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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.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

Nam Nguyen, WSBA No. 47402
Assistant Attorney General
Revenue & Finance Division
OID No. 91027
P.O. Box 40123
Olympia, WA 98504
(360) 664-0870

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I. INTRODUCTION

Certain public retirement plans offer their members irrevocable options that require the members to make predictions about their career. Most of the time, members make the optimal decision, maximizing their future retirement benefits. After all, members themselves are in the best position to anticipate their career path, future earnings, and other factors affecting their retirement. There is, however, no guarantee that the members made the optimal decision.

One such irrevocable option is the Public Employees' Retirement System (PERS) Plan 1's Post-30 Year Program at issue in this appeal. The Program addresses a situation unique to PERS Plan 1. Retirement allowance for Plan 1 members is calculated by the following formula: (two percent) times (years of service credit) times (highest two years' average final compensation, or AFC). However, a PERS 1 member may earn only 30 years' worth of service credit. After reaching this cap on service credit, the member must nonetheless continue to pay employees' contributions into the PERS retirement fund.

Created in 1999 and codified under RCW 41.40.191, the Post-30 Year Program provides PERS Plan 1 members the option of having post-30-year service credit employee contributions refunded at retirement. In

return, their AFC (and corresponding retirement benefit) is calculated based on compensation received only during the first 30 years of service.

Appellant Donald Sloma enrolled into the Post-30 Year Program in 2004. Near the end of his career, he made a rational calculation that his AFC would no longer increase and he would therefore gain more from a contributions refund. He then retired from PERS. Mr. Sloma's prediction, however, proved incorrect, because eight years later, in 2012, Mr. Sloma decided to return to PERS employment when he took a higher compensated position for Thurston County. After retiring from Thurston County in 2016, his second retirement, Mr. Sloma sought to have his AFC calculated with compensation from Thurston County.

Mr. Sloma argues that the restriction in the Post-30 Year Program does not apply to his second retirement. The Department's adjudication properly rejected that proposition. RCW 41.40.191 states clearly and unambiguously that the Program's enrollees cannot have their AFC calculated with compensation made after enrollment into the Program. To support his argument to the contrary, Mr. Sloma cites only general statutes, governing different subject matters. These statutes do not conflict with the more specific, later-enacted statute governing the Program, RCW 41.40.191. The Court should harmonize the statutory scheme and give effect to the unambiguous language governing the Program.

Additionally, Mr. Sloma asserts equitable and promissory estoppel against the Department. He cannot, however, invoke equitable estoppel here because equitable estoppel is not available as a "sword, or cause of action." Even if it were, Mr. Sloma cannot establish the elements of equitable estoppel. Likewise, he fails to establish promissory estoppel because no authorized agent of the Department promised to calculate Mr. Sloma's AFC in any particular way.

Finally, Mr. Sloma argues that the Program, or as it is applied to him, is an unconstitutional impairment of contract. But there is no impairment or violation of the statute or any contractual rights. Rather, it is Mr. Sloma who is trying to revoke his 2004 decision to enroll in the Program, ignoring the benefits he received from that enrollment, because hindsight shows that it was not the optimal decision. In other words, he wants to revoke his enrollment because it turns out that he returned to employment and that his retirement benefit could have been higher if he had never enrolled. As with other retirement options, the Program offers no such guarantee that the Program will be optimal for every enrollee, but that does not make it unconstitutional. Mr. Sloma made a choice to enroll. Hindsight is not a basis for constitutional impairment of contract.

The Court should affirm the Department's Final Order.

II. RESTATEMENT OF ISSUE

The three issues in this case are (1) whether the Department correctly determined that Mr. Sloma's compensation from Thurston County is not includable in his AFC, because Mr. Sloma had elected into the Program; (2) whether Mr. Sloma can estop, either under the theory of equitable or promissory estoppel, the Department from calculating Mr. Sloma's AFC without including his compensation from Thurston County; and (3) whether the Program, or the Department's application of the Program, is constitutional.

III. STATEMENT OF THE CASE

A. Background on the Post-30 Year Program

PERS Plan 1 is a defined benefit plan available to eligible public employees who joined the Public Employee Retirement System or PERS prior to October 1977. RCW 41.40.010(27). PERS Plan 1 members may retire with an allowance calculated based the following statutory formula: two percent x service credit amount x AFC. RCW 41.40.185. AFC is the "average of the greatest compensation earnable by a member during any consecutive two year period." RCW 41.40.010(6)(a).

Under PERS Plan 1, the ultimate benefit may not exceed 60 percent of the member's AFC. RCW 41.40.185(3). If a member renders service for 30 years or more, the benefit is exactly 60 percent of the

member's AFC. Thus, the benefit is "capped" at 30 years of service because service beyond 30 years is not used to increase the member's benefit beyond 60 percent of AFC (although AFC might still increase after 30 years).

To pay for PERS Plan 1 benefits, the member's employer and the member make contributions of a percentage of the member's compensation during the member's employment. The member contributes a fixed six percent, while the employer's contribution rate is set by a pension funding council and approved by the Legislature. RCW 41.40.330; RCW 41.45.060.[1] The members and employers must make contributions even after the member has accrued 30 years of service.

In 1999, the Legislature enacted RCW 41.40.191, which offered PERS Plan 1 members who reached 30 years of PERS service the option to receive a refund of their post-30 year contributions. Laws of 1999, ch. 362, § 2. No later than six months after attaining 30 years of service, PERS Plan 1 members were required to choose whether to receive their eventual retirement under the new option or under the statute as it previously existed (hereinafter, the "old option"). *Id.*

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[1] Employee and employer contributions are deposited into the PERS Plan 1 trust fund and invested by the Washington State Investment Board to fund future benefits. RCW 41.50.075, .080. If a member separates from service and elects to retire from PERS Plan 1, the member will receive the monthly benefit described above, paid from the PERS Plan 1 trust.

Under either option, the member had to continue to contribute six percent of compensation. But, under the new option, at the time of a member's retirement, (i) the member's AFC (and corresponding retirement benefit) is determined by looking at compensation received *only* during the first 30 years of service, *and* (ii) the member receives a refund of the six percent employee contributions made after the 30-year milestone. *Id.* The new option is codified under RCW 41.40.191 and is known as the Post-30 Year Program (Program).

On the other hand, under the old option, at the time of a member's retirement (i) the member's AFC is determined by looking at compensation for *all* years of service (including compensation made after the 30-year milestone), but (ii) the member does *not* receive a refund of employee contributions made after the 30-year milestone.

Election into the Program is irrevocable, and involves a risk calculation. RCW 41.40.191. If a member chose the Program and his AFC subsequently increased between election and retirement, the increased AFC would not be considered in his retirement calculation. But if the member did not choose the Program, and the member's AFC did not change between election and retirement, the member would have foregone a refund of post-30 contributions (with no concomitant improvement in his retirement calculation). Thus, PERS Plan 1 members might rationally

choose to receive refunds of their six percent contributions unless AFC increases were significant enough to outweigh that option.

Regardless of what happened between the member's election and ultimate retirement, the member could not undo the irrevocable election. RCW 41.40.191 ("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").

B. Mr. Sloma's Election into the Program

Mr. Sloma joined PERS Plan 1 on September 1, 1973. AR 0205-0206. On January 15, 2004, in anticipation of reaching 30 years of service on January 31, he enrolled in the Program by completing a Notice of Election for Post 30-Year Program. AR 0208. The form read, "This is an IRREVOCABLE ELECTION. Once you have submitted this election to DRS, you cannot reverse your decision." By signing the form, Mr. Sloma indicated that he understood that his AFC "will be based on earnings prior to DRS receiving this election" (hereinafter, "pre-election earnings"). *Id.*

At the time of his election, Mr. Sloma had reviewed the January 2002 version of the PERS Plan 1 Member Handbook, which states:

> If you participate in the 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.

AR 0211. Because he was planning to retire from state employment shortly, he saw "no down side from collecting those few months of PERS contributions. . . ." *Id.* It simply did not occur to him to consider the effect that joining the program could have on any future employment with the state. AR 0217-0218.

Mr. Sloma's election became effective February 1, 2004. AR 0222. At that time, his employee contributions under the Program totaled $920.60. AR 0224. Mr. Sloma then retired from the State Board of Health, effective March 1, 2004. AR 0222, 0231. Based on his earnings prior to electing in the Program, his AFC was at $6,492.80 per month. AR 0222. Consistent with his election into the Program, Mr. Sloma withdrew his February 2004 employee contributions of $920.60, less federal withholding of $184.12 (i.e., $736.48). AR 0224.

C. Mr. Sloma's Career After He Enrolled into the Program

After retiring from the Board of Health, Mr. Sloma worked for non-profit organizations from 2004 to 2012. AR 0231, 0233. From 2004 to 2011, he worked part-time as Policy Director for the Washington Health Foundation, with a salary of approximately $50,000 per year and benefits comparable to his prior state benefits. AR 0231. From 2011 to 2012, he

worked part-time for the Comprehensive Health Education Foundation in Olympia, Washington, with a salary of approximately $55,000 per year and benefits comparable to his prior state benefits. AR 0231, 0239.

In 2011, Mr. Sloma learned about an opening for the position of Director of Thurston County Department of Public Health. AR 0214. In December 2011, he contacted the Department for information on his prior PERS employment. AR 0341-0242. On December 16, 2011, the Department sent him a letter confirming that his PERS benefit was a "lifetime benefit," and on January 26, 2012, Ms. Katie Johnson (now Katie Sparkles) sent him an email showing his prior PERS employment. AR 0249, 0251. Mr. Sloma does not recall discussing his enrollment in the Program with the Department at this time, nor does anyone at the Department recall talking to Mr. Sloma about the program at this time. AR 0246-0247. Neither the Department nor Mr. Sloma has record of any other communication in December 2011 or January 2012. AR 0269.

Mr. Sloma applied for the Director of Thurston County Department of Public Health position on January 31, 2012. AR 0226. Thurston County hired him on April 12, 2012. AR 0253, 0255. Mr. Sloma began full-time employment on May 1, 2012, with a salary of $9,160 per month and benefits comparable to those of his position at the Comprehensive Health Education Foundation. AR 0240, 0253.

On May 2, 2012, the day after Mr. Sloma began employment, he telephoned the Department and spoke with Ms. Sparkles about how his return to work would affect his PERS Plan 1 retirement. He again did not mention that he had enrolled in the Program in 2004. AR 0269-0270. As Ms. Sparkles understood his question, Mr. Sloma was only asking whether he would have to remain employed with the County for a minimum amount of time before his PERS benefit could be recalculated using his compensation from the County to derive his AFC.[2] AR 0269-0270. Ms. Sparkles, after consultation with her supervisor, sent Mr. Sloma an email containing excerpts from RCW 41.40.037, WAC 415-108-710, and the DRS publication, "PERS Plan 1 Thinking About Working After Retirement." AR 0257-0258. Based on the information Mr. Sloma had provided on the phone and her understanding of his question, Ms. Sparkles—unaware that Mr. Sloma had enrolled in the Program—summarized the general information in the foregoing sources as follows:

> 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 recalculating your new AFC for re-retirement.

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[2] Describing this contact with Ms. Sparkles, Mr. Sloma wrote, "Katie Johnson. . . took an interest in my questions and was willing to do the research to follow up, get clear and specific answers to my questions and document her responses. I don't recall her mentioning the post 30 year plan or asking me about it. . . . I kept asking Katie about whether there was any period of time I would have to work in order to be able to rebase my pension." AR 0216-0217.

AR 0257. On May 4, 2012, Mr. Sloma notified the Department that he had chosen to suspend his retirement and re-enroll in PERS Plan 1. AR 0260. The Department re-enrolled him in PERS Plan 1 effective May 1, 2012, and suspended his monthly retirement allowance. AR 0263. Mr. Sloma and the County began to make PERS Plan 1 employee and employer retirement contributions respectively.

By all accounts, Mr. Sloma enjoyed working for Thurston County. AR 0244. The work allowed him to complete a final career goal, moving from public health policy development to implementation. *Id.* (County job was "a little closer to the ground"). He has no regrets about his decision to return from part-time to full-time employment to guide the County in exciting new directions in the field of public health. *Id.*

On July 9, 2015, Mr. Sloma contacted the Department, indicating he wanted to retire from Thurston County effective October 1, 2015. AR. 0263. The Department sent him a benefit estimate and, taking into account his participation in the Program, calculated his AFC and corresponding benefit based on his salary prior to his 2004 election into the Program. The Department did not consider compensation from the County between 2012 and 2015. AR 0262-0264. Mr. Sloma requested further review. On

October 9, 2015, the Department confirmed that it cannot calculate his AFC with compensation from Thurston County. AR 0266-0267.

D. Procedural Background

Mr. Sloma petitioned the Department to reverse its decision. On July 27, 2015, the Department issued a petition decision upholding the Department's decision not to calculate Mr. Sloma's AFC to include his compensation from Thurston County. AR 0421-24. Mr. Sloma filed a notice of appeal to the Department's Presiding Officer, which included an equitable estoppel claim. AR 0402-20.

The Presiding Officer granted the Department's motion for summary judgment, and issued a Final Order. The Presiding Officer concluded that

> [h]aving made an irrevocable election to participate in the PERS Plan 1 post-30 year program with his first retirement, the Appellant, after re-entering active PERS membership in post-retirement PERS-covered employment, and retired again, is not entitled to a re-retirement benefit calculated with an AFC component reflecting the increased salary earned in his post-retirement employment.

AR 0020 (COL 25). The Presiding Officer also found that, pursuant to *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 110 P.3d 812 (2005), Mr. Sloma cannot assert equitable estoppel against the Department "to pursue his claim for a higher benefit." AR 0019-20 (COL 23 & 24).

Mr. Sloma petitioned for judicial review. CP 113-16. In addition to the arguments he raised before the Presiding Officer, Mr. Sloma claimed that the Department's interpretation of RCW 41.40.191, which governs the Program, was unconstitutional as applied to him. CP 43. Mr. Sloma also added a promissory estoppel claim. CP 47. The superior court affirmed the Final Order. CP 111-12. Mr. Sloma timely appealed to this Court.

IV. SUMMARY OF ARGUMENT

To prevail in his quest to increase his AFC, it is Mr. Sloma's burden to demonstrate that the Department's Final Order is invalid. RCW 34.05.570(3)(d). The material facts in this case are undisputed, and the appeal involves only questions of law. Br. Appellant at 9. Under the error-of-law standard, this Court reviews the agency's interpretation of the law *de novo*. Under that standard, a court may substitute its judgment for that of the agency only if the agency's interpretation of the law is incorrect. *Franklin Cty. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

Here, Mr. Sloma fails to demonstrate invalidity. The plain meaning of RCW 41.40.191, which governs the Program, is unambiguously clear that he cannot have his AFC calculated with compensation earned after he elected into the Program. The statutes Mr. Sloma cites, RCW 41.40.023(12) and RCW 41.40.037, to argue that the Program does not

apply to a "second" retirement, govern different subject matters, and the Department correctly applied each statute.

Additionally, equitable and promissory estoppel do not apply in the context of defying the statutory limits for persons in the Post-30 Year Program. Mr. Sloma cannot invoke equitable estoppel as a "sword, or cause of action." Even if he can, Mr. Sloma cannot establish the five elements of equitable estoppel with the requisite clear, cogent, and convincing evidence. To establish promissory estoppel, Mr. Sloma must prove that there was a "clear and definite" promise, made by an authorized agent of the Department, that the Department would calculate his AFC to include his compensation from Thurston County. Mr. Sloma does not even attempt to show that the Department made such a promise.

Finally, the Program as applied to Mr. Sloma is not an unconstitutional impairment of contract. Mr. Sloma had a choice to elect into the Program. That in hindsight, he regretted having enrolled, does not render the Program, or its application, unconstitutional.

V. ARGUMENT

A. RCW 41.40.191 is Unambiguously Clear that Mr. Sloma's Election into the Post-30 Year Program Means His Post-30 Compensation Cannot Be Used to Calculate His AFC

Determining whether the Program's restriction on AFC applies to Mr. Sloma's second retirement involves ascertaining the legislative intent

underlining the relevant statutes. *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015) (holding that "[o]n matters of statutory interpretation, our fundamental objective is to ascertain and carry out the Legislature's intent"). Where the statutory language is unambiguous, the courts "accept the legislature means exactly what it says." *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). In other words, "[i]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Darkenwald*, 183 Wn.2d at 244-45.

1. Under the plain meaning rule, RCW 41.40.191 does not allow the Department to calculate Mr. Sloma's AFC with compensation made after he enrolled into the Program

RCW 41.40.191, which governs the Program, is unambiguous because the Legislature could not have stated it more clearly: when a PERS Plan 1 member elects into the Program, that member will have his or her post-30 years contributions refunded at retirement. RCW 41.40.191(1). In return, "[u]pon retirement, the member's benefit shall be calculated using only the compensation earnable credited prior to the effective date of the member's election." RCW 41.40.191(2). "A member may make the irrevocable election under this section no later than six months after attaining thirty years of service." RCW 41.40.191.

Mr. Sloma's situation here is no different. He made an irrevocable election into the Program and received the benefits the program offered. Nothing in statute or law allows him now to revoke that election to remove himself from the Program so that his PERS Plan 1 benefit would be calculated based on his compensation at Thurston County.

The Court should reject Mr. Sloma's argument that certain statutes governing PERS Plan 1 members' retirement, including RCW 41.40.191, which governs the Program, are ambiguous, and thus the Court should construe them in the members' favor. Br. Appellant at 28-9 (citing *Morrison v. Dep't of Ret. Sys.,* 67 Wn. App. 427, 835 P.2d 1044 (1992)). Pension statutes are only construed in favor of the members if they are ambiguous. See *Vorhies v. Dep't of Ret. Sys.,* 199 Wn. App. 543, 557, 399 P.3d 599 (2017). "A statute is ambiguous when it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *State v. Gray*, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012). Here, the statute is not ambiguous because only one interpretation is reasonable: that a member who elects into the Program will have his or her AFC determined by the member's AFC at the 30-year mark.

2. RCW 41.40.023(12) and RCW 41.40.037 do not allow Mr. Sloma to revoke his participation in the Program upon return to PERS membership

In arguing that the relevant statutes here are ambiguous and conflicting, Mr. Sloma points to the fact that RCW 41.40.191 does not expressly address the rights of Program enrollees who retired and subsequently returned to PERS employment. Br. Appellant at 22-23. He asserts that RCW 41.40.023(12) and RCW 41.40.037(3) govern all PERS Plan 1 retirees' subsequent return to PERS-covered employment, allowing them to return to employment, terminate retirement status, and elect prospective PERS membership. *Id.* In other words, the Program does not apply to a "second" retirement.

This interpretation, however, would mean that Mr. Sloma could revoke his irrevocable election into the Program, contrary to RCW 41.40.191. No provision in either RCW 41.40.023 or RCW 41.40.037 allows a member to revoke a prior irrevocable election into the Program.

As a rule, courts should read statutes "as complementary, rather than in conflict with each other." *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). RCW 41.40.023, RCW 41.40.037, and RCW 41.40.191 are complementary, dealing with distinct aspects in the sequence of retiring and subsequently returning to membership. They raise no contradictions

that require harmonization, and simply govern different subject matters. The Department correctly applied each statute as its subject matter became relevant as follows.

First, RCW 41.40.191 governs participation in the Program. In 2004, Mr. Sloma irrevocably elected into the Program. Thus, under RCW 41.40.191(2), Mr. Sloma's retirement benefit was calculated using the "compensation earnable credited prior to the effective date of [his] election" plus "eligible cash outs of sick and annual leave based on [his] salary and leave accumulations at the time of [his] retirement" from the State Board of Health.

Second, when he returned to a PERS-eligible position for Thurston County in 2012, RCW 41.40.023 governed Mr. Sloma's eligibility for PERS membership: as a PERS retiree, he had the option to "elect to prospectively become a member of the retirement system if otherwise eligible." RCW 41.40.023(12). Mr. Sloma elected prospective membership and reenrolled in PERS Plan 1 where he was a participant in the Program, consistent with his earlier irrevocable election.

Next, having opted to reestablish membership under RCW 41.40.023(12), Mr. Sloma's subsequent participation in PERS was governed by RCW 41.40.037(3) (emphasis added):

> *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.

Consistent with this subsection, Mr. Sloma's retirement status was terminated, and his monthly distributions from PERS Plan 1 ceased. He began to make retirement contributions and receive membership credit. He had the right to retire again in accordance with RCW 41.40.180, which sets the age and service requirements for retirement eligibility.

Finally, upon his retirement from Thurston County, Mr. Sloma's retirement allowance was again calculated consistent with applicable statute and rule. The Department rule in WAC 415-108-710(6)(b) provides that if a retiree "reenter[s] PERS membership and later choose[s] to retire again, DRS will recalculate [his] retirement allowance under the applicable statutes and regulations." For a participant in the Program, the applicable statute is RCW 41.40.191.

Nothing in RCW 41.40.191 limits its application to a "first" retirement; the statute simply provides how a member's benefit is

calculated "upon retirement." Accordingly, Mr. Sloma's new monthly benefit was properly calculated under RCW 41.40.191. RCW 41.40.023 and RCW 41.40.037 contain no contrary provision on this "recalculation."

Mr. Sloma's argument is essentially that because statutes governing "second" retirements do not explicitly mention the Program, the Program does not apply to "second" retirements. Br. Appellant's at 23-25, 38. This is a strained way to read these statutes. Nothing in RCW 41.40.191, which governs the Program, limit its application to "first" retirements. And, provisions governing "first" retirements also do not mention the Program. *See* RCW 41.40.185 (governing PERS Plan 1 members' benefits calculation).The implication of Mr. Sloma's argument is that the Program would never apply, as neither statutes governing "first" or "second" mention the Program. This is clearly contrary to legislative intent.

In short, the Final Order relied on a correct reading of these statutes, and that is an interpretation that advanced the purpose of the various statutes and reflects the only reasonable construction. AR 0019 (COL 22).[3] Mr. Sloma has not proven that the Department's interpretation is unreasonable and invalid.

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[3] Mr. Sloma asserts that no Department rule is inconsistent with *his* position. Br. Appellant at 27. Although Mr. Sloma is correct (no agency rule interprets the provisions

B. To The Extent the PERS Statute Contains Any Inconsistency, Under Canons of Statutory Construction, the Specific, and Later Enacted, Provisions of RCW 41.40.191 Prevail

Even if the relevant statutes here are ambiguous or conflict with each other, the purpose of statutory interpretation remains to ascertain the legislative intent. *Darkenwald,* Wn.2d at 244. To find such intent, courts employ rules of statutory construction.

The court should consider two such rules here. First, courts give "great weight" to "the construction of the statute by the administrative body whose duty it is to administer its terms." *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989). The Legislature has charged the Department with administering PERS. RCW 41.50.030. Second, if a general and specific statute irreconcilably conflict, "the more specific statute will prevail, unless there is legislative intent that the more general statute controls." *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). In other words, if a general statute, standing alone, includes the same subject as a special statute and conflicts with it, the court deems the special statute as the exception to, or qualification of, the general statute. *State v. Flores*, 194 Wn. App. 29, 37, 374 P.3d 222, 226 (2016). This preference for specific statute is especially convincing if the

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of the Program), his assertion has no legal significance. No rule was required before the Department could apply the plain language of the statutes.

specific statute was enacted after the more general statute. *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d. 393, 412, 377 P.3d 199 (2016) (resolution of statutory conflicts by giving "preference to the more specific and more recently enacted statute").

To the extent that RCW 41.40.191, the statute governing the Program, is inconsistent with other provisions, RCW 41.40.191's provisions governing a Program participant's calculation of the AFC prevails. Here, Mr. Sloma argues that RCW 41.40.010(6) is inconsistent with RCW 41.40.191. Br. Appellant 24-25.[4] This provision is a general definition of PERS Plan 1 AFC, governing how AFC is determined for purposes of calculating service retirement benefits from PERS Plan 1 generally. *See* Laws of 1969, ch. 128, § 1. It does not mention the Program or RCW 41.40.191. It has remained virtually unchanged since 1969. *Id.* In contrast, in 1999, the Legislature created the Program to provide an alternative to members who attained 30 years of service.

In addition, the Program is available only to a subset of PERS Plan 1 members. The special statute governing the AFCs of Program participants is, therefore, an exception to or qualification of RCW 41.40.010(6)(a), the AFC statute generally applicable at retirement.

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[4] In Mr. Sloma's argument that the statutes governing his AFC calculation are inconsistent, Mr. Sloma also cited other statutory provisions, i.e. RCW 41.40.023(12) and RCW 41.40.037. These provisions, however, do not address AFC calculation.

Mr. Sloma has provided no evidence to suggest that the Legislature intended the more general, earlier-enacted, definition of AFC to control when a Program retiree returned to PERS membership and retired a second time. Therefore, as a specific, later-enacted, statute, governing the calculation of AFC for a limited group of the Program retirees, RCW 41.40.191 governs the calculation of Mr. Sloma's AFC.

C. Equitable Estoppel May Not Be Used As a Sword to Compel an Award of Retirement Benefits in Violation of Statutory Limits

Both the Presiding Officer and the superior court held that Mr. Sloma cannot invoke equitable estoppel to compel an award of retirement benefits to which he is not statutorily entitled. The Presiding Officer cited *Motley-Motley,* 127 Wn. App. at 73-75. AR 19-20. The superior court agreed, and cited a more recent Division Two case, *Byrd v. Pierce County*, 5 Wn. App 249, 257-58, 425 P.3d 948, 952 (2018). VRP at 14. *Motley-Motley* and *Byrd* both confirmed that the longstanding principle that "[e]quitable estoppel is available only as a shield or defense and not as a sword, or cause of action," *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259, 616 P.2d 644 (1980), applies when equitable estoppel is invoked against the government.

Had the Department violated RCW 41.40.191 by paying Mr. Sloma retirement benefits calculated with an AFC that included

compensation from Thurston County, and then sought to collect the overpayments, Mr. Sloma could have invoked equitable estoppel to defend against a collection action by the Department. In this scenario, Mr. Sloma would be invoking equitable estoppel as a "shield" or defense. *Byrd*, 5 Wn. App at 257; *see e.g. Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (allowing equitable estoppel as a defense against the Department of Social and Health Services' action to collect welfare overpayments). This case, however, presents an entirely different situation.

The Department here has not asserted a claim against Mr. Sloma, and he is not defending against any claim. Mr. Sloma is invoking equitable estoppel to compel the Department to recalculate his AFC, and corresponding benefits, based on compensation earned after he elected into the Post-30 Year Program, contrary to RCW 41.40.191. He is impermissibly using equitable estoppel to force the Department to engage in a violation of statute and ultra vires action. And in any event, the facts in this case do not support equitable estoppel.

Application of equitable estoppel against the government is disfavored. *Kramarevcky*, 122 Wn.2d at 743. Thus, when asserting equitable estoppel against the government, a party must establish five elements by clear, cogent, and convincing evidence:

(1) A statement, admission, or act by the party to be estopped, which is inconsistent with its later claims;

(2) The asserting party acted in reliance upon the statement or action;

(3) Injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action;

(4) Estoppel is "necessary to prevent a manifest injustice;" and

(5) Estoppel will not impair governmental functions.

Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wn.2d 868, 887, 154 P.3d 891 (2007) (citation omitted). More stringent than the ordinary "more probable than not" standard, this standard requires that the trier of fact be convinced that the fact at issue is "highly probable." *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). Unsupported conclusory allegations are insufficient to prove equitable estoppel. *Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990).

1. The Department made no representation inconsistent with a claim later asserted

To prove the first element, Mr. Sloma must prove that the Department made a statement, representation, or admission inconsistent with the current assertion that, under RCW 41.40.191, his AFC does not include compensation from Thurston County. Mr. Sloma cited his 2012 contacts with the Department as the source of an alleged inconsistent statement. Br. Appellant at 6-8. However, at no time during these contacts

did the Department indicate that the Program does not apply to a "second" retirement. The Department never told Mr. Sloma that Program members who retired, unretired, and subsequently reenrolled in PERS Plan 1 could revoke their election into the Program and use their salary from the subsequent period of employment to update their AFC. The January 2012 email simply provided a list of Mr. Sloma's PERS history from 1973 to 2004. AR 0251. In the May 2012 email, Ms. Sparkles focused only on answering Mr. Sloma's question as she understood it: PERS Plan 1 members that left PERS employment and subsequently returned to PERS membership may have their AFC recalculated on "re-retirement." AR 0255. Mr. Sloma had not informed her that he had enrolled in the Program, and Ms. Sparkles had no independent knowledge that he had. AR 0269-0270. Her statements simply did not address the ramifications of returning to PERS membership for a Program retiree.[5]

In short, the Department has made no statement inconsistent with its present position.

[5] In any case, Ms. Sparkles' May 2012 email cannot serve as the basis for an estoppel claim because Mr. Sloma had accepted the Director of Thurston County Department of Public Health position and begun his service before the email was sent.

2. Even if Ms. Sparkles had represented to Mr. Sloma that the Department would recalculate his AFC, such representation would have been ultra vires and void

"[T]he doctrine of equitable estoppel will not be applied to a governmental body where the [statement or] act giving rise to the alleged reliance was ultra vires or void." *Choi v. City of Fife*, 60 Wn. App. 458, 464, 803 P.2d 1330 (1991). *See also State v. Adams*, 107 Wn.2d 611, 615, 732 P.2d 149 (1987) (holding that Department of Transportation (DOT) employees could not invoke equitable estoppel to prevent DOT from collecting salary overpayments made due to computer errors, because the overpayments were ultra vires and void); *Wash. Educ. Ass'n v. Smith*, 96 Wn.2d 601, 610, 638 P.2d 77 (1981); *Hite v. PUD No. 2 of Grant Cty.*, 51 Wn. App. 704, 709, 754 P.2d 1274 (1988).

The Court of Appeals applied this concept in determining that equitable estoppel did not prevent the City of Westport from terminating a police dispatcher's employment. *Arbogast v. Town of Westport,* 18 Wn. App. 4, 8, 567 P.2d 244, 246 (1977). The Court concluded that the mayor lacked authority to amend the city's ordinance when he reinstated her employment contrary to an ordinance that required her to complete a one-year probationary period. *Id.*

Arborgast is especially salient here because the court specifically distinguished the sole case that Mr. Sloma cited in support of his argument

that Ms. Sparkles' communications to him are not ultra vires and void, *Haslund v. City of Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976). *Arbogast,* 18 Wn. App. at 7; Br. Appellant at 32-33. In *Haslund*, a Seattle building inspector issued a building permit that included unauthorized conditions. *Haslund*, 86 Wn.2d at 622-23. The Court of Appeals held that the city was estopped from denying the permit's validity, notwithstanding the illegality of the conditions. *Id.* at 623-24. The *Arbogast* Court did not apply *Haslund* because "in that case, the building inspector had the power to issue permits. He merely did so in an unauthorized manner." *Arbogast,* 18 Wn. App. at 7 (finding "[i]t would be a different situation if he [the mayor] did have such authority but exercised it in violation of the ordinance's guidelines or added unauthorized conditions to the waiver").

As in *Arbogast*, where the Westport mayor did not have the authority to reinstate Ms. Arbogast, Ms. Sparkles did not have the authority to grant Mr. Sloma any retirement benefits. She was authorized to give informal advice to PERS members. AR 0082, 0086-087. Therefore, even if Ms. Sparkles had represented to Mr. Sloma that the Department would recalculate his AFC upon his retirement from Thurston County notwithstanding his participation in the Program, that representation would have been ultra vires and void.

3. Mr. Sloma does not meet the second or third elements of equitable estoppel because he did not detrimentally rely on the Department's statements

Mr. Sloma's estoppel claims also fail because he could not prove by clear, cogent, and convincing evidence that he took action in reliance on the statement of another. *Leonard v. Wash. Emp'rs, Inc.*, 77 Wn.2d 271, 280, 461 P.2d 538 (1969). "Not all those who rely upon another's conduct or statements may raise an estoppel. Rather, it is only those who have a [r]ight to rely upon such acts or representations." *Id.* at 280.

The party seeking to prove equitable estoppel must also prove with non-conclusory evidence that he or she will be injured if the party against whom estoppel is sought is permitted to repudiate its statement. *Kirk,* 114 Wn.2d 550. Washington cases have used the terms "injury," "prejudice," and "detrimental reliance" "interchangeably to express the requirement that a party asserting equitable estoppel must show a detrimental change of position [due to the reliance]." *Kramarevcky*, 122 Wn.2d at 747.

To demonstrate a "detrimental change in position," the claimant must show that if the party is allowed to repudiate its original statement, the claimant will be in a worse position had he not taken the alleged action in reliance. Injury may arise, *inter alia*, (i) if repudiation would cause lost investment of time or money or (ii) if other beneficial choices have clearly

been foreclosed by virtue of the choice the claimant made. *See, e.g.*, *Haywood v. Aranda*, 97 Wn. App. 741, 747, 987 P.2d 121 (1999).

Here, it is not clear from Mr. Sloma's brief what action Mr. Sloma claims he took in reliance on a Department statement. Before the Presiding Officer, Mr. Sloma identified the action that he took in reliance as working for Thurston County. AR 0067. However, the timing of Mr. Sloma's decision to return to employment for Thurston County precluded that claim of reliance. Mr. Sloma accepted the position with Thurston County on April 12, 2012, and started working on May 1, 2012. AR 0253, 0255. The email he received from Ms. Sparkles in January 2012 outlined his PERS membership history, but contained no discussion regarding the effect of returning to work on his PERS monthly benefit. AR 251.[6] Thus, he cannot claim now that he took this high paying job in reliance on a Department promise to calculate his AFC to include that future compensation. AR 0066-0067.

Further, Mr. Sloma compared the detriments he suffered from the Department's alleged misrepresentation as akin to when an employer promises someone a bonus to accept a job but later refuses to honor that

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[6] Mr. Sloma's only other email exchange with Ms. Sparkles occurred between May 2 and May 4, 2012. AR. 0257-0258. In these exchanges, he asked questions about rebasing his retirement (without informing her of his participation in the Program). Clearly, these questions had not been resolved to his satisfaction before he accepted and began employment.

promise. Br. Appellant at 33 ("Well, it appears you have enjoyed the job, we decided not to pay you the bonus we promised"). That describes a breach of contract, not equitable estoppel. The issue in equitable estoppel is whether the misrepresentation led the person alleging estoppel to put him or herself in a "detrimental change of position." *Kramarevcky*, 122 Wn.2d at 747. He has no complaint based on breach of contract. His claim fails because he would only be injured for purposes of equitable estoppel if he arrived at a worse position by accepting employment at Thurston County than he otherwise would have had he not accepted employment with the County. That did not occur.

By working for Thurston County, Mr. Sloma made more money, increased Social Security benefits, and, when his leave cashouts are taken into account,[7] increased his PERS retirement benefits. Mr. Sloma contends this increased income was not enough for him to afford the waterfront home he sought, (which he implies is a result of the Department's

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[7] Although the Program only allows participating members to have their AFC determined by looking at compensation received *only* during the first 30 years of PERS service, the participating members can still increase their AFC through leave cashouts. RCW 41.40.191(2) (stating that "[u]pon 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") (emphasis added). Thus, by working for Thurston County, Mr. Sloma accrued leave cashouts which, in turn, increased his AFC and corresponding PERS retirement benefits.

misrepresentation). Br. Appellant at 1-2. But if Mr. Sloma had not worked for Thurston County, he would have even less money for that purchase.

Mr. Sloma's choice to return to work was beneficial and freely made. He admitted that he enjoyed the work, which allowed him to round out his career with an on-the-ground experience. AR 0238-0247. He also appears to value the increased income and social security over having more leisure time. AR 181. Therefore, Mr. Sloma's estoppel claim to increase his AFC fails because he could not prove that his alleged action (taking the job) was taken in reliance or caused him injury.

4. Mr. Sloma does not meet the fourth element of estoppel because the Department's refusal to recalculate Mr. Sloma's AFC is not "manifest injustice"

Mr. Sloma can only prevail under equitable estoppel if the application of estoppel is necessary to prevent a manifest injustice. *Silverstreak*, 159 Wn.2d at 887. The Court must, however, be reluctant to find estoppel against the government unless it is "self-evidently unfair" to allow the government's action to proceed. *Silverstreak*, 159 Wn.2d at 889. Although this balancing of equities is necessarily case-specific, Washington courts have at times found manifest injustice when some combination of the following factors are present: (i) the government has acted erroneously, negligently, or somehow unconscionably; (ii) the government did not act in a situation in which a relatively easy action

could have prevented foreseeable problems; (iii) the actions of the party claiming estoppel are beyond reproach; or (iv) the injury to the party claiming estoppel is extreme.[8]

Here, applying the Program's limits on AFC calculation to Mr. Sloma is not "self-evidently unfair." When he enrolled in the Program, he knew that he was making an irrevocable decision. It is not self-evidently unfair to hold him to the consequences of his decision.

The Department's actions vis-à-vis Mr. Sloma were not erroneous, negligent, or unconscionable. Mr. Sloma never informed Ms. Sparkles of his participation in the Program. Thus, in responding to Mr. Sloma's questions, Ms. Sparkles sent him an email containing excerpts from the relevant statutes, rules, and publications without taking into account the Program. AR 0257-0258. This was not an egregiously careless behavior that equals manifest injustice. By not informing her of his participation in the Program, Mr. Sloma shares in the responsibility that Ms. Sparkles was unaware of his participation when she provided her response.

Nor has Mr. Sloma shown that his claimed injury is so extreme that it amounts to manifest injustice. Courts have required that the injury

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[8] Various cases illustrate these principles. *See, e.g.*, *Harbor Air Serv., Inc. v. Dep't of Rev.*, 88 Wn.2d 359, 560 P.2d 1145 (1977); *West v. Dep't of Soc. & Health Servs.*, 21 Wn. App. 577, 580, 586 P.2d 516 (1978); *Kramarevcky*, 122 Wn.2d at 748-49; *Silverstreak*, 159 Wn.2d at 889-90; *Ruland v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 263, 278, 182 P.3d 470 (2008).

asserted by the party claiming estoppel would leave the party virtually destitute before applying estoppel to prevent a manifest injustice. For example, in *Kramarevcky*, the Court found manifest injustice when the Department of Social and Health Services attempted to collect welfare overpayments because the welfare recipients did not have adequate resources to repay the overpayments without depriving themselves of their "most basic needs" and those recipients were not abusing the system. 122 Wn.2d at 748-49. Mr. Sloma will not suffer such destitution. Estoppel is, therefore, unnecessary to prevent manifest injustice.[9]

D. Mr. Sloma Cannot Prevail Under a Theory of Promissory Estoppel

Along with equitable estoppel, Mr. Sloma claims that the Department is estopped from refusing to calculate his AFC with compensation from Thurston County under promissory estoppel. Br. Appellant at 44. He did not elaborate the basis of this claim, only that "the Supreme Court noted that Washington cases intermingled promissory estoppel with equitable estoppel." *Id.* at 45.

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[9] The Department has offered him the opportunity to cancel his reenrollment in PERS Plan 1 in 2012 and to be treated instead as a "retiree returned to work" under RCW 41.40.037. If Mr. Sloma does not prevail here, it appears that he will avail himself of the Department's offer. He would then still receive approximately $93,600 per year in retirement benefits, including Social Security. AR. 0043.

Promissory estoppel is not equitable estoppel. Promissory estoppel renders a promise made without consideration enforceable and has distinct requirements, which are: "(1) [a] promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." *Washington Educ. Ass'n v. Dep't of Ret. Sys.,* 181 Wn.2d 212, 225, 332 P.3d 428 (2014) (Washington Education Association I). "Importantly, promissory estoppel requires the existence of a promise that is 'clear and definite.'" *Id.* (defining a promise, under the Restatement (Second) of Contracts, as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made").

The promise that forms the basis for a promissory estoppel claim must also be made by an authorized agent. *See McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 117, 992 P.2d 511 (2000) (finding that a teacher cannot invoke promissory estoppel against a school district to enforce the promise of a job because the promise was made by an employee not authorized to make job offers). Even if an authorized agent had made the promise, it cannot contradict a statute; otherwise, it is ultra vires and void. *See Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emp's of*

Peninsula, 130 Wn.2d 401, 410, 924 P.2d 13, 17 (1996); *McGuire v. State,* 58 Wn. App. 195, 198-199, 791 P.2d 929 (1990).

Mr. Sloma has not shown, or even claimed, that Ms. Sparkles, or anyone else from the Department, made a "clear and definite" promise to calculate Mr. Sloma's AFC to include compensation from Thurston County. Even if she had, such a promise is unenforceable because Ms. Sparkles did not have the authority to promise that the Department would calculate Mr. Sloma's retirement benefits in any particular way. The Department only authorized Ms. Sparkles to provide general information and guidance. AR 0082, 0086-087. Even if the Department had promised to calculate Mr. Sloma's AFC to include compensation from Thurston County, such a promise would contradict the Program requirements as set forth in RCW 41.40.191. It would therefore be ultra vires and void.

E. The Program as Applied to Mr. Sloma Complies With the Constitution Because the Program Provides a Benefit to PERS Members Without Taking Away Any Benefit

Based on *Washington Education Association v. Department of Retirement Systems,* 181 Wn.2d 233, 332 P.3d 439 (2014) (Washington Education Association II), Mr. Sloma asserts that the Department's application of the Program amounts to an unconstitutional impairment of the State's contract with its employees. Br. Appellant at 36-40. He argues

that public pension plans, such as PERS, are contractual in nature, and taking away a pension benefit without providing an offsetting benefit violates Art. II, § 25 and Art. VIII, § 7 of the Washington constitution.[10] Br. Appellant at 36-40.

In *Washington Education Association II*, the Supreme Court held that a three-part test applies to determine whether a legislative change to a public pension plan is constitutional: (i) did the modification substantially impair the State's contractual relationship with plan members; (ii) if so, is the modification reasonable and necessary to serve a legitimate public purpose; and (iii) if the modification reduced or removed a retirement benefit, did the Legislature add equivalent or greater benefits in return? 181 Wn.2d 233 at 243. The Supreme Court found that a 2011 repeal of uniform cost of living adjustments (UCOLA) was not an unconstitutional impairment because, when the Legislature enacted the UCOLA, the Legislature also reserved the right to repeal the UCOLA.[11] *Id.* at 249.

Similarly, the Program is not an impairment of contract because the Program did not take away any benefit from PERS members. The Program is an *added* benefit that gives members the option to have

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[10] This is commonly referred to as an argument based on *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956).

[11] Because revoking the UCOLA was not an unconstitutional impairment, the Supreme Court did not decide if it met the other two parts of the test.

contributions refunded in return for having their AFC determined by looking at compensation received *only* at the first 30 years of PERS service. Members can decline to enroll and are then in the same position as before the creation of the Program. The Program requires PERS members at 30-years of service to make a rational calculation on whether to enroll into the Program.[12] Though members are in the best position to make this rational calculation, there is, however, no guarantee they have maximized their future retirement benefits by choosing to enroll.

Mr. Sloma made a rational calculation to enroll into the Program. Near the end of his career, he figured that a contributions refund was worth more than having his AFC calculated using post-30 compensation. No one was in a better position to make this calculation. That hindsight shows the other choice would have been better does not mean that the Program took away a retirement benefit. He could have turned down the offer. Or, had Mr. Sloma never worked in another PERS-eligible position

[12] Public retirement plans contain other options that require members to make a similar rational calculation. For example, incoming PERS-eligible workers must choose to join either PERS Plan 2 or Plan 3. PERS Plan 2's retirement benefits are calculated by the same retirement formula as PERS Plan 1. RCW 41.40.620. PERS Plan 3's retirement benefits have two components. One is calculated by a similar formula as Plan 1 and 2: (one percent) times (service credit) times (AFC). RCW 41.40.790(1). The other component depends on returns on investment made by the SIB. RCW 41.34.060. This means that, if investment returns are high, opting into Plan 3 may lead to more retirement benefits than opting into Plan 2. However, if investment returns are low, the opposite can occur. Like the 30-year program, an election into PERS Plan 2 or 3 is irrevocable. RCW 41.40.785.

after his "first" retirement, his decision to enroll in the Program would have been the optimal decision.

Mr. Sloma is ultimately complaining that he did not appreciate the full ramifications of enrolling in the Program. But there is no guarantee that every pension option will, in hindsight, maximize retirement benefits. The Program does not offer such a guarantee, but that does not mean that the Program, or the Department's application of the Program, impaired a contract or unconstitutionally removed a pension benefit without providing an offsetting benefit. Rather, it is clear here that the State did not take away a benefit but instead provided an additional benefit.

F. Even if Mr. Sloma Prevails, He is Not Entitled to Attorneys' Fees Because the Department's Decision was Substantially Justified

Mr. Sloma is not entitled to attorneys' fees under RCW 4.84.010 and RAP 18.1. As this case is an appeal of a judicial review of agency action under the RCW 34.05.570, the proper statute governing attorneys' fees and costs are RCW 4.84.340-.360. Under RCW 4.84.350, a court shall not award attorneys' fees and costs if the agency action was substantially justified.

An agency action is substantially justified if it is reasonable. *Silverstreak,* 159 Wn.2d at 892. Substantial justification is also based on the "strength of the factual and legal basis for the action, not the manner of

the investigation and the underlying legal decisions." *Id.* As discussed above, the plain meaning of RCW 41.40.191 and legal precedent support the Department's decision, and the superior court agreed with the Department's conclusion. Therefore, the decision was substantially justified. Even if he prevails, Mr. Sloma is not entitled to fees or costs under RCW 4.84.340-.360.

VI. CONCLUSION

Mr. Sloma fails to demonstrate that the Presiding Officer erred in concluding that RCW 41.40.191, governing the Post-30 Year Program, prevents the Department from calculating his AFC with compensation from Thurston County. He cannot establish equitable or promissory estoppel. Mr. Sloma also fails to show that the Program, or its application, amounts to an unconstitutional impairment of contract. This Court should affirm the Final Order.

RESPECTFULLY SUBMITTED this 3rd day of May, 2019.

ROBERT W. FERGUSON
Attorney General

NAM NGUYEN, WSBA No. 47402
Assistant Attorney General
Attorneys for Appellant
Department of Retirement Systems

PROOF OF SERVICE

I certify that on May 3, 2019, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, which will send notification of such filing to all counsel of record at the following:

Wayne L. Williams
wayne@wwolaw.net

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

DATED this 3rd day of May, 2019, at Tumwater, WA.

Ebonne Robinson, Legal Assistant

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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