

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 DEC 23 A 11: 58

BY RONALD R. CARPENTER

CLERK

NO. 81187-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
JAN 02 2009
CLERK OF SUPREME COURT
STATE OF WASHINGTON
apl

DAVID McALLISTER and
KEN McALLISTER

Petitioners,

vs.

CITY OF BELLEVUE FIREMENS'
PENSION BOARD;

Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS

Daniel G. Lloyd, WSBA No. 34221
Amicus Curiae on behalf of WSAMA
Assistant City Attorney, City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500 / (360) 487-8501 (fax)

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
III. STATEMENT OF THE CASE.....	2
IV. ISSUE PRESENTED.....	2
V. ARGUMENT.....	2
A. LEOFF, as a subsequently enacted pension scheme, has numerous additional, and therefore, comparable benefits, which legitimately offsets any legislative change to the pensioner’s detriment, regardless of what benefit is actually desired.....	3
1. Because a statute’s unambiguous language cannot be judicially excised, the Court must give effect to the plain definition of “basic salary.”.....	4
a. The 1955 Pension Act required contributions to the local fund only until LEOFF took effect.....	4
b. LEOFF shifted the recipient of contributions from the municipality to the state and changed pension calculations, but preserved the pension formula under the 1955 Pension Act.....	6
c. LEOFF requires municipalities to pay excess pensions available under the 1955 Pension Act, but neither expressly nor impliedly amends that statute.....	9
2. Nothing in this Court’s precedent examining pension rights of public employees grants judicial amendment to a prior pension scheme as a viable remedy.....	12
B. Reversing the Court of Appeals would effectively overrule <i>Vallet v. City of Seattle</i> , a result that cannot be squared with principles of stare decisis.....	16
VI. CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	v

TABLE OF CASES AND AUTHORITIES

PAGE(S)

WASHINGTON STATE CASES

Am. Legion Post No. 32 v. City of Walla Walla,
116 Wn.2d 1, 802 P.2d 784 (1991).....10

Bakenhus v. City of Seattle,
48 Wn.2d 695, 296 P.2d 536 (1956)..... *passim*

Bowen v. Statewide City Employees Ret. Sys.,
72 Wn.2d 397, 433 P.2d 150 (1967).....4

Brutsche v. City of Kent,
164 Wn.2d 664, 193 P.3d 110 (2008).....18

Dailey v. City of Seattle,
54 Wn.2d 733, 344 P.2d 718 (1959).....13, 15

Davis v. Dep't of Licensing,
137 Wn.2d 957, 977 P.2d 554 (1999).....10

Eggleston v. Pierce County,
148 Wn.2d 760, 64 P.3d 618 (2003).....17, 18

Eisenbacher v. City of Tacoma,
53 Wn.2d 280, 333 P.2d 642 (1958).....13, 14, 15, 20

In re Stranger Creek,
77 Wn.2d 649, 466 P.2d 508 (1970).....17

Int'l Ass'n of Fire Fighters v. City of Seattle,
93 Wn. App. 235, 967 P.2d 1267 (1998).....6

Letterman v. City of Tacoma,
53 Wn.2d 294, 333 P.2d 650 (1958).....13, 14, 15, 19

McAllister v. City of Bellevue Firemen's Pension Bd.,
142 Wn. App. 250, 180 P.3d 786 (2007).....1, 2

Mulholland v. City of Tacoma,
83 Wn.2d 782, 522 P.2d 1157 (1974).....7, 20

Philippides v. Bernard,
151 Wn.2d 376, 88 P.3d 939 (2004).....11

Schrom v. Bd. for Volunteer Firefighters,
153 Wn.2d 19, 100 P.3d 814 (2004).....4, 10

Schumacher v. Williams,
107 Wn. App. 783, 28 P.3d 792 (2001).....12

State v. J.P.,
149 Wn.2d 444, 69 P.3d 318 (2003).....10

	PAGE(S)
<i>State v. Martin</i> , 137 Wn.2d 149, 969 P.2d 450 (1999).....	11
<i>State v. Strauss</i> , 119 Wn.2d 401, 832 P.2d 78 (1992).....	12
<i>State v. Sullivan</i> , 143 Wn.2d 162, 19 P.3d 1012 (2001).....	10
<i>Vallet v. City of Seattle</i> , 77 Wn.2d 12, 459 P.2d 407 (1969).....	<i>passim</i>
<i>Waremart, Inc. v. Progressive Campaigns, Inc.</i> , 139 Wn.2d 623, 989 P.2d 524 (1999).....	17
<i>Wash. Fed'n of State Employees Council 28 v. State</i> , 98 Wn.2d 677, 658 P.2d 634 (1983).....	3
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	10

WASHINGTON STATE CONSTITUTIONAL PROVISIONS

CONST. art. I, § 23	13, 20
---------------------------	--------

WASHINGTON STATUTES

LAWS OF 1915, ch. 40, § 2.....	16
LAWS OF 1955, ch. 382, § 1.....	6
LAWS OF 1961, ch. 191, § 1.....	16
LAWS OF 1965, Ex. Sess., ch. 45, § 3 (codified as amended at RCW 41.18.040).....	4
LAWS OF 1969, 1st Ex. Sess., ch. 209 (codified as amended at ch. 41.26 RCW).....	6
LAWS OF 2000, 2d Sp. Sess., ch. 1, § 907 (codified at RCW 41.26.080(2)).....	7
Chapter 41.16 RCW	5
RCW 41.16.050	5, 19
RCW 41.16.060	9
Chapter 41.18 RCW	1, 11
RCW 41.18.010	11
RCW 41.18.010(4).....	<i>passim</i>
RCW 41.18.010(12).....	5, 19

	PAGE(S)
RCW 41.18.030	19
RCW 41.18.040	5, 6, 19
RCW 41.18.060	6
Chapter 41.20 RCW.....	15
Chapter 41.26 RCW.....	1, 2
RCW 41.26.030	11
RCW 41.26.030(9).....	7
RCW 41.26.030(12)(a)	8
RCW 41.26.030(13)(a)	4, 13, 17
RCW 41.26.030(28).....	7
RCW 41.26.040(1).....	7, 9
RCW 41.26.040(2).....	7, 9, 20
RCW 41.26.040(3).....	5, 9
RCW 41.26.080(1)(a)	7, 13
RCW 41.26.080(1)(b)	19
RCW 41.26.080(2).....	7
RCW 41.26.090	19
RCW 41.26.090(1).....	19
RCW 41.26.100	8
RCW 41.26.130(1).....	8
RCW 41.26.150	19
RCW 41.26.160	19
RCW 41.26.161	19

I. INTRODUCTION

This case requires the Court to consider the interrelation between the Firemen's Relief and Pensions Act of 1955, ch. 41.18 RCW [hereinafter "1955 Pension Act"], and the Law Enforcement Officers and Fire Fighters Retirement System Act, ch. 41.26 RCW [hereinafter "LEOFF"]. Consistent with the constitutional prohibition against impairing existing contracts, this Court has consistently invalidated any legislation that prejudices the pension rights of the state's public employees without providing a corresponding benefit. *E.g., Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). However, the Court has never taken the extra leap sought by Petitioners David and Ken McAllister here, specifically drafting new legislation by judicial fiat. Undersigned amicus curiae, writing on behalf of the Washington State Association of Municipal Attorneys (WSAMA), offers this brief in support of affirming *McAllister v. City of Bellevue Firemen's Pension Board*, 142 Wn. App. 250, 180 P.3d 786 (2007).

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WSAMA is a non-profit organization of municipal attorneys in Washington. Washington has 281 cities and towns, ranging from Seattle at over half a million citizens to Krupp, with a population of about 60. WSAMA members represent municipalities throughout the state, as both

in-house counsel and as private, outside legal counsel. WSAMA associate members include attorneys that advise both fire and police departments on employment matters, including deferred compensation under Washington's Law Enforcement Officers and Fire Fighters' (LEOFF) pension plan, chapter 41.26 RCW. As such, it has an interest in the outcome of this case.

III. STATEMENT OF THE CASE

The briefs presented by both parties reveal that neither party disputes the facts, which are accurately represented by the Court of Appeals below. *See McAllister*, 142 Wn. App. at 252-55. As such, WSAMA incorporates by reference the factual discussion presented by the appellate court and the parties, thus negating any need to repeat them here.

IV. ISSUE PRESENTED

Whether the Court of Appeals correctly determined that a firefighter's pension under the 1955 Pension Act is determined according to that statute's definition of basic salary rather than from another existing statute or proffered hybrid statute.

V. ARGUMENT

The basic thrust of McAllisters' argument is that because LEOFF required them to contribute six percent of their Chief and Deputy Chief salaries in lieu of a battalion chief cap, the municipality that employed

them (Bellevue) must be compelled to augment their compensation from what the legislature defined in the 1955 Pension Act. This overly simplistic argument ignores two fundamental points of law, each of which support affirming the Court of Appeals: (1) nothing in the line of cases forbidding a legislative impairment of a public employee's pension system permits the court to judicially amend statutory language previously left unaltered, and (2) reversing the Court of Appeals would create precedent that would effectively overrule *Vallet v. City of Seattle*, 77 Wn.2d 12, 459 P.2d 407 (1969), without any party making the required showing that *Vallet* is both incorrect and harmful.

- A. **LEOFF, as a subsequently enacted pension scheme, has numerous additional, and therefore, comparable benefits, which legitimately offsets any legislative change to the pensioner's detriment, regardless of what benefit is actually desired.**

Underlying the McAllisters' arguments is a misapplied reliance on what this Court has dubbed "the *Bakenhus* rule." *Wash. Fed'n of State Employees Council 28 v. State*, 98 Wn.2d 677, 686, 658 P.2d 634 (1983) (citing *Bakenhus*, 48 Wn.2d 695). An examination of this Court's statutory construction jurisprudence, of *Bakenhus*, and of its progeny that followed demonstrates that the Court of Appeals was correct.

1. Because a statute's unambiguous language cannot be judicially excised, the Court must give effect to the plain definition of "basic salary."

The goal of any statutory analysis is to give effect to the legislature's intent, which is derived solely from the plain language of the statute whenever possible. *Schrom v. Bd. for Volunteer Firefighters*, 153 Wn.2d 19, 25, 100 P.3d 814 (2004). Though courts "construe ambiguous pension statutes 'in favor of the party for whose benefit the pension statute was intended,'" that rule has no application to unambiguous statutes. *Id.* at 32 & n.8 (quoting *Bowen v. Statewide City Employees Ret. Sys.*, 72 Wn.2d 397, 402, 433 P.2d 150 (1967)).

The dispositive question in this case centers on the statutory term of art "basic salary," which though appearing in both the 1955 Pension Act and LEOFF, is defined differently by those two statutes. Compare RCW 41.18.010(4) with RCW 41.26.030(13)(a). To properly understand the fallacy in the McAllisters' argument, it is necessary to discuss the separate statutory frameworks that apply in this case.

a. The 1955 Pension Act required contributions to the local fund only until LEOFF took effect.

The pension rights and obligations of firefighters beginning employment after 1955 but before 1970 were governed by the 1955 Pension Act. See LAWS OF 1965, Ex. Sess., ch. 45, § 3 (codified as

amended at RCW 41.18.040). Previously, the legislature had “created and established in the treasury of each municipality” a pension fund that would be used to satisfy the City’s future obligations. RCW 41.16.050. Five separate components comprised this fund: (1) one-quarter of the money received by state taxes on insurance premiums, (2) city property taxes, (3) interest on investments from the fund, (4) donations, and (5) the component most germane here, firefighter contributions. *Id.* These pension funds were initially established by the older Pension Act of 1947, ch. 41.16 RCW, but were used to fulfill each municipality’s obligations under the 1955 Pension Act until LEOFF was enacted. *See* RCW 41.18.010(12); RCW 41.26.040(3).

The contributions made by each firefighter equated to six percent of their “basic salary,” a term of art statutorily defined to mean:

the basic monthly salary, including longevity pay, attached to the rank held by the retired fireman at the date of his retirement, without regard to extra compensation which such fireman may have received for special duties assignments not acquired through civil service examination: *Provided*, That such basic salary shall not be deemed to exceed the salary of a battalion chief.

RCW 41.18.010(4). Firefighters retiring under the 1955 Pension Act were paid “a monthly pension which shall be equal to fifty percent of the basic salary now or hereafter attached to the same rank and status held by the said fireman at the date of his or her retirement,” provided they served for

at least 25 years and were 50 years old at the time of retirement. RCW 41.18.040. If the firefighter retired because of disability incurred in the line of duty, he or she would receive “a monthly sum equal to fifty percent of the amount of his or her basic salary at any time thereafter attached to the rank which he or she held at the date of retirement.” RCW 41.18.060.

Under this scheme, a pensioner rising to a rank above battalion chief was never required to contribute more than six percent of the battalion chief’s salary, but correspondingly was entitled to a monthly pension no greater than fifty percent of a battalion chief’s salary upon satisfying the statutory prerequisites. Not once has the legislature attempted to amend the clause limiting “basic salary” to ranks at or below a battalion chief. *Compare id. with LAWS OF 1955, ch. 382, § 1.*

b. LEOFF shifted the recipient of contributions from the municipality to the state and changed pension calculations, but preserved the pension formula under the 1955 Pension Act.

In 1969 the legislature enacted¹ LEOFF with “the purpose of . . . creat[ing] a single statewide system for all full-time fire fighters and law enforcement officers, replacing the multitude of separate retirement systems which previously existed.” *Int’l Ass’n of Fire Fighters v. City of Seattle*, 93 Wn. App. 235, 239, 967 P.2d 1267 (1998). LEOFF required all

¹ LAWS OF 1969, 1st Ex. Sess., ch. 209 (codified as amended at ch. 41.26 RCW).

Washington firefighters and law enforcement officers to become members of the statewide system no later than March 1, 1970, “to the exclusion of any system existing under any prior act.” RCW 41.26.040(1). LEOFF mandated that any firefighter who, as of March 1, 1970, was “making retirement contributions under any prior act shall have his membership transferred” to the LEOFF system. RCW 41.26.040(2); *see also Mulholland v. City of Tacoma*, 83 Wn.2d 782, 784, 522 P.2d 1157 (1974).

Similar to their obligations under the 1955 Pension Act, firefighters employed on or after March 1970 were required to contribute “a sum equal to six percent of [their] . . . basic salary for each pay period.” RCW 41.26.080(1)(a). But unlike the 1955 Pension Act, the firefighters’ contributions were no longer added to their municipal employers’ local pension fund, but rather were forwarded in full to the state fund maintained and administered by the Department of Retirement Systems. RCW 41.26.030(9), .080(1)(a); *see also Mulholland*, 83 Wn.2d at 784 n.2 (recognizing that “Prior to LE[O]FF both the employee and the city contributed to the [local] pension fund,” whereas “[u]nder LE[O]FF the contributions are made to the state system.”).² As such, no employee ever

² Because the McAllisters became LEOFF members prior to October 1977, they are considered LEOFF “Plan 1” members. RCW 41.26.030(28). The legislature ceased requiring firefighters to fund the plan 1 system after June 30, 2000. *See LAWS OF 2000, 2d Sp. Sess., ch. 1, § 907* (codified at RCW 41.26.080(2)). However, both McAllister brothers appear to have retired that date.

contributed to the local pension funds under the 1955 Pension Act once LEOFF took effect on March 1, 1970. LEOFF's definition of "basic salary," did not limit the term's reach to the battalion chief rank. As such, pensioners such as the McAllisters who attained ranks higher than battalion chief (such as Chief and/or Deputy Chief) were required to contribute six percent of their full "basic salary" to the LEOFF fund. RCW 41.26.030(13)(a); .080(1)(a).

The retirement allowance available to the LEOFF pensioner increased depending on the length of time the firefighter served, up to "one-twelfth of two percent of his or her final average salary for each month of service" for firefighters who served more than 20 years. RCW 41.26.100. The term "final average salary," as applied to LEOFF 1 pensioners like the McAllisters, meant "the basic salary attached to such same position or rank at time of retirement." RCW 41.26.030(12)(a). Firefighters like the McAllisters who retired for disability incurred in the line of duty were entitled to not only "[a] basic amount of fifty percent of final average salary at time of disability retirement," but also an additional five percent per child up to an aggregate sum of 60 percent. RCW 41.26.130(1).

- c. **LEOFF requires municipalities to pay excess pensions available under the 1955 Pension Act, but neither expressly nor impliedly amends that statute.**

Cognizant of constitutional limitations, LEOFF expressly forbids any construction that limits the pension the firefighter would have received if, hypothetically, LEOFF never existed. RCW 41.26.040(2). Though all firefighters became members of LEOFF “to the exclusion of” the 1955 Pension Act, RCW 41.26.040(1), their “benefits under the prior retirement act to which [t]he[y] w[ere] making contributions at the time of [the] transfer [to LEOFF] shall be computed as if [t]he[y] had not transferred,” RCW 41.26.040(2). The municipality that employed the firefighter would then pay “[t]he excess, *if any*, of the benefits so computed, giving full value to survivor benefits, over the benefits payable under [LEOFF] whether or not the employee has made application under the prior act.” *Id.* (emphasis added). Per LEOFF, cities would meet their excess payment obligations by maintaining the previously established local pension funds and continuing to levy the property tax as originally established in 1947. *See* RCW 41.16.060; RCW 41.26.040(3).

The result sought by the McAllisters cannot be realized without judicially excising the last clause of RCW 41.18.010(4), namely the wording at the end of the 1955 Pension Act’s definition of “basic salary”:
“*Provided*, That such basic salary shall not be deemed to exceed the salary

of a battalion chief.” To reach this outcome, the Court must violate two well-settled points of law. First, the Court would have to disregard precedent holding that “[d]efinitions provided by the legislature are given controlling effect.” *Schrom*, 153 Wn.2d at 27 (citing *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) and *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991)). Second, the Court would have to ignore its rule to never “delete language from an unambiguous statute.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). As a result, the Court would wholly discount the rule that “[s]tatutes [are] interpreted and construed so that *all* the language used is given effect, *with no portion rendered meaningless or superfluous.*”” *Id.* (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996))) (emphasis added).

Without question, RCW 41.18.010(4) expressly caps “basic salary” as used in the 1955 Pension Act to the rank of battalion chief. Statutes are ambiguous only when they are susceptible to more than one reasonable interpretation, and only when a statute is ambiguous may the court look beyond the statute’s plain language. *Schrom*, 153 Wn.2d at 31 (citations omitted). Here, there is no room for confusion. Though the terms are

identical in name, the 1955 Pension Act and LEOFF definitions of “basic salary” are plainly different.

Furthermore, the statutes expressly limit the definitions to their respective statutes alone. Applying LEOFF’s definition of “basic salary” to the term in the 1955 Pension Act would force the Court to excise the opening clause of RCW 41.18.010, which states “words and phrases [in RCW 41.18.010] *shall* have the meaning hereinafter ascribed” to them “[f]or the purpose of this chapter [41.18 RCW], *unless clearly indicated otherwise by the context.*” RCW 41.18.010 (emphasis added); *accord* RCW 41.26.030. The word “shall” is universally understood to “impose[] a mandatory requirement unless a contrary legislative intent is apparent.” *State v. Martin*, 137 Wn.2d 149, 154, 969 P.2d 450 (1999). There is no “context” that “clearly indicate[s]” that chapter 41.18 RCW borrowed LEOFF’s “basic salary” definition *sub silentio*, RCW 41.18.010, and there is no “contrary legislative intent” suggesting the word “shall” in that section is anything less than an imperative, *Martin*, 137 Wn.2d at 154.

As it is clear that the legislature never *expressly* amended the 1955 Pension Act definition, it is equally clear that LEOFF never *impliedly* amended the section. Washington law is absolute that courts shall not assume that the legislature intended to effect significant change to statutes by implication. *Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939

(2004); *State v. Strauss*, 119 Wn.2d 401, 418, 832 P.2d 78 (1992); *Schumacher v. Williams*, 107 Wn. App. 783, 801, 28 P.3d 792 (2001).

The conclusion advanced by the McAllisters—namely that the definition from LEOFF implicitly overrides the clear definition of the 1955 Pension Act—cannot be squared with logic or precedent. Accordingly, the Court of Appeals correctly concluded that the plain language of the 1955 Pension Act requires that pensions calculated under *that Act* must use *that Act's* definitions.

2. Nothing in this Court's precedent examining pension rights of public employees grants judicial amendment to a prior pension scheme as a viable remedy.

The only alternative advanced to compel municipalities to disregard 1955 Pension Act's definition of "basic salary" is reliance on *Bakenhus* and its progeny. Yet *Bakenhus* does not—and cannot—require a court to craft a hybrid pension system if a later statute is deemed to have impaired existing contractual rights.

Bakenhus held:

[T]he employee who accepts a job to which a pension plan is applicable contracts for a substantial pension and is entitled to receive the same when he has fulfilled the prescribed conditions. His pension rights may be modified prior to retirement, but only for the purpose of keeping the pension system flexible and maintaining its integrity.

Bakenhus, 48 Wn.2d at 701. Three years later, the Court clarified its precedent on legislative modifications to pension plans:

1. That employees who accept employment to which pension plans are applicable contract thereby for a substantial pension, and are entitled to receive the same when they have fulfilled the prescribed conditions.
2. That employees (prospective pensioners) will be presumed to have acquiesced in legislative modifications that do not unreasonably reduce or impair existing pension rights; or, stated positively, if the modifications are reasonable and equitable.
3. That an act of the legislature, making a change in pension rights, will be weighed against pre-existing rights in each individual case to determine whether it is reasonable and equitable. If the over-all result is reasonable and equitable, the employees (prospective pensioners) will be presumed to have acquiesced in the modifications; if the over-all result is not reasonable and equitable, there will be no such presumption.

Dailey v. City of Seattle, 54 Wn.2d 733, 739, 344 P.2d 718 (1959). In other words, “pension rights are to be determined by the latest act which could constitutionally be applied.” *Id.* (emphasis added).

Bakenhus and its progeny are grounded in the constitutional prohibition in article I, section 23 forbidding the passage of any “law impairing the obligations of contracts.” CONST. art. I, § 23; see also *Letterman v. City of Tacoma*, 53 Wn.2d 294, 298-99, 333 P.2d 650 (1958) (“The *Bakenhus* case specifically dealt with the constitutionality of the 1937 police pension act as applied to Mr. Bakenhus.”); *Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 282, 333 P.2d 642 (1958) (recognizing *Bakenhus* held a 1937 amendment to a public pension act “could not,

constitutionally, be applied to Mr. Bakenhus as a limitation on his pension rights”) (italics in original).

Yet cases in which the pensioner succeeded in proving that subsequent legislation unconstitutionally impaired his or her preexisting pension rights, the pensioner was allowed only to *retire* under the preexisting pension act, *not* receive an *increase* in that former pension. For example, in *Bakenhus* the plaintiff, a former police officer, convinced this Court that the 1937 pension act unconstitutionally capped his pension at \$125. *Bakenhus*, 48 Wn.2d at 701. His remedy was the ability to retire under the act that defined his rights prior to 1937. *Id.* at 697, 702-03.

In *Eisenbacher* former Tacoma firefighters, like Mr. Bakenhus, claimed a 1935 cap on their pension to \$125 per month unconstitutionally impaired their rights under prior legislation, which if applied would result in more money. *Eisenbacher*, 53 Wn.2d at 282. This Court agreed, and ordered the firefighters be paid in accordance with “the Firemen’s Relief and Pension Act *in force prior to 1935.*” *Id.* at 281 (emphasis added); *see also id.* at 284, 286.

Likewise, *Letterman* considered which of several different pension acts (1919, 1929, 1935, 1955) applied to a Tacoma firefighter employed between 1929 and 1957. *Id.* at 296-300. The Court first held that the 1929 act’s amendments did not unreasonably impair the firefighter’s rights

under the 1919 act, consequently concluding “that the 1929 act c[ould] validly be applied to respondent [firefighter].” *Id.* at 299. The Court then held that “[t]he 1935 act could *not* constitutionally be applied to respondent as a limitation on his pension rights,” concluding that the firefighter’s pension would be governed by either the 1929 pension act or the 1955 act. *Id.* The Court held that, per the terms of the 1955 act, the firefighter could within 60 days elect between retiring under either the 1929 act or the 1955 act. *Id.* at 300-01.

Lastly, *Dailey* held that a 1955 act governing police officers (ch. 41.20 RCW), was unconstitutional as applied to Captain Dailey. *Dailey*, 54 Wn.2d at 742. The Court then held that “Captain Dailey could and did retire under the terms of the 1915 act, and that the terms of chapter 69, Laws of 1955, are not applicable to his retirement.” *Id.*

These authorities hold and reaffirm that “pension rights are to be determined by *the latest act which could constitutionally be applied.*” *Id.* at 739 (emphasis added); *Letterman*, 53 Wn.2d at 298; *Eisenbacher*, 53 Wn.2d at 280. Even assuming that LEOFF was unconstitutional as applied to the McAllisters (which it is not), nothing in this Court’s jurisprudence holds that the remedy to a legislative impairment of one’s existing contractual rights is a judicial modification of the terms governing the existing contract.

B. Reversing the Court of Appeals would effectively overrule *Vallet v. City of Seattle*, a result that cannot be squared with principles of stare decisis.

Notably, this Court already rejected a prior attempt to create a hybrid pension by borrowing different sections from separate pension acts. *See Vallet*, 77 Wn.2d at 19-22. *Vallet* involved a police officer at the rank of Inspector who elected to retire in 1965. *Id.* at 13. At issue was whether a 1915 act or a 1961 act determined the amount of benefits due. *Id.* at 16. The 1915 statute provided a pension at one-half his rank's salary, but that amount was fixed. *Id.* at 16-17 (citing LAWS OF 1915, ch. 40, § 2). The 1961 statute's pension was capped at the level of one-half of a Captain's salary, but the amount escalated with the pay of Captains in active service. *Id.* (citing LAWS OF 1961, ch. 191, § 1). The police officer sought a pension at one-half the salary of Inspector, as under the uncapped 1915 statute, that would escalate like pensions under the 1961 statute. *Id.* at 19. After the officer prevailed at the trial court, this Court reversed, agreeing with the city's argument "that the *Bakenhus* rule does not allow the selection by respondent of the best parts of several pension plans, but only requires the application of the most favorable statute to respondent's status at the time of his retirement." *Id.* The Court found that the 1961 statute's "modification to respondent's pension rights [was] reasonable and equitable and respondent must, therefore, retire under the 1961 act and

cannot select the most favorable parts of the 1915 and 1961 acts as a basis for his pension rights.” Id. at 22 (emphasis added). The Court found that “to permit [one] to receive the most beneficial parts of the 1915 and 1961 acts to the exclusion of any detriments contained therein would result in absurd consequences to the whole pension system.” Id. at 19.

To obtain the pension scheme desired by the McAllisters, the Court would have to borrow RCW 41.26.030(13)(a) from LEOFF and insert that definition into the 1955 Pensions Act in lieu of RCW 41.18.040(4). This is exactly what *Vallet* forbids. Consequently, reversing the Court of Appeals and finding in favor of the McAllisters would establish precedent that overrules *Vallet* either expressly or *sub silentio*. This outcome cannot be acceptable for the “doctrines [of stare decisis] requires a *clear* showing that an established rule is *incorrect and harmful* before it is abandoned.” *Walmart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 634, 989 P.2d 524 (1999) (quoting *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)) (emphasis added) (alteration in original). This Court again reaffirmed this principle as recently as last October, refusing to overrule a previously decided case when the party offered the same arguments previously raised and rejected in the authority sought to be overruled, *Eggleston v. Pierce County*, 148

Wn.2d 760, 64 P.3d 618 (2003). See *Brutsche v. City of Kent*, 164 Wn.2d 664, 682, 193 P.3d 110 (2008).

The McAllisters have not cited *Vallet* anywhere in their briefing, much less persuasively argued for the case to be overruled. No party adequately argues that *Vallet* was wrongly decided or that *Vallet*'s precedent is harmful in any way. In order to uphold stare decisis principles, this Court must affirm the Court of Appeals, and "determine[] [the McAllisters' pension rights] by the latest act which can be constitutionally applied to" them. *Vallet*, 77 Wn.2d at 21.

Even assuming a constitutional challenge was appropriately raised,³ it still would fail. The McAllisters "presum[ptively] . . . acquiesced in legislative modifications" so long as those enactments "do not unreasonably reduce or impair [the McAllisters' then] existing pension rights." *Id.* Thus, if LEOFF's "modifications are reasonable and equitable," LEOFF alone governs. *Id.* When compared with the 1955 Pension Act, it becomes readily clear that the lone disadvantage LEOFF created (i.e., a higher contribution rate for the highest ranked firefighters), is more than offset by LEOFF's advantages. And it is important to note that this inquiry requires consideration of *all* possible advantages that

³ A review of the briefs suggests that no party claims LEOFF is unconstitutional. See Reply to Answer to Pet. for Review at 1 ("The McAllisters are making no argument before this court that LEOFF is unconstitutional.")

applied to the McAllisters, even if the McAllisters never actually availed themselves of such benefits. *Accord Letterman*, 53 Wn.2d at 295, 298 (comparing 1919 and 1929 acts and considering, *inter alia*, benefits such as the ability to recoup contributions plus interest if the firefighter retired before 15 years, even though Letterman worked for over 27 years)

First, LEOFF entitled fire fighters to obtain a pension after serving only five years. RCW 41.26.090(1). Conversely, under the 1955 Pension Act, a fire fighter could not obtain any retirement allowance until he or she had completed 25 years of service. RCW 41.18.040. Thus, although David and Ken McAllister worked from 1965 until 1975 and 1983, respectively, LEOFF gave them the previously unavailable option of retiring in 1970 and obtaining a retirement allowance upon reaching 50 years of age. RCW 41.26.090. Second, LEOFF provides pensioners with benefits not offered by the 1955 Pension Act, such as medical coverage for life and a survivor's benefit at 100 percent of the retiree's pension. *See* RCW 41.26.150; RCW 41.26.160; RCW 41.26.161. Lastly (this discussion is not meant to be an exhaustive list of every benefit LEOFF provides over the 1955 Pension Act), LEOFF requires employers to match employee contributions, RCW 41.26.080(1)(b), whereas the 1955 Pension Act required only the employee to contribute, RCW 41.16.050, 41.18.010(12), .030. In sum, despite requiring only a specific subset of

firefighters (those rising above the rank of battalion chief) to contribute more than under the 1955 Pension Act, LEOFF offset that slight drawback with numerous advantages. As a result, any alleged detriment incurred by the McAllisters is substantially outweighed by numerous corresponding benefits, thus fully complying with *Bakenhus* and article I, section 23 of the state constitution. *Accord Eisenbacher*, 53 Wn.2d at 268.

VI. CONCLUSION

LEOFF directly addresses *Bakenhus* through a provision ensuring that pensioners receive the most advantageous benefit calculation, under the provisions of one plan *or* the other. RCW 41.26.040(2). As this Court has already held, the legislature enacted this section “[i]n obvious recognition of’ *Bakenhus*. *Mulholland*, 83 Wn.2d at 785. Pensioners cannot, consistent with this Court’s jurisprudence, pick and choose parts of both plans to craft a new design the legislature did not enact.

Because the Court of Appeals correctly rejected the McAllisters’ proffered hybrid system, this Court should affirm.

RESPECTFULLY SUBMITTED this 23rd day of December, 2008.

/s/ Daniel G. Lloyd

Daniel G. Lloyd, WSBA No. 34221
Amicus Curiae on behalf of WSAMA
Assistant City Attorney, City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 696-8251 / (360) 696-8250 (fax)

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 DEC 23 A 11: 58

CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

I certify that on or before the date below, I mailed (via first class
mail, postage prepaid) a copy of the foregoing document to each and
every attorney of record herein, as identified below:

CLERK

COUNSEL FOR PETITIONERS

Mr. Hans E. Johnsen
10655 NE 4th St Ste 312
Bellevue, WA 98004-5022

COUNSEL FOR RESPONDENTS

Ms. Cheryl A. Zakrzewski
Assistant City Attorney
City of Bellevue Attorney's Office
PO Box 90012
Bellevue, WA 98009-9012

DATED on December 23, 2008.

/s/ Daniel G. Lloyd

Daniel G. Lloyd, WSBA No. 34221
Attorney for Amicus Curiae WSAMA
Assistant City Attorney, City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 696-8251 / (360) 696-8250 (fax)

OFFICE RECEPTIONIST, CLERK

To: Lloyd, Dan
Subject: RE: McAllister v. City of Bellevue Firemen's Pension Board, No. 81187-3

Rec. 12-23-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Lloyd, Dan [mailto:Dan.Lloyd@ci.vancouver.wa.us]
Sent: Tuesday, December 23, 2008 11:57 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Lloyd, Dan
Subject: McAllister v. City of Bellevue Firemen's Pension Board, No. 81187-3

Dear Mr. Carpenter:

Pursuant to this Court's General Order No. 25700-B-334 (Sept. 4, 1997), and the policies adopted by the Clerk, please accept for filing the attached Motion and Brief of Amicus Curiae Washington State Association of Municipal Attorneys.

Case Name: McAllister v. City of Bellevue Firemen's Pension Board
Case No.: 81187-3

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
210 E. 13th St., 2nd Floor
P.O. Box 1995
Vancouver, WA 98668-1995
Tel: 360.487.8500 * **Fax:** 360.487.8501
dan.lloyd@ci.vancouver.wa.us

CONFIDENTIALITY NOTICE: This e-mail may contain confidential and privileged information. If you have received this message in error, please notify me immediately by replying to this e-mail and telephoning me. Do not review, disclose, copy, or distribute this message. Thank you.