

Can I return to PERS membership?

(a) If you are a PERS retiree, you have the option to return to membership if you are employed by a PERS employer and meet eligibility criteria. The option to return to membership is prospective from the first day of the month following the month in which you request to return to membership. See RCW 41.40.023(12).

(b) If you reenter PERS membership and later choose to retire again, DRS will recalculate your retirement allowance under the applicable statutes and regulations. You will be subject to the return to work rules in place at the time of your reretirement. If you are a PERS Plan 1 member you will also be entitled to a new nineteen hundred hour cumulative hour limit. You will be subject to the return to work rules, including the nineteen hundred hour lifetime limit described in subsection (3) of this section, in place at the time of your retirement.

(c) If you are a retiree from another retirement system that DRS administers, you may choose to enter PERS membership if you are eligible. The option to enter membership is prospective from the first day of the month following the month in which you request membership. See RCW 41.40.270 and 41.40.023. (Emphasis supplied).

E. No DRS Rules Or Publications Are Inconsistent With Mr. Sloma's Position

If DRS' interpretation of RCW 41.40.191 is correct, one would think that its administrative rules would mention either the statute or 30-year election. However, a search of the Washington Administrative Code reveals no such mention. A search of the DRS website reveals an explanation of the 30-year election itself, but nothing at all is said in that explanation about reemployment after retirement or about AFC at re-retirement.

There is no reason to suppose, from regulations or other published materials of DRS, that the election in RCW 41.40.191 would somehow apply to one's reemployment and ultimate re-retirement.

The most reasonable interpretation is that RCW 41.40.191 only affects a member's first retirement. Any ambiguity must be resolved in favor of the member of the system, pursuant to established case law.

F. Pension Statutes Are Liberally Construed In Favor Of System Members

In cases involving pensions, doubt should be resolved in favor of the party for whose benefit the pension statute was enacted. Bowen, supra. Clearly, the retirement system was enacted for Mr. Sloma and others covered by the Act and must be interpreted in their favor.

In Morrison v. Department of Retirement Systems, 67 Wn.App. 419, 427, 835 P.2d 1044 (1992), the court found that:

. . . any ambiguities in the standard by which to determine disability should be construed in Morrison's favor given the remedial nature of pension statutes, which Washington Courts liberally construe in favor of the intended beneficiary." Morrison at 427.

In Hanson v. City of Seattle, 80 Wn.2d 242, 493 P.2d 775 (1972), the court said:

The law is well established that pension legislation must be liberally construed most strongly in favor of the beneficiaries. *Benedict v. Board of Police Pension Fund Comm'rs*, 35 Wash.2d 465, 214 P.2d 171 (1950); *Cottam v. Los Angeles*, 184 Cal.App.2d 523, 7 Cal.Rptr. 734, 85 A.L.R.2d 238 (1960). It is further well established, that pension statutes are to be construed as a whole and together with related acts with the view of promoting the objects and purposes of the lawmaking body, and their force and effect are not to be confined or restricted to the literal terms of the statute. Subsidiary provisions contained in pension acts must be construed consistently with the objects and purposes of the act. See 62 C.J.S.

*Municipal Corporations s 588(d), p. 1195 (1951); 70
C.J.S. Pensions s 2, p. 425 (1951).*

G. DRS Advice Supported Mr. Sloma

Ms. Sparkles⁷ worked for DRS. She underwent a year-long training program (six months of intensive training and a second six months of phone shadowing and various other trainings) to become a Retirement Specialist 2. (Sparkles Deposition, Exhibit 1, CAR, p. 0081, l. 23 through p. 0082, l. 10)

Ms. Sparkles did not recall having been told about the 30-year program in PERS. (Sparkles Deposition, Exhibit 1, CAR, p. 0082, l. 24 through p. 0083, l. 1) She does not recall whether the 30-year program was mentioned when she was trained about PERS. (Sparkles Deposition, Exhibit 1, CAR, p. 0085, lns. 19-22) She did not remember when she first heard of the program. (Sparkles Deposition, Exhibit 1, CAR, p. 0083, lns. 2-3) She did not recall whether she had heard of the program before or after May of 2012. (Sparkles Deposition, Exhibit 1, CAR, p. 0083, lns. 4-5) She does not recall when she first became aware that there were people who had elected to participate in the 30-year program.

⁷ Formerly Johnson CAR, p. 0079, lns. 13-20.

(Sparkles Deposition, Exhibit 1, CAR, p. 0085, Ins. 11-14) Her only memory of speaking to Mr. Sloma in May of 2012 was from referencing her notes. (Sparkles Deposition, Exhibit 1, CAR, p. 0083, Ins. 6-7).

Before speaking with Mr. Sloma, she could not recall if any retiree had approached her about attempting to return to a covered position. (Sparkles Deposition, Exhibit 1, CAR, p. 0084, Ins. 7-10). She testified that she spoke to her supervisor at the time of Mr. Sloma's contact in May of 2012. (Sparkles Deposition, Exhibit 1, CAR, p. 0084, Ins. 18-21) She did not recall which supervisor she spoke to. (Sparkles Deposition, Exhibit 1, CAR, p. 0084, l. 21 through p. 0085, l. 3) She did not recall if she had spoken to more than one person or had spoken with any of her co-workers. (Sparkles Deposition, Exhibit 1, CAR, p. 0085, Ins. 7-10)

She testified:

A: I do educate retirees on what their options are and then it's up to them to make the final decision.

Q: Would you say that's a critical part of your job to give them the options and let them choose?

A: In my opinion, it's a large part of my job. (Sparkles Deposition, Exhibit 1, CAR, 0086, Ins. 13-17).

When asked about a retiree who returns to work in a covered position, she testified as follows:

Q: Okay. And if they return to membership, how long would you advise them they would have to work before they could have a new average final compensation?

A: It's -- they only have to work a month to have their AFC recalculated.

Q: How long would you advise them they would have to work before they could choose a new survivor option?

A: They would have to work a minimum of 24 months.

Q: And would those have been the -- what you just told me, those two things, have been the advice you would have given in 2012?

A: Based on my training and time with the Department back in 2012, I was not aware of those requirements and that's why I depended on my supervisors. (Sparkles Deposition, Exhibit 1, CAR, p. 0087, l. 23 through p. 0088, l. 11).

As we understand DRS' position, unless a retired member tells DRS employees that they think there might be a problem, DRS has no obligation to review information in the file. Of course, Mr. Sloma's inquiry was to confirm that there would be no

problem with rebasing his AFC, and he was assured there would not be a problem.

Ms. Sparkle's statements were not *ultra vires*.

Modern case law has given the concept of *ultra vires* a very limited scope. As the Supreme Court said in Haslund v. City of Seattle, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976):

Appellant argues its issuance of the building permit in violation of the city building code was an *ultra vires* act for which it may not be held liable. See 18 E. McQuillin, Municipal Corporations § 53.60 (3d ed. rev. Supp. 1975). An *ultra vires* act is one performed without any authority to act on the subject. Woodward v. Seattle, 140 Wash. 83, 87, 248 P. 73 (1926).

Here there is no plausible claim that the City did not have authority, through its building department, to issue building permits. Wendel v. Spokane County, 27 Wash. 121, 124, 67 P. 576 (1902), distinguished between those acts which are absolutely *ultra vires* because the subject matter is wholly beyond the scope of the municipal corporation's powers and those acts which might be considered in some sense *ultra vires*, as where the government entity has jurisdiction of the subject matter but in the execution of this authority acts in violation of a statute or the rights of others. The court held that '[i]n the first instance it is conceded by all authority that the corporation is not liable, and in the second, by almost universal modern authority, that it is; ...' Wendel v. Spokane County, supra at 124; accord, 18 E. McQuillin, Municipal Corporations § 53.60, at 285, § 53.61; Fordney v. King County, 9 Wn.2d 546, 554-56, 115 P.2d 667

(1941). Appellant failed to establish that its employees had no authority to act on the subject matter giving rise to this suit and, hence, the defense of ultra vires action is unavailable to it.

(Emphasis supplied)

There cannot be any doubt that DRS, in general, and Ms. Sparkle, in particular, had the authority to advise members and prospective members about their options under PERS.

DRS may argue that Mr. Sloma returned to employment and enjoyed the work, and, therefore, he has suffered no detriment. Imagine, if you went to work for an employer who told you that you would receive a bonus at the end of 24 months. When the 24 months had passed, the employer said: "Well, it appears you have enjoyed the job, we have decided not to pay you the bonus we promised." Everyone would agree that would be a detriment and illegal.

In Mr. Sloma's case, the DRS position will lead to the loss of approximately \$2,214.00 per month in PERS pension income, for the remainder of his life. (CAR, Finding 40, p. 0010, paragraph 4). If he should live to age 86, that would total over \$500,000.00.

In this case, the evidence clearly shows that Mr. Sloma invested three and one-half years of employment. (CAR, Finding 30, p. 0008; Finding 43, p. 0011). Mr. Sloma went to work for the County at a salary level nearly identical to what he had been earning part-time. (CAR, Finding 28, p. 0009). Mr. Sloma started contributing to the PERS 1 Retirement Plan. (CAR, Finding 34, p. 0009). He stopped receipt of his social security benefits and repaid some which had already been received. (CAR, Finding 37, p. 0009). While working for the County, he and his wife were seeking to purchase a waterfront home and found a property they could purchase on favorable terms. (CAR, Finding 38, pgs. 0009-0010). Reviewing their finances, including his anticipated post-retirement income, they applied for a mortgage to purchase the "long-sought property." (CAR, Finding 38, pgs. 0009-0010). When he was informed that his post-retirement benefit would not reflect his County salary, he and his wife felt forced to cancel the purchase of the house they planned to buy, after years of looking. (CAR, Finding 40, p. 0010). Mr. Sloma was not allowed to rebase his retirement benefits.

H. Denying Mr. Sloma A Recalculated AFC Is

Unconstitutional

1. Pension Benefits Are Constitutionally Protected Rights

Article 1, Section 3 of the Washington Constitution prohibits enacting any law impairing the obligations of contracts. United States Constitution Article 1, Section 10, contains a similar prohibition. The courts defer to the legislature when a private contract is impaired, but are more stringent in their review when a state action impairs a public contract. Washington Education Association v. Department of Retirement Systems, 181 Wn.2d 233, 242, 332 P.3d 439 (2014). The statutory interpretation urged by DRS is unconstitutional as applied to Mr. Sloma.

Bakenhus v. Seattle, *supra*, adopted a contract doctrine applicable to pensions. In Vallet v. City of Seattle, 77 Wn.2d 12, 20, 459 P.2d 407 (1969), the Supreme Court described that doctrine as follows:

The substance of our holdings is:

1. That employees who accept employment to which pension plans are applicable contract thereby for a substantial pension, and are entitled to receive the same when they have fulfilled the prescribed conditions.

2. That employees (prospective pensioners) will be presumed to have acquiesced in legislative modifications that do not unreasonably reduce or impair existing pension rights; or, stated positively, if the modifications are reasonable and equitable.

3. That an act of the legislature, making a change in pension rights, will be weighed against pre-existing rights in each individual case to determine whether it is reasonable and equitable. If the over-all result is reasonable and equitable, the employees (prospective pensioners) will be presumed to have acquiesced in the modifications; if the over-all result is not reasonable and equitable, there will be no such presumption.

4. Where the modifications in a pension plan are reasonable and equitable, they are considered under the foregoing cases to be constitutional. In such cases, a pensioner's rights will be determined by the latest act which can be constitutionally applied to him. Dailey v. Seattle, supra; Eisenbacher v. Tacoma, 53 Wash.2d 280, 333 P.2d 642 (1958); Letterman v. Tacoma, 53 Wash.2d 294, 333 P.2d 650 (1958). (Emphasis supplied).

In Tembruell v. Seattle, 64 Wn.2d 503, 506, 392 P.2d 453 (1964), the Supreme Court said:

Pension rights thus vesting from the inception become a property right and may not be divested except for reasons of the most compelling force.

The test to be applied to a statute is not its effect on all or most employees, but on the individual employee who has

challenged the statute. Dailey v. Seattle, 54 Wn.2d 733, 738-739, 344 P.2d 718 (1959), where the Court said:

That an act of the legislature, making a change in pension rights, will be weighed against pre-existing rights in each individual case to determine whether it is reasonable and equitable. If the over-all result is reasonable and equitable, the employees (prospective pensioners) will be presumed to have acquiesced in the modifications; if the over-all result is not reasonable and equitable, there will be no such presumption. (Emphasis supplied).

In Eagan v. Spellman, 90 Wn.2d 248, 581 P.2d 1038 (1978), the Supreme Court held that King County's attempt to change the mandatory retirement age from 70 to 65 was unconstitutional, as it affected Ms. Eagan, by reducing her average final compensation and providing no comparable new advantages to her. As support for its opinion, the Court cited with approval Donner v. New York City Employee's Retirement Sys., 33 N.Y. 2d 413, 353 N.Y.S. 2d 428, 308 N.E. 896 (1974).⁸

RCW 41.40.191 was enacted by Chapter 362, 1999 Washington Laws 1999 Reg. Sess. The portion relating to the PERS is Section 2.⁹

⁸ 90 Wn.2d 255. That case held that the right to rejoin a retirement system, if rehired, is a retirement benefit.

⁹ Section 3 provided that certain members who received state-funded long-term care services would not be eligible for a cost of living increase, if that cost of

If RCW 41.40.191 is limited to the confines of that statute, freezing AFC, as to a first retirement, with the ability to receive a refund of contributions plus seven and one-half percent interest, the refund would be a compensating advantage. However, if a disadvantage is that one can never re-retire from PERS membership, based on returning to service with a higher AFC, in the face of specific statutes that state that the member can do exactly that, then the disadvantage clearly outweighs the advantage. This is especially true as applied to Mr. Sloma, whose re-retirement benefits would be reduced by \$2,214.00 each month, for life. All in exchange for the \$920.60 that he received, at his first retirement, as a refund of contributions and interest.¹⁰

2. Mr. Sloma's Pension Rights Were Not Waived

If Mr. Sloma could waive his constitutional right to re-retire with a higher AFC, what test should be used to determine the validity of the waiver? In other contexts, the Supreme Court has held that waiver of constitutional rights will not be presumed, but must be made voluntarily, knowingly and intelligently. In re Matter

living increase would make them ineligible for state-funded long-term care services. This has no application to Mr. Sloma and it is not a compensating advantage.

¹⁰ If equity requires, Mr. Sloma is quite willing to repay DRS the \$920.60, plus interest, over the intervening years.

of James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). If we look at Mr. Sloma's signing of the 30-year election, from the contract point of view, then for a contract or contract modification to be valid, there must be a meeting of the minds. Sea-Van Inv. Assoc. v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). The parties have to agree to the essential terms of the contract. Westcoast Airlines, Inc. v. Miner's Aircraft and Engine Serv., Inc., 66 Wn.2d 513, 403 P.2d 833 (1965). In a situation such as presented here, where DRS is arguing the existence of a waiver, then the burden is upon DRS to prove each essential fact, including mutual intention. Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957).¹¹

Here, Mr. Sloma did not and could not have known that his election would affect his re-employment and re-retirement from the PERS system, several years later. We know precisely what Mr. Sloma thought at the time he signed the election.

In early 2004 Mr. Sloma was extremely busy managing the transition to a new director at the

¹¹ "The state's impairment of its own contracts is subject to more stringent review under the contract clause than impairment of contracts between private parties." Retired Public Employees Council of Washington v. Charles, 148 Wn.2d 602, 623-624, 62 P.3d 470 (2003).

Department of Health and his own transition to part-time post-retirement employment. He paid only cursory attention to his choice to enroll in the post-30-year program, which was just one piece of paperwork among many. He saw the election as simply a way to obtain a refund of a few months' PERS employee contributions. He does not recall discussing any other effect of the post-30-year election with anyone, or receiving any advice that his choice could affect his benefit after future re-employment. He noticed the 'irrevocable election' language, but since he was planning to retire in the immediate future, he thought it only might bar him from buying back service credit or salary for the months between his 30-year-service anniversary and his retirement (in the past he had withdrawn PERS contributions, then later restored (bought back) the lost service credit by restoring the withdrawn contributions). (CAR, Finding 15, p. 0005).

DRS argues that, since the 30-year program involves a choice or election, it is constitutionally valid. This is incorrect. In Vallet, supra, the Supreme Court noted:

We have previously held that a civil servant must be paid for his services the amount prescribed by law and that any agreement to accept a lesser sum is contrary to public policy and hence is void. Malcolm v. Yakima, Cy. Consol. School Dist. No. 90, 23 Wn.2d 80, 159 P.2d 394 (1945); Watkins v. Seattle, 2 Wn.2d 695, 99 P.2d 427(1940); Chatfield v. Seattle, 198 Wn.2d 179, 88 P.2d 582, 121 A.L.R. 1279 (1939), and cases cited therein at 186.

Vallet, supra, p.15.

The Supreme Court made that law equally

applicable to pension payments due pensioners, under the laws of this state. Vallet, supra, pgs. 15-16. Mr. Sloma could not constitutionally reject the right to return to PERS employment and rebase, unless what he received in exchange was “reasonable and equitable.” Vallet, supra, at p. 20-21.

The DRS interpretation would take away Mr. Sloma’s right to re-retire at an increased benefit level that can be worth hundreds of thousands of dollars to him. It is hardly reasonable and equitable to find Mr. Soma waived a constitutional right when he had no reason to think he had done so. The Department’s construction is unconstitutional as applied to Mr. Sloma.

Courts should avoid reaching a constitutional issue where they are able to decide a case on non-constitutional grounds. State v. Smith, 104 Wn.2d 497, 505, 707 P.2d 1306 (1985); Brunson v. Pierce County, 149 Wn.App. 855, 205 P.3d 963 (2009). We have offered a perfectly reasonable statutory interpretation which avoids unconstitutionality.

I. Estoppel Prevents Denying Mr. Sloma A Recalculated AFC

The Supreme Court has held that the State must not expect more favorable treatment than is fair between men, and that

“the state, in its dealings with individuals, should be held to ‘resolute good faith.’ ” State ex rel. Washington Pav. Co. v. Clausen, 90 Wash. 450, 452, 156 Pac. 554 (1916).

Estoppel has been applied against DRS. For example, in Hitchcock v. Washington State Department of Retirement Systems, 39 Wn.App. 67, 692 P.2d 834 (1984) Mr. Hitchcock challenged DRS’ determination that transportation and local expenses would not be included in his average final compensation.

The court overturned DRS, explaining:

The Department's authority to determine earnable compensation, however, could not impinge upon a contractual relationship with the employee which creates the expectation of deferred benefits. See Washington Fed’n of State Employees, Coun. 28 v. State, 101 Wn.2d 536, 541, 682 P.2d 869 (1984) (reviewing cases). Such a relationship may arise by estoppel. That doctrine is employed to prevent a manifest injustice where there has been an admission, statement, or act which has been relied upon to the employee's injury because of an inconsistent claim thereafter asserted. Beggs v. Pasco, 93 Wn.2d 682, 689, 611 P.2d 1252 (1980).

Here, the Department concluded estoppel did not apply because the doctrine cannot be used to require a result which is contrary to statute. It is true estoppel will not be applied to frustrate the

clear purpose of state laws. See Noel v. Cole, 98 Wn.2d 375, 378-79, 655 P.2d 245 (1982); Washington Educ. Assn'n v. Smith, 96 Wn.2d 601, 638 P.2d 77 (1981); State v. O'Connell, 83 Wn.2d 797, 523 P.2d 872 (1974); Marquardt v. Federal Old Line Ins. Co., 33 Wn. App. 685, 658 P.2d 20 (1983); Hasan v. Eastern Wash. Univ., 24 Wn. App. 829, 604 P.2d 191 (1979). But, including fringe benefits in earnable compensation is not clearly contrary to the retirement statute.

The Supreme Court has also held that “. . . a party's substantive ineligibility to receive a benefit is not a per se bar to establishing an 'injury' for equitable estoppel purposes, and we agree with this determination.” Kramarevcky v. Department of Social and Health Services, 122 Wn.2d 738, 863 P.2d 535 (1993).

The Supreme Court also remarked that:

In Washington, injury, prejudice and detrimental reliance have been used interchangeably to express the requirement that a party asserting equitable estoppel must show a detrimental change of position. State ex rel. Shannon v. Sponburgh, 66 Wn.2d 135, 143-44, 401 P.2d 635 (1965); Woodworth v. School Dist. 2, 92 Wash 456, 463, 159 Pac. 757 (1916); Butler v. Supreme Court of Indep. Order of Forresters, 53 Wash. 118, 124, 101 P. 481 (1909).

Kramarevcky, supra.

In West v. Social & Health Services, 21 Wn.App. 577, 579, 586 P.2d 516 (1978), the court held that:

Equitable estoppel may be applied against the State, even when it is acting in a governmental capacity, if necessary to prevent manifest injustice, and the exercise of governmental powers will not be impaired as a result. Shafer v. State, 83 Wn.2d 618, 521 P.2d 736 (1974); Conversions and Surveys, Inc. v. Department of Revenue, 11 Wn.App 127, 521 P.2d 1203 (1974).

The three elements of estoppel the court established were as follows:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted, [Ms. Johnson's statements and email]

(2) action by the other party on the faith of such admission, statement, or act, and [Mr. Sloma rejoining PERS]

(3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. [The loss of \$2,214.00 per month, for life] West v. Social & Health Services, Supra, at 579.

Promissory estoppel can be used affirmatively. The court in Chemical Bank v. WPPSS, 102 Wn.2d 874, 901, 691 P.2d 524 (1984), said:

First, American courts, including Washington's, recognize promissory estoppel. It is defined in Restatement (Second) of Contracts § 90(1) (1981):

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a

third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Unlike its British equivalent, however, the Restatement does not limit promissory estoppel to use as defense. Nor has Washington's case law done so. See Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 616 P.2d 644 (1980).

The Supreme Court also noted that Washington cases have intermingled promissory estoppel with equitable estoppel. Chemical Bank, supra, at 902 citing to State v. Northwest Magnesite Co., 28 Wn.2d 1, 182 P.2d 643 (1947).

In Potter v. Department of Retirement Systems, 100 Wn.App. 898, 999 P.2d 1280 (2000), the court assumed, that equitable estoppel was available. But, factually, DRS had not acted in a way inconsistent with its later position and the plaintiff had not shown how she had relied on a DRS statement to her detriment.

In this case, DRS made direct representations to Mr. Sloma and Mr. Sloma took actions based upon those representations. Mr. Sloma's reliance was reasonable, since he spoke to the person at DRS who was trained and assigned to answer the type of question he asked, and he requested and

received written confirmation of the information he had been given so that he would have a “leg to stand on”¹² if there was a challenge in the future.

In Shafer v. State, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). The Supreme Court allowed Ms. Shafer’s tort action against the State to proceed, even though she had not filed it within the statutory time period, because an Assistant Attorney General had represented to her that she need not file it within that period. The court so held even though Ms. Shafer had her own attorney. She informed her attorney what the Assistant Attorney General had told her, and her attorney apparently undertook no independent action to follow up, but relied on what the Assistant Attorney General had said. The court found that it would be a manifest injustice to allow the state to repudiate what the Assistant Attorney General had advised.

There cannot be any doubt that DRS, in general, and Ms. Sparkle (Johnson), in particular, had the authority to advise members and prospective members about their rights under the Public Employees’ Retirement System.

¹² Exhibit 7, CR 0148

In State Ex Rel Shannon v. Sponburgh, 66 Wn.2d

135, 144-145, 401 P.2d 635 (1965), the court said that:

The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, had made a commitment and the party to whom it was made has acted to his detriment on reliance in that commitment, the official should not be permitted to revoke that commitment.

J. Attorney's Fees And Costs

We ask this Court to award attorney's fees and costs, pursuant to RCW 4.84.010 and RAP 18.1.

IV. CONCLUSION

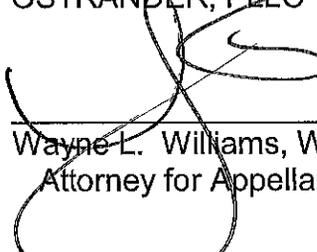
The most reasonable and only constitutional interpretation of RCW 41.40.191 is that the election, once made, is irrevocable until retirement. After retirement, a member's return to service is governed by RCW 41.40.023, RCW 41.40.037(3) and WAC 415-108-710(6). Mr. Sloma's retirement benefits must be based on his new AFC.

DRS represented to Mr. Sloma that he could rejoin PERS and rebase his AFC on his salary with Thurston County. Mr.

Sloma relied on that advice. DRS should be estopped to deny Mr. Sloma rebasing his AFC. The DRS Order must be reversed. Attorney's fees and costs should be awarded, pursuant to RCW 4.84.010

DATED this 3rd day of April, 2019.

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Attorney for Appellant

CERTIFICATE OF MAILING

I, Julie Hatcher, hereby certify, under penalty of perjury, that on this date, a true and correct copy of the foregoing Brief of Appellant was emailed, per our electronic service agreement, to the following:

Nam Nguyen
Assistant Attorney General
P.O. Box 40123
Olympia, Washington 98504-0123

DATED this 3rd day of April, 2019.



Julie Hatcher

WILLIAMS, WYCKOFF & OSTRANDER, PLLC

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