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Division II
State of Washington
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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 REPLY BRIEF

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The Department of Retirement Systems' (DRS) Findings of Fact, which are verities on appeal, paint a very different picture than that which appears in the DRS Brief. 1

THERE IS NO 30-YEAR "PROGRAM"

DRS describes the election to receive a partial refund of contributions made on Mr. Sloma's behalf, as a "program." "Program" implies something larger than what is basically a request for a refund.

Mr. Sloma received a refund of the contributions he made after accruing 30 years of service and before he first retired. DRS, in turn, had a windfall by retaining the employer's contributions made on Mr. Sloma's behalf. RCW 41.40.191(3).

Mr. Sloma did not choose to waive his right to "rebase" his pension. Mr. Sloma only requested a refund of his contributions. He did not and could not have known that the request would affect his ability to accrue future benefits. DRS found:

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service credit or salary for the months between his 30-year-service anniversary and his retirement (in the past he had withdrawn PERS contributions, then later restored (bought back) the lost service credit by restoring the withdrawn contributions). (CAR¹, Finding 15, p. 0005).

Mr. Sloma is not, as DRS argues, attempting to revoke his irrevocable election. Rather, he is attempting to enforce that election as he understood it, at the time he made it.

INCREASING HIS AFC WAS CRUCIAL TO MR. SLOMA’S
DECISION TO ACCEPT THE THURSTON COUNTY JOB

Before applying for the Thurston County position, Mr. Sloma thought the County position might offer him an opportunity to “rebase” his PERS pension benefit. (CAR, Finding 24, p. 0006).

In late 2011 and early 2012, DRS sent Mr. Sloma a verification of the amount of his monthly PERS retirement benefit and his PERS record. (CAR, Finding 25, p. 0007). Neither communication mentioned anything about the application of RCW 41.40.191.

¹ Certified Appeal Record

When Mr. Sloma applied for the Thurston County position, he was fairly sure he would be able to rebase his PERS retirement, and that was a motivating factor in his decision to apply. (CAR, Finding 26, p. 0006). In deciding whether to accept the County's job offer, Mr. Sloma made the County aware of his concerns and asked how accepting the position would affect his PERS benefits. (CAR, Finding 24, p. 0006). Based upon "earlier contacts with DRS and the 2012 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 reenter active PERS membership and retire from PERS in the future. He saw rejoining PERS as the better choice, when he considered that it would allow him to rebase his pension. (CAR, Finding 29, pp. 0007-0008).

At that time, he accepted employment, he believed that the higher salary of his new employment with the County would enable him to rebase his PERS retirement benefit when he later retired again. (CAR, Finding 31, p. 0008).

Mr. Sloma sought written confirmation from DRS that he would be able to rebase his pension, if he took the Thurston County job and reentered active PERS membership. (CAR, Finding 32, pp. 0008-0009). Both he and the County representative received the requested confirmation. (CAR, Finding 32, p. 0008-0009).

Had the advice been different, Mr. Sloma could have stopped work or renegotiated his Thurston County salary to compensate him for the fact that he would not be able to increase his AFC on re-retirement.

“ADMINISTRATIVE CONSTRUCTION” IS NOT
ENTITLED TO WEIGHT

DRS argues the Court should give great weight to its construction of RCW 41.40.191. However, there is no rule, regulation, publication or document which suggests that DRS has ever construed RCW 41.40.191, outside the context of this specific case. In fact, everything DRS did or said prior to telling Mr. Sloma his AFC would not be rebased was consistent with Mr. Sloma’s position.

There is no place on the form Mr. Sloma filled out, to rejoin PERS membership, which asks whether he had made the

election or draws his attention to a construction different than his own.

Ms. Sparkles informed Mr. Sloma that she had conducted research, consulted with her team leader and other experienced retirement analysts, before answering his concerns. (CAR, Finding 32, pp. 0008-0009). Obviously, none of those people considered RCW 41.40.191 would affect a return to PERS membership. There was no administrative construction.

DRS MADE INCONSISTENT REPRESENTATIONS

Mr. Sloma was given written assurance that his Thurston County earnings would be included in his Average Final Compensation (AFC). He asked a precise question and he was given a precise answer. (CAR, Decision and Order, Finding 32, p. 0008). Ms. Sparkles had the authority to make the representation, especially after she had consulted with her co-workers and her supervisor. To think otherwise defies logic.

MR. SLOMA'S CONSTITUTIONALLY PROTECTED CONTRACT RIGHTS

In the section of the brief dealing with equitable estoppel, DRS asserts that Mr. Sloma has “. . . has no complaint

based on breach of contract.” (Brief of Respondent, p. 31).

However, this overlooks the fundamental principle that public employee pension rights are contractual in nature. Bakenhus v. Seattle, 48 Wn.2d 695, 698, 296 P.2d 536 (1956); Washington Federation of State Employees v. State, 98 Wn.2d 677, 683, 658 P.2d 634 (1983).

The Supreme Court said, in International Association of Fire Fighters, Local 1789, v. Spokane Airports, 146 Wn.2d 207, 218, 45 P.3d 186 (2002):

Thus we have consistently held that any alterations in pensions that reduce benefits prior to the natural expiration date of an employment relationship must be supplemented by a corresponding benefit for the duration of the agreement. *Bradford v. Data Processing Joint BD*, 106 Wn.2d 368, 372, 722 P.2d 95 (1986); *Bakenhus*, 48 Wn.2d 695, 698, 296 P.2d 536.

Mr. Sloma had a right to return to PERS membership and rebase his pension. That right cannot be taken away under the circumstances of this case.

ATTORNEY’S FEES SHOULD BE AWARDED

There is nothing in RCW 4.84.340 and 4.84.350 which suggests that an individual, who is not a qualified party within

the meaning of RCW 4.84.340(5), cannot avail him or herself of RCW 4.84.010. The legislature found in Chapter 403 Laws of 1995, Section 901, that:

The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

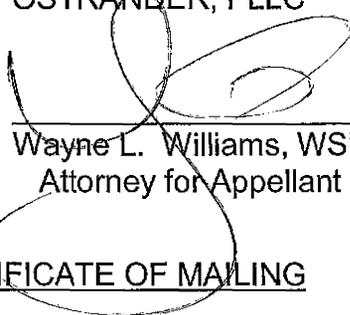
RCW 4.84.340 and 4.84.350 are not the sole basis for awarding costs. Creating special conditions governing “qualified persons” does not constitute repeal of the law governing unqualified persons. RCW 4.84.010.

CONCLUSION

The governing statutes, equity and the Constitution require the DRS Order to be reversed.

DATED this 10th day of May, 2019.

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CERTIFICATE OF MAILING

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

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DATED this 10th day of May, 2019.



Julie Hatcher

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