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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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KRIS BARRY KILBOURNE and BRIGETTE LYNN KILBOURNE,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF  
RETIREMENT SYSTEMS,

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF RETIREMENT SYSTEMS**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. STATEMENT OF ISSUES.....2

III. COUNTERSTATEMENT OF THE CASE .....3

    A. LEOFF Plan 2 Duty Disability Retirement Benefits .....3

    B. Mr. Kilbourne’s Employment and Resignation from the  
    City of Everett.....4

    C. Mr. Kilbourne’s 2012-2016 Reinstatement Requests.....5

    D. Proceedings Below.....6

IV. ARGUMENT .....7

    A. Standard of Review.....8

    B. The Plain Language of RCW 41.26.470 Does Not  
    Require DRS to Notify Employers .....10

    C. The Three-Year Statute of Limitations Bars Mr.  
    Kilbourne’s Claims .....14

        1. A three-year statute of limitations applies to Mr.  
        Kilbourne’s claims.....15

        2. The statute of limitations for Mr. Kilbourne’s claim  
        began accruing when Mr. Kilbourne retired over five  
        years ago .....16

    D. Mr. Kilbourne’s Arguments Under the APA and the  
    Everett Municipal Code Have No Merit.....17

        1. Mr. Kilbourne waived the right to argue that the  
        Department failed to create rules or procedures under  
        the Administrative Procedure Act .....18

2.	Mr. Kilbourne’s Everett Municipal Code arguments have no merit .....	20
E.	Mr. Kilbourne Has Not Demonstrated That the Newly Claimed Error Based on Due Process is “Manifest” and “Truly of Constitutional Dimension” .....	22
V.	CONCLUSION .....	25

## TABLE OF AUTHORITIES

### Cases

<i>Auto. Drivers &amp; Demonstrators Union Local No. 882 v. Dep't of Ret. Sys.</i> , 92 Wn.2d 415, 598 P.2d 379 (1979).....	11
<i>Aventis Pharm., Inc. v. Dep't of Revenue</i> , 5 Wn. App. 2d 637, 428 P.3d 389 (2018).....	22
<i>Bowles v. Dep't of Ret. Sys.</i> , 121 Wn.2d 52, 847 P.2d 440 (1993).....	16, 17
<i>Bullo v. City of Fife</i> , 50 Wn. App. 602, 749 P.2d 749 (1988).....	24
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	9
<i>Cave Props. v. City of Bainbridge Island</i> , 199 Wn. App. 651, 401 P.3d 327 (2017).....	18
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	12
<i>City of Pasco v. Dep't of Ret. Sys.</i> , 110 Wn. App. 582, 42 P.3d 992 (2002).....	16
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wn.2d 749, 881 P.2d 216 (1994).....	9
<i>Danielson v. City of Seattle</i> , 108 Wn.2d 788, 742 P.2d 717 (1987).....	23
<i>Darkenwald v. Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	10
<i>Dep't of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	10, 11, 12

<i>Durland v. San Juan County</i> , 182 Wn.2d 55, 340 P.3d 191 (2014).....	23
<i>Eyman v. McGehee</i> , 173 Wn. App. 684, 294 P.3d 847 (2013).....	23
<i>Fox v. Dep't of Ret. Sys.</i> , 154 Wn. App. 517, 225 P.3d 1018 (2009).....	24
<i>Gamboa v. Clark</i> , 180 Wn. App. 256, 321 P.3d 1236 (2014).....	15
<i>Green River Cmty. Coll., Dist. 10 v. Higher Ed. Pers. Bd.</i> , 95 Wn.2d 108, 622 P.2d 826 (1980).....	19
<i>Ingalls v. Angell</i> , 76 Wash. 692, 137 P. 309 (1913) .....	16
<i>Keodalah v. Allstate Ins. Co.</i> , ___ Wn.2d ___, 2019 WL 4877438 (Oct. 3, 2019).....	9
<i>Kilbourne v. City of Everett</i> , No. 76461-6-I, 2018 WL 2316516 (Wash. App. May 21, 2018) .....	6
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	12
<i>King County v. City of Seattle</i> , 70 Wn.2d 988, 425 P.2d 887 (1967).....	11
<i>Lenander v. Dep't of Ret. Sys.</i> , 186 Wn.2d 393, 377 P.3d 199 (2016).....	11, 24
<i>M.W. v. Dep't of Social and Health Services</i> , 149 Wn.2d 589, 70 P.3d 954 (2003).....	9
<i>Moran v. Stowell</i> , 45 Wn. App. 70, 724 P.2d 396, review denied, 107 Wn.2d 1014 (1986).....	16

<i>Noah v. State</i> , 112 Wn.2d 841, 774 P.2d 516 (1989).....	15, 16, 17
<i>Parker v. Taylor</i> , 136 Wn. App. 524, 150 P.3d 127 (2007).....	9
<i>Punton v. City of Seattle Pub. Safety Comm'n</i> , 32 Wn. App. 959, 650 P.2d 1138 (1982).....	24, 25
<i>Ranger Ins. Co. v. Pierce County</i> , 164 Wn.2d 545, 192 P.3d 886 (2008).....	8
<i>Retired Pub. Emps. Coun. of Washington v. Charles</i> , 148 Wn.2d 602, 62 P.3d 470 (2003).....	16
<i>Rhoad v. McLean Trucking Co.</i> , 102 Wn.2d 422, 686 P.2d 483 (1984).....	11
<i>Right-Price Rec., LLC v. Connells Prairie Cmty. Coun.</i> , 146 Wn.2d 370, 46 P.3d 789 (2002).....	8
<i>Schmitt v. Langenour</i> , 162 Wn. App. 397, 256 P.3d 1235 (2011).....	8, 9
<i>Smith v. Shannon</i> , 100 Wn. 2d 26, 666 P.2d 351 (1983).....	18
<i>State v. Johnson</i> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	22
<i>Tenore v. AT&amp;T Wireless Servs.</i> , 136 Wn.2d 322, 962 P.2d 104 (1998).....	9
<i>Tuerk v. Dep't of Licensing</i> , 123 Wn.2d 120, 864 P.2d 1382 (1994).....	24
<i>Washington Educ. Ass'n v. Dep't of Ret. Sys.</i> , 181 Wn.2d 233, 332 P.3d 439 (2014).....	15, 16, 17
<i>Washington Fed'n of State Emps. v. State</i> , 107 Wn. App. 241, 26 P.3d 1003 (2001).....	16

**Statutes**

RCW 4.16.080 .....	15
RCW 7.24 .....	18
RCW 34.05.330(1).....	20
RCW 41.26 .....	13, 18
RCW 41.26.020 .....	20
RCW 41.26.030(23).....	3
RCW 41.26.270 .....	7
RCW 41.26.270(2).....	14
RCW 41.26.420 .....	3
RCW 41.26.470 .....	passim
RCW 41.26.470(2).....	passim
RCW 41.50.055(6).....	14
RCW 41.50.055(7).....	13
RCW 41.50.110 .....	13
RCW 41.50.110(2).....	13
RCW 51.50.110 .....	13

**Rules**

CR 12(b).....	8
CR 12(b)(6).....	7, 9
RAP 2.5(a) .....	2, 18

RAP 2.5(a)(3)..... 22

RAP 10.3(a)(6)..... 18

**Regulations**

WAC 415-104-485..... 5

WAC 415-104-486..... 19

## I. INTRODUCTION

It is undisputed that the Department of Retirement Systems fulfilled its statutory duty to notify Mr. Kilbourne of its determination that he was able to return to service. Instead, Mr. Kilbourne asks this Court to impose on the Department a duty to also notify the member employer. But the statute contains no such requirement. This Court should decline Mr. Kilbourne's request to re-write the statute.

Nor is a notice requirement to the employer necessary to effectuate the purpose of the statute. When a member receives notification from the Department, the member may choose to seek reinstatement by the employer and, if the employer declines, may pursue legal action against the employer. Unfortunately for Mr. Kilbourne, he filed his legal action against his former employer beyond the statute of limitation. But that is not a basis for this Court to re-write a statute that was adopted by the Legislature.

This Court should affirm the trial court's order dismissing Mr. Kilbourne's claim. The duty that Mr. Kilbourne relies on does not exist in RCW 41.26.470(2). Even if it did, Mr. Kilbourne's claim would be barred by the three-year statute of limitations. Additionally, this Court should decline to consider Mr. Kilbourne's three new arguments raised for the

first time on appeal. But even if this Court considers those additional claims, they lack merit and do not change the result of this case.

## **II. STATEMENT OF ISSUES**

1. RCW 41.26.470(2) explicitly requires that the Department notify a member of a determination that a member has recovered from the disability and is no longer entitled to duty disability benefits. There is no express requirement to notify the member's employer. Must the Department also notify the member's employer?

2. A three-year statute of limitations is typically applied in pension cases. Are Mr. Kilbourne's claims time-barred when the Department informed him in 2012 that he would receive a duty disability retirement for February 2011 through June 2012, and paid him those benefits by April 2013, but he did not file suit against the Department until August 2018?

3. Should the Court decline to consider Mr. Kilbourne's new claims raised on appeal, under RAP 2.5(a)?

4. If the Court does consider Mr. Kilbourne's new claims, did the Department have a duty to promulgate a rule requiring employers to be notified of Department decisions about members who are able to return to service after a duty disability retirement when (a) RCW 41.26.470

contains no such requirement, and (b) Mr. Kilbourne never petitioned the Department for adoption of such a rule?

5. Mr. Kilbourne never requested a hearing from the Department and never informed the City of the Department's termination of his duty disability benefits. Should the Court reject the claim against the Department for violation of the Administrative Procedure Act or the Everett Municipal Code related to opportunity for a hearing?

6. For appellate courts to hear a claimed error based on a constitutional right not addressed in the trial court, a party must demonstrate that it is "manifest" and "truly of constitutional dimension." Should Mr. Kilbourne's due process claim be rejected when (a) he did not argue this standard, and (b) he received the notice due to him by the Department?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. LEOFF Plan 2 Duty Disability Retirement Benefits**

The Law Enforcement Officers' and Firefighters' (LEOFF) Retirement System Plan 2 covers full-time officers and firefighters employed after October 1, 1977. RCW 41.26.030(23). LEOFF Plan 2 members generally qualify for retirement based on age and years of service. RCW 41.26.420. If a member is totally incapacitated before qualifying for retirement, the member may be eligible for a duty disability

retirement, if (1) the member can prove that the disability was incurred in the line of duty, and (2) the disability totally incapacitates the member from continued employment in a LEOFF-eligible position. RCW 41.26.470.

**B. Mr. Kilbourne's Employment and Resignation from the City of Everett**

In October 1987, Mr. Kilbourne joined LEOFF Plan 2 through his employment as a police officer for the City of Everett. CP 77. In March 2006, Mr. Kilbourne was injured while on duty. CP 5. Mr. Kilbourne underwent treatment for this injury for six years and did not work during this time. CP 77. Mr. Kilbourne resigned from the City effective January 1, 2011, citing the reason as his "on the job injury." CP 97.

Mr. Kilbourne applied for LEOFF Plan 2 duty disability retirement. CP 33. On September 24, 2012, the Department sent Mr. Kilbourne a letter stating that the Department had approved his application for retroactive duty disability retirement for the time-limited period of February 1, 2011, to June 30, 2012. CP 33. In the same determination, the Department also determined that his condition beyond June 30, 2012, did not meet the requirement for duty disability retirement. CP 33. The Department paid Mr. Kilbourne his duty disability retirement benefits for

February 1, 2011, to June 30, 2012, in two installments; the first on October 12, 2012, and the second on April 10, 2013. CP 34.

Included with the decision were instructions on how Mr. Kilbourne could appeal the Department's decision, including the opportunity to submit additional records, evidence, and arguments. CP 15. Mr. Kilbourne did not appeal the Department's decision on duty disability. CP 34. Instead, he chose to remain retired from his employment with the City, and has been receiving a non-disability related service LEOFF Plan 2 retirement allowance since April 30, 2013. CP 34.

**C. Mr. Kilbourne's 2012-2016 Reinstatement Requests**

Even before he had applied to the Department for LEOFF Plan 2 duty disability retirement benefits in April 2012,<sup>1</sup> Mr. Kilbourne had already asked the City to reinstate him to his previous position. He first asked in April 2012, and again in July 2012. CP 99, 105. The City denied his requests on August 1, 2012. CP 107. After the Department issued its decision regarding Mr. Kilbourne's duty disability retirement benefits on September 24, 2012, Mr. Kilbourne's attorneys wrote the City in 2014 and again two years later, to protest the August 2012 decision not to rehire

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<sup>1</sup> The Department determines whether a LEOFF 2 member is eligible for duty disability retirement benefits based on the member's application, which includes input from the member's employer. *See* WAC 415-104-485.

him. CP 109-14. The City's only response was to provide Mr. Kilbourne's attorneys with his personnel file, as they had requested. CP 89-90.

In April 2016, Mr. Kilbourne sued the City in Snohomish County Superior Court, demanding that the City reinstate him as a police officer, based on RCW 41.26.470. CP 90. The Department was not a party to Mr. Kilbourne's lawsuit against the City. *See Kilbourne v. City of Everett*, No. 76461-6-I, 2018 WL 2316516, at \*1 (Wash. App. May 21, 2018) (unpublished opinion). In January 2017, the superior court granted the City's motion for summary judgment, because Mr. Kilbourne had failed to file his complaint within the three-year statute of limitations. *Id.*

The Court of Appeals affirmed the superior court's order in an unpublished decision on May 21, 2018. *Id.* At no point between the Department's decision (on September 24, 2012) to grant Mr. Kilbourne LEOFF Plan 2 duty disability benefits for a time-limited period and the dismissal of his lawsuit against the City by the Court of Appeals (on May 21, 2018) did Mr. Kilbourne contact the Department or ask for the Department to get involved. *See* CP 77-81.

#### **D. Proceedings Below**

Three months after the Court of Appeals' decision, Mr. Kilbourne filed this lawsuit against the Department in Thurston County. CP 4. He asserted three causes of action. CP 7-9. The first was that the Department

violated RCW 41.26.270. CP 7. The second was that the Department breached its contractual obligations, citing RCW 41.26.270 as the contract in question. CP 8. The third sought a declaratory judgment but does not specify what he wants the court to order. CP 8-9. On the Department's CR 12(b)(6) motion to dismiss and on cross motions for summary judgment, the superior court denied summary judgment to Mr. Kilbourne and granted the Department's motion to dismiss. CP 132-133. The court ruled that Mr. Kilbourne failed to state a claim upon which relief can be granted because RCW 41.26.470(2) does not obligate the Department to inform a member's employer that the Department had determined the member is no longer eligible for LEOFF Plan 2 duty disability retirement benefits. CP 132-33. Mr. Kilbourne now appeals.

#### **IV. ARGUMENT**

This Court should affirm the superior court's ruling as there is only one reasonable interpretation of RCW 41.26.470(2): The Department had no duty to notify Mr. Kilbourne's employer when he no longer qualified for duty disability retirement benefits. Additionally, this Court should also affirm the superior court's ruling because Mr. Kilbourne's suit is time-barred as a matter of law as he brought this lawsuit more than three years after he retired.

Mr. Kilbourne's other claimed errors have no merit, and this Court should not consider them. First, the Department does not have a duty to promulgate a rule requiring employers to be notified of its determination of a member's duty disability benefits. Second, Mr. Kilbourne's failure to receive a hearing before the Everett Civil Service Commission is not based on any inaction of the Department, but rather, is based on the City's decision not to grant him reinstatement or a hearing. Third, any cause of action Mr. Kilbourne might have involving due process is against his employer, not the Department.

**A. Standard of Review**

Because both parties submitted evidence outside the pleadings in support of their motion to provide background facts and facts related to the timeliness of Mr. Kilbourne's action, this Court should consider the ruling below an order granting summary judgment to the Department, rather than merely a dismissal of Mr. Kilbourne's claims for failure to state a claim. *See Right-Price Rec., LLC v. Connells Prairie Cmty. Coun.*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002); CR 12(b); *see* CP 33- 35, 77-81, 84-120.

An order on summary judgment is reviewed de novo by this Court. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Specifically, legal questions decided by summary judgement are reviewed de novo as well. *Schmitt v. Langenour*, 162 Wn. App. 397, 406,

256 P.3d 1235 (2011); *see also M.W. v. Dep't of Social and Health Services*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003) (because the trial court dismissed the claims based on a question of law, the Court's review was de novo).

Even if the Court were to treat this as an order pursuant to CR 12(b)(6), the standard of review is also novo. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998) (whether a dismissal was appropriate under CR 12(b)(6) is a question of law that an appellate court reviews de novo.) Further, this Court reviews a trial court's CR 12(b)(6) dismissal regarding a statutory interpretation issue de novo. *Parker v. Taylor*, 136 Wn. App. 524, 527, 150 P.3d 127 (2007); *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

Washington courts have found that a CR 12(b)(6) dismissal is appropriate when a trial court has determined that the plain language of the statute at issue does not create a cause of action as alleged in the complaint. *See Keodalah v. Allstate Ins. Co.*, \_\_\_ Wn.2d \_\_\_, 2019 WL 4877438 at \*2 (Oct. 3, 2019); *see also Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 763-64, 881 P.2d 216 (1994)(CR 12(b)(6) dismissal was proper because the causes of action were all preempted under the Employee Retirement Income Security Act).

As this case only involves a question of law, this Court should review the ruling below as granting summary judgment to the Department and review this order de novo.<sup>2</sup>

**B. The Plain Language of RCW 41.26.470 Does Not Require DRS to Notify Employers**

RCW 41.26.470(2) does not mandate that the Department notify an employer when it terminates a member's duty disability retirement benefits. This is clear from the plain language of this provision. This Court should affirm the trial court's order dismissing this action.

The interpretation of RCW 41.26.470(2) is governed by familiar rules of statutory construction. "On matters of statutory interpretation, our 'fundamental objective is to ascertain and carry out the Legislature's intent.'" *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015) (citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). For unambiguous statutes, the courts utilize the plain meaning rule. In order to determine the plain meaning, courts look to "the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the

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<sup>2</sup> While Mr. Kilbourne argues there is a factual question as to "whether the City should have received notice from DRS of its determination that Mr. Kilbourne was eligible for reinstatement," this is incorrect. App. Br. at 10. This is actually a legal question, which the Superior Court addressed, and there are no questions of fact present in this appeal. CP 137.

provision, and the statutory scheme as a whole.” *Lenander v. Dep’t of Ret. Sys.*, 186 Wn.2d 393, 405, 377 P.3d 199 (2016). If the meaning of the statute is plain on its face, the court must give effect to that meaning as an expression of legislative intent. *Id.* (citing *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 10).

It is also well settled that courts will neither read into a statute matters which are not there nor modify a statute by construction. *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 426, 686 P.2d 483 (1984) (citing *King County v. City of Seattle*, 70 Wn.2d 988, 991, 425 P.2d 887 (1967)). For example, this Court declined to expand the definition of “law enforcement officer” under LEOFF to include “port police officers” because to do so would read a matter into the statute that is not there. *Auto. Drivers & Demonstrators Union Local No. 882 v. Dep’t of Ret. Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379 (1979).

Nothing in the text of RCW 41.26.470(2) requires the Department to notify an employer when a person is no longer entitled to disability retirement benefits. The only notice requirement in the statute pertains to providing notice to “the member.” RCW 41.26.470(2). Here, “the member” is Mr. Kilbourne. CP 33. The Department complied with this notice requirement, and Mr. Kilbourne does not dispute that. CP 33; *see* App. Br. at 8.

Mr. Kilbourne argues that this statute is ambiguous and this Court should consider statutory construction including legislative history to interpret this provision. App. Br. at 12. The argument is without merit. Before a court resorts “to aid[] to construction, such as legislative history,” the court first must make a determination that the statute is ambiguous. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 12. And for a statute to be ambiguous, “two reasonable interpretations must arise from the language of the statute itself, not from considerations outside the statute.” *Cerrillo v. Esparza*, 158 Wn.2d 194, 203-04, 142 P.3d 155 (2006). Mr. Kilbourne cannot show this.

Here, only one reasonable interpretation arises from RCW 41.26.470(2): If the Department determines that the member is able to return to service, only the *member* is entitled to notice. The language of the statute does not give rise to any reasonable interpretation that the Department must notify the employer. As the Supreme Court held in *Cerrillo*, if an interpretation requires “the importation of additional language into the statute,” the interpretation is not reasonable and does not create ambiguity. 158 Wn.2d at 203-04. This rule respects the separation of power, and it prevents courts from “engaging in legislation.” *Kilian v. Atkinson*, 147 Wn.2d 16, 27, 50 P.3d 638 (2002). Mr. Kilbourne’s interpretation of RCW 41.26.470(2) is not reasonable because it requires

the addition of a requirement that the Department notify a member's employer.

Mr. Kilbourne also argues that the Department has a duty to notify a member's employer under RCW 41.26.470(2) because it shall “perform such other functions’ as are required for the execution of the provisions of the statute.”<sup>3</sup> App. Br. at 12. But notification of the employer is not required for execution of any provision of RCW 41.26.470(2). Instead, the Department notifies the member pursuant to this statute, and the member in turn can seek reinstatement.

Additionally, the other statutory provisions Mr. Kilbourne cites support the conclusion that the Department is not required to notify a member's employer to execute RCW 41.26.470(2). These other statutes specifically include an employer notification requirement in plain language. First, Mr. Kilbourne cites RCW 41.50.110(2),<sup>4</sup> providing that the Department “shall ascertain and report to each employer” administrative expense fees. Second, Mr. Kilbourne brings up RCW 41.50.132, stating that the Department shall provide employers with a list

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<sup>3</sup> Mr. Kilbourne cites RCW 41.26 as support for this proposition. App. Br. at 12. However, pursuant to RCW 41.50.055(7), the Director of the Department shall “[p]erform such other functions as are required for the execution of the provisions of chapter 41.26 RCW.”

<sup>4</sup> In support of this argument, Mr. Kilbourne mistakenly cites RCW 51.50.110. App. Br. at 12. However, the provision providing that the Department shall notify employers of administrative fees is at RCW 41.50.110.

of members whose employer deducted or picked up employee contributions during a month the employee did not earn service credit. Third, Mr. Kilbourne cites RCW 41.50.055(6), which requires the Department to provide employers with a financial statement of the LEOFF fund. App. Br. at 13. The Legislature included plain language in all of these statutes requiring the Department to notify the employer in the indicated scenarios. In contrast, RCW 41.26.470(2) does not include any such notice requirement.

The plain meaning of RCW 41.26.470(2) requires the Department to notify the member, but does not require the Department to notify the third-party employer. Because there is only one reasonable interpretation of RCW 41.26.470(2), the statute is unambiguous, and the superior court correctly dismissed Mr. Kilbourne's action on the basis that the Department had no duty to notify his employer when he no longer qualified for duty disability retirement benefits. The Court should affirm the trial court.

**C. The Three-Year Statute of Limitations Bars Mr. Kilbourne's Claims**

If this Court determines that Mr. Kilbourne's complaint does state a claim upon which relief can be granted, Mr. Kilbourne's claim under RCW 41.26.270(2) is still untimely because it was not filed within three

years of when it accrued. Although the superior court did not reach this issue in deciding the Department's motion, this Court can affirm the trial court on any correct ground. *E.g., Gamboa v. Clark*, 180 Wn. App. 256, 283, 321 P.3d 1236 (2014).

**1. A three-year statute of limitations applies to Mr. Kilbourne's claims**

In this case, Mr. Kilbourne alleges that the Department violated RCW 41.26.470, the statute that governs LEOFF Plan 2 disability retirement benefits. Additionally, Mr. Kilbourne alleges that the Department breached its contractual obligations to him by violating RCW 41.26.470. CP 8. Because RCW 41.26.470 is a public pension statute, the statute of limitations for public pension cases applies. In public pension cases, a three-year statute of limitations applies. *Washington Educ. Ass'n v. Dep't of Ret. Sys.*, 181 Wn.2d 233, 248, 332 P.3d 439 (2014); *see* RCW 4.16.080.

In *Noah v. State*, the Court rejected the plaintiff's argument that public pensions are analogous to written contracts, and therefore a six-year statute of limitations should apply. 112 Wn.2d 841, 843, 774 P.2d 516 (1989). The Court found that while "[t]he contract theory of public pensions in *Bakenhus* has been consistently followed since the opinion was handed down," a public pension is not a "complete contract" because

“[a] contract in writing must contain all the essential elements of the contract.” *Id.* at 844, 845 (citing *Ingalls v. Angell*, 76 Wash. 692, 695–96, 137 P. 309 (1913); *Moran v. Stowell*, 45 Wn. App. 70, 73–74, 724 P.2d 396, *review denied*, 107 Wn.2d 1014 (1986)).

Almost exactly like the plaintiffs in *Noah* and *Washington Educ. Ass’n*, Mr. Kilbourne is challenging the Department’s application or interpretation of a public pension statute. Nothing relevant to the limitation periods distinguishes this case from *Noah*, or subsequent public pension law cases, all of which applied a three-year statute of limitations. *See Retired Pub. Emps. Coun. of Washington v. Charles*, 148 Wn.2d 602, 621, 62 P.3d 470 (2003); *City of Pasco v. Dep’t of Ret. Sys.*, 110 Wn. App. 582, 590, 42 P.3d 992 (2002); *Washington Fed’n of State Emps. v. State*, 107 Wn. App. 241, 243, 26 P.3d 1003 (2001). Therefore, the three-year statute of limitation applies here.

**2. The statute of limitations for Mr. Kilbourne’s claim began accruing when Mr. Kilbourne retired over five years ago**

The statute of limitations accrues when the member challenging the Department’s application of a pension statute retires. *Noah*, 112 Wn.2d at 843; *Bowles v. Dep’t of Ret. Sys.*, 121 Wn.2d 52, 78, 847 P.2d 440 (1993) (the “limitations period begins to run upon the employee’s retirement from service”); *see also Washington Educ. Ass’n*, 181 Wn.2d at

248. The plaintiffs in both *Noah* and *Bowles* raised the same impairment of contract claim that Mr. Kilbourne is raising in this case. *Noah*, 112 Wn.2d at 843-44; *Bowles*, 121 Wn.2d at 65-66.

Here, the Department granted Mr. Kilbourne's LEOFF duty disability retirement application for a time-limited period on September 24, 2012, and then paid him his disability retirement allowance. Mr. Kilbourne chose not to appeal the decision. He also chose to remain retired, and thus, the Department began paying to Mr. Kilbourne his non-disability service retirement benefits on April 10, 2013. Mr. Kilbourne filed this lawsuit more than five years later, on August 9, 2018. Accordingly, this suit is time-barred as a matter of law, and the Department is entitled to summary judgment.

**D. Mr. Kilbourne's Arguments Under the APA and the Everett Municipal Code Have No Merit**

This Court should not consider Mr. Kilbourne's newly raised arguments that he is entitled to relief under the APA, or the Everett Municipal Code, as these issues are not related to the issues addressed in the superior court. If the Court finds that these issues are related to the issues addressed in the superior court, Mr. Kilbourne fails to show that he is entitled to relief under these arguments.

**1. Mr. Kilbourne waived the right to argue that the Department failed to create rules or procedures under the Administrative Procedure Act**

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn. 2d 26, 37, 666 P.2d 351 (1983); RAP 2.5(a). An appellate court does have inherent authority to consider issues that the parties have not raised “when an argument is related to the issues addressed in the superior court.” *Cave Props. v. City of Bainbridge Island*, 199 Wn. App. 651, 662, 401 P.3d 327 (2017).<sup>5</sup> Mr. Kilbourne’s new arguments, however, are not related to the legal issue addressed in the superior court.

Mr. Kilbourne brings up the argument that the Department failed to create rules or procedures under the APA to effectuate the intent of RCW 41.26.470 for the first time before this Court. App. Br. at 14-16. In his complaint, Mr. Kilbourne pled three causes of action: the Department’s alleged violation of RCW 41.26.470, a breach of contract by the Department with Mr. Kilbourne, and a request for declaratory judgment under RCW 7.24. CP 7-9. Mr. Kilbourne does not reference the APA or the Department’s duty under RCW 41.26 to promulgate rules to enforce its statute. Likewise, Mr. Kilbourne’s motion for summary judgment and

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<sup>5</sup> Additionally, under RAP 10.3(a)(6), arguments must be supported by citations to legal authority and references to relevant parts of the record.

response to the Department's motions in the lower court focuses on Mr. Kilbourne's contract claim and the applicable statute of limitations of his suit. CP 60-69. Thus, the issue of the Department's rules is not related to the issues presented in the superior court.

But even if this Court considers Mr. Kilbourne's APA argument, Mr. Kilbourne fails to show that he is entitled to relief. No legal authority supports his assertion that the Department is required to promulgate additional rules providing for notice to employers of duty disability decisions under RCW 41.26.470.

Mr. Kilbourne's reliance on the general principle that agency rules may be used to "fill in the gaps" of a general statutory scheme is misplaced.<sup>6</sup> This is because gap-filling is something an agency may do if "such rules are necessary to the effectuation of a general statutory scheme." *Green River Cmty. Coll., Dist. 10 v. Higher Ed. Pers. Bd.*, 95 Wn.2d 108, 113, 622 P.2d 826 (1980). Here, the Department did promulgate rules necessary to implement RCW 41.26.470(2). See WAC 415-104-486. These rules lay out a list of factors as to when the Department terminates a member's duty disability benefits, thus effectuating RCW 41.26.470(2), which authorizes the Department to

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<sup>6</sup> Mr. Kilbourne's gap-filling argument to suggest employer notice should be required by rule amounts to an implicit concession that the statute itself contains no such requirement.

cancel a member's duty disability retirement benefits if the member is able to return to service. This WAC is in line with LEOFF's statutory scheme, created "to provide for an actuarial reserve system for the payment of death, disability, and retirement benefits to law enforcement officers and firefighters." RCW 41.26.020.

Additionally, if Mr. Kilbourne wanted the Department to promulgate a rule with this notice requirement, he could have petitioned the Department for rulemaking under RCW 34.05.330(1). That is how the APA provides for persons to seek agency action on rulemaking. No evidence in the record suggests he did. Thus, Mr. Kilbourne's claim that the Department should have promulgated additional rules to its statute fails.

**2. Mr. Kilbourne's Everett Municipal Code arguments have no merit**

Mr. Kilbourne also presents his argument regarding the Everett Municipal Code for the first time before this Court. Mr. Kilbourne argues that if the Department had notified the City that Mr. Kilbourne was no longer receiving duty disability benefits, the City would have either reinstated Mr. Kilbourne to his prior position or he would have had a hearing before the Everett Civil Service Commission. App. Br. at 20.

This argument is not related to the issues addressed in the superior court, as Mr. Kilbourne makes no reference to Everett's Civil Service Commission in his complaint, summary judgment motion and response to the Department's motion, or in his oral argument. CP 7-9, 60-66; Tr.12-21. Mr. Kilbourne thus has also waived this issue.

If this Court considers Mr. Kilbourne's municipal code argument, Mr. Kilbourne is still not entitled to relief. Mr. Kilbourne argues that if the City had known about the Department's determination, the City would have either reinstated him to his prior position or provided him with a hearing before its civil service commission. App. Br. at 20. Because Mr. Kilbourne resigned from his position voluntarily, this assertion is meritless. *See* CP 88 (in which the City stated that Mr. Kilbourne resigned from his position on January 18, 2012, and treated this as a "voluntary retirement.") When the Department notified Mr. Kilbourne in September 2012 that it granted him time-limited duty disability retirement benefits that ended on June 30, 2012, Mr. Kilbourne requested the City to reinstate him. The City in turn, denied this request. CP 89, CP 107. Thus, after Mr. Kilbourne resigned from his position, he requested reinstatement and the City did not reinstate him, nor did they provide him with any sort of hearing.

As a result, Mr. Kilbourne's failure to receive a hearing before the Everett Civil Service Commission is not based on any inaction of the Department, but rather, is based on the City's decision not to grant him either reinstatement or a hearing. Accordingly, Mr. Kilbourne's claim of error based on the Everett Municipal Code should be denied.

**E. Mr. Kilbourne Has Not Demonstrated That the Newly Claimed Error Based on Due Process is "Manifest" and "Truly of Constitutional Dimension"**

Mr. Kilbourne's Notice of Appeal makes no mention of any constitutional claim. CP 135-38. Now, for the first time, Mr. Kilbourne argues that the State has deprived him of a protected property interest and alleges that the deprivation occurred without due process. Courts generally refuse to review claimed errors raised for the first time on appeal, but the rule has an exception for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Mr. Kilbourne, though, does not meet this standard because he fails to provide the Court with the necessary information to consider a due process challenge. *See Aventis Pharm., Inc. v. Dep't of Revenue*, 5 Wn. App. 2d 637, 650, 428 P.3d 389 (2018) (stating RAP 2.5(a)(3) "permits constitutional issues to be raised for the first time on appeal, provided the record is adequate to permit review"); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) ("Parties wishing to

raise constitutional issues on appeal must adhere to the rules of appellate procedure.”)

Mr. Kilbourne has not demonstrated that the claimed error is “manifest” and “truly of constitutional dimension.” *Eyman v. McGehee*, 173 Wn. App. 684, 698, 294 P.3d 847 (2013). If the record from the trial court is not sufficient to determine the merits of the constitutional claim, then the claimed error is not “manifest” and review is not warranted. *Id.* at 698-99. Mr. Kilbourne did not address this argument before the trial court, nor did he address these standards in his brief. *See App. Br.* at 16-19. Thus, he has waived this due process argument.

In addition, Mr. Kilbourne fails to show that he is entitled to relief under this argument. To succeed on a federal due process claim, Mr. Kilbourne must identify a property right, show that the State has deprived him of that right, and show that the deprivation occurred without due process. *Danielson v. City of Seattle*, 108 Wn.2d 788, 795, 742 P.2d 717 (1987); *see generally Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014). Mr. Kilbourne cannot meet this standard.

The entity that denied Mr. Kilbourne’s reinstatement was the City, not the Department. CP 79, 107. The Department does not administer or control the City to either grant or take away Ms. Kilbourne’s position. The Department cannot return Mr. Kilbourne to his previous position, at the

“same civil service rank” or at “a lesser rank,” because the Department does not have the authority to force the City hire or rehire anyone. Nothing in the statutes gives the Department the authority to have such enforcement power. “Administrative agencies have only those powers expressly granted by statute or are necessarily implied from the legislature's statutory delegation of authority.” *Lenander*, 186 Wn.2d at 404 (citing *Tuerk v. Dep’t of Licensing*, 123 Wn.2d 120, 124–25, 864 P.2d 1382 (1994)); see also *Fox v. Dep’t of Ret. Sys.*, 154 Wn. App. 517, 525, 225 P.3d 1018 (2009) (the Department is not responsible for the University of Washington’s recordkeeping).

The cases Mr. Kilbourne cites support this conclusion that any cause of action Mr. Kilbourne might have involving due process is against his employer, not the Department. In a case concerning the City of Fife, for instance, the Court remanded the matter to trial court to determine whether the City, as the employee’s former employer, furnished the employee with a pretermination hearing prior to her termination. *Bullo v. City of Fife*, 50 Wn. App. 602, 607, 749 P.2d 749 (1988). Similarly, in a case regarding the City of Seattle, the Court held that the employee was denied due process of law when his former employer, the Seattle Police Department, “failed to provide a pretermination hearing.” *Punton v. City of Seattle Pub. Safety Comm’n*, 32 Wn. App. 959, 969, 650 P.2d 1138

(1982). For these multiple reasons, Mr. Kilbourne's due process argument is without merit.

## V. CONCLUSION

The Department had no duty to notify Mr. Kilbourne's former employer that his duty disability retirement benefits were for a set period of time or had terminated. To determine otherwise would read an obligation into the statute which is not there. The Court should affirm the superior court's motion to dismiss ruling in favor of the Department. The Department also requests that the Court grant summary judgment to the Department on the basis that Mr. Kilbourne's claims were untimely filed and barred by the three-year statute of limitations.

RESPECTFULLY SUBMITTED this 16th day of October, 2019.

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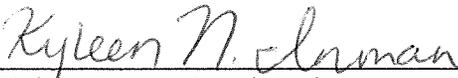
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of October, 2019, at Tumwater, WA.

  
\_\_\_\_\_  
Kyleen Inman, Legal Assistant

**ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION**

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