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Court of Appeals Cause No. 57869-3-I

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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DAVID McALLISTER and  
KEN McALLISTER, Appellants,

vs.

CITY OF BELLEVUE FIREMENS'  
PENSION BOARD, Respondents.

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PETITION FOR REVIEW

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- A. Copy of McAllister v. City of Bellevue Opinion
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**A. IDENTITY OF PETITIONERS**

David McAllister and Ken McAllister (“McAllisters”) ask the Court to accept review of the Court of Appeals’ decision designated in Part B of this petition.

**B. COURT OF APPEALS’ DECISION**

McAllisters ask the Court to review the Court of Appeals’ decision holding that their pension, in effect at the time they were hired, can be modified by subsequent legislation that requires them to contribute an increased amount where there is no increase in pension benefit.

The Court of Appeals’ decision is contained under cause number 57869-3-I and was filed on November 19, 2007. (Appendix A.) A motion to publish was granted on December 17, 2007. (Appendix B.)

**C. ISSUES PRESENTED FOR REVIEW**

Where members of a municipal fire service begin employment under a pension system that provides for pension benefits based upon a particular contribution rate, can the contribution rate be increased by subsequent legislation and applied to existing members without any corresponding benefit?

**D.     STATEMENT OF THE CASE**

1.     Introduction.

This case is before the Court presenting issues similar to those presented in *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). In *Bakenhus*, the Court held that a police officer's pension could not be decreased by legislation enacted subsequent to the police officer's hiring. In the McAllister case, the Court of Appeals' opinion affirms a decision allowing the Legislature to increase the amount of the McAllisters' pension contribution with no corresponding increase in benefits.

2.     Facts.

David McAllister was hired by the Bellevue Fire Department on January 1, 1965, as deputy chief. He became chief of the Department in April of 1968. He retired on February 1, 1975, on a duty-related disability. At the time of his retirement, he held the rank of chief of the Fire Department. (CP 28, lines 23-25.)

Ken McAllister was hired on January 1, 1965, in the rank of firefighter. He advanced to lieutenant in 1968, to captain in 1969, to battalion chief in 1970 and to deputy chief in 1973. He retired with a duty-related disability on May 6, 1983. At the time of his retirement, he

held the rank of deputy chief of the Fire Department. (CP 28, lines 26-28.)

Because of their employment with the Fire Department, at the time they were hired, the McAllisters were covered for retirement benefits under RCW 41.18, hereinafter referred to as the ("Pension Act"), enacted in 1955. (CP 28, lines 29-30.)

The employee contribution rate under the Pension Act was six percent (6%) multiplied by the salary of the rank occupied by the member. This contribution rate rank was limited by the Pension Act's definition of "basic salary" to the maximum rank of battalion chief. (RCW 41.18.030 and RCW 41.18.010(4).) A deputy chief and chief, therefore, only contributed six percent (6%) of a battalion chief's salary. Upon retirement for disability, a deputy chief or chief received the maximum benefit of fifty percent (50%) of the salary of battalion chief.

In 1969, the Legislature adopted RCW 41.26, the Law Enforcement Officers' and Fire Fighters' Retirement System ("LEOFF"). The McAllisters became members of LEOFF as of March 1, 1970. (CP 29, lines 1-3.) The original LEOFF legislation, RCW 41.26.040, continued the McAllisters' coverage under the Pension Act and

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guaranteed the same contribution rate.<sup>1</sup> By later amendment, effective February 12, 1970, the right to the Pension Act contribution rate was removed.<sup>2</sup>

After March 1, 1970, the McAllisters contributed six percent (6%) of their actual salary toward their pension, disregarding the Pension Act

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<sup>1</sup> (1) All firefighters, policemen, deputy sheriffs and town marshals initially employed in that capacity on or after March 1, 1970, on a full time basis in this state shall be members of the retirement system established by this chapter, to the exclusion of any pension system existing under any prior act.

(2) Any employee who has made retirement contributions under any prior act shall have his membership transferred to the system established by this chapter on March 1, 1970: *Provided, however,* that for purposes of employee contribution rate, creditability of service, eligibility for service or disability retirement and survivor and all other benefits, such employee shall also continue to be covered by the provisions of such prior act which relate thereto, as if this transfer of membership had not occurred. Upon retirement for service or for disability or death of any such employee, his retirement benefits earned under this chapter shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had continued to be a member of the retirement system covered thereby and these benefits, including survivor's benefits, offset by all benefits payable under this chapter, shall be paid to him by the county, city, town or district by which he was employed at the time of his retirement. [Emphasis added]

<sup>2</sup> (1) All fire fighters and law enforcement officers employed as such on or after March 1, 1970, on a full time fully compensated basis in this state shall be members of the retirement system established by this chapter with respect to all periods of service as such, to the exclusion of any pension system existing under any prior act except as provided in subsection (2) of this section.

The Washington law enforcement officers' and fire fighters' retirement system is hereby created for firefighters and law enforcement officers.

(2) Any employee serving as a law enforcement officer or fire fighter on March 1, 1970, who is then making retirement contributions under any prior act shall have his membership transferred to the system established by this chapter as of such date. Upon retirement for service or for disability, or death, of any such employee, his retirement benefits earned under this chapter shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had not transferred. For the purpose of such computations, the employee's creditability of service and eligibility for service or disability retirement and survivor and all other benefits shall continue to be as provided in such prior retirement act, as if transfer of membership had not occurred. The excess, if any, of the benefits so computed, giving full value to survivor benefits, over the benefits payable under this 1970 amendatory act shall be paid. . .

limitation at six percent (6%) of the battalion chief salary. (Administrative Record, HEG 04-01-576.)

From the time of their retirement, the McAllisters were receiving benefits calculated under the Pension Act based upon their respective ranks of deputy chief and chief, ostensibly because they contributed at that rank. In November 2003, the Pension Board determined that their pension under RCW 41.18 should instead be calculated based upon the rank of battalion chief, notwithstanding their contribution at the full salary of deputy chief and chief. (CP 29, lines 13-23 and CP 73-75.) The result was a substantial reduction in the McAllisters' retirement benefits. (CP 29 line 14 to CP 30, line 22.)

### 3. Procedure.

The McAllisters appealed the decision by the City of Bellevue Pension Board that reduced their Pension Act benefits. This appeal was taken to Gordon Crandall, an administrative hearing officer appointed by the Pension Board. He made a recommendation to affirm the reduction in benefits made by the Pension Board, and the Pension Board thereafter adopted his recommendation and affirmed the decision to reduce the McAllisters' benefits. (CP pages 28-33.) It is from the final action of the Pension Board that a Writ of Review was taken to the Superior Court.

(CP pages 5-8.) The trial court denied the relief requested in the Writ of Review and affirmed the Pension Board.

The decision of the Trial Court was appealed to Division I of the Court of Appeals. In a published opinion, the Court of Appeals affirmed the Trial Court. (Appendix A.)

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

1. The Decision of the Court of Appeals is in Conflict With Prior Decisions of the Supreme Court.

In the landmark case of *Bakenhus v. City of Seattle*, 54 Wn.2d 695, 296 P.2d 536 (1956), the court set forth the rules that Washington has followed in analyzing public service pension legislation and modifications to existing pensions. The *Bakenhus* court held that a pension was not a gratuity but a contractual obligation to pay deferred compensation and, as such, any amendment to Bakenhus' Pension Act could not constitutionally be applied to Bakenhus as a limitation on his pension rights.

The *Bakenhus* court further went on to adopt the holding of *Allen and Alger v. City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (1955). In that case, one of the issues was whether an employee's contribution rate toward an existing pension system for firefighters could be raised. The California court held it could not without some corresponding benefit to the recipient. The court stated:

Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. [Emphasis added].

Similar to the quoted language in the *Allen* and *Alger* cases, the case of *Dailey v. City of Seattle*, 54 Wn.2d 733, 344 P.2d 718 (1959) dealt with the contribution side of the pension equation. In the *Dailey* case, the court held that an increase in contributions with no increase in benefits was unreasonable and inequitable.

The cases following *Bakenhus* have never wavered from its holding, repeating the reasoning contained in the *Bakenhus* opinion. In the case of *Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 333 P.2d 642 (1958), the City of Tacoma tried to restrict the *Bakenhus* holding to cases involving retirement for service, excluding those where the retirement was for disability. The court disagreed, holding as follows:

The proper interpretation of the firemen's relief and pension act and of the decision in *Bakenhus*, supra, is as follows: An employee who accepts a job to which a pension and relief plan or system is applicable contracts for a pension and relief plan or system substantially in accord with the then existing legislation governing the same; modifications of a pension plan or system cannot be imposed on the employee unless the changes are equitable to the employee. Permissible modification could, in some

cases, completely destroy inchoate benefits of third parties. *Packer v. Board of Retirement*, 1950, 35 Cal.2d 212, 217 P.2d 660. The contractual rights of the *employee* to a 'substantially similar' pension and relief system belong only to the employee until all contingencies have been fulfilled.

In the case of *Eagan v. Spellman*, 90 Wn.2d 248, 581 P.2d 1038

(1978), the court followed *Bakenhus*, holding as follows:

An employee who accepts a job to which a pension and relief plan or system is applicable contracts for a pension and relief plan or system substantially in accord with the then existing legislation governing the same; modifications of a pension plan or system cannot be imposed on the employee unless the changes are equitable to the employee. Accord, *Letter v. Tacoma*, 53 Wn.2d 294, 333 P.2d 650 (1958). [Emphasis Added]

In *Tembruell v. Seattle*, 64 Wn.2d 503, 506, 392 P.2d 453 (1964), we held:

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

We have further held that any change must be equitable to the employee or, put another way, any change which results in a disadvantage to the employee must be accompanied by comparable new advantages. See *Bakenhus v. Seattle*, supra, and *Eisenbacher v. Tacoma*, supra. [Emphasis Added]

Most recently in the case of *Bates v. City of Richland*, 112 Wn.App. 919, 51 P.3d 816 (2002), the court again reaffirmed the *Bakenhus* principles, stating as follows:

In Washington, pension rights are contractual rights that vest at the beginning of the employment relationship. *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 700, 296 P.2d 536 (1956). Pension rights vesting from the inception of employment become property rights and may not be divested unless the changes are equitable to the employee or are necessary to maintain the flexibility and integrity of the pension system. *Eagan v. Spellman*, 90 Wn.2d 248, 256, 581 P.2d 1038 (1978) (citing *Bakenhus*, 48 Wn.2d at 701, 296 P.2d 536). Article I, section 23 of the Washington Constitution and Article I, section 10 of the United States Constitution prohibit any form of legislative action impairing existing obligations.

In the McAllister case, it is undisputed that under the Pension Act (RCW 41.18) in existence at the time the McAllisters were hired, their contributions would be capped at the battalion chief's level in exchange for a limited pension benefit also capped at the battalion chief's level. While LEOFF continued the McAllisters' rights under the Pension Act, the specific right to a capped contribution was replaced by contributions based upon their full salary. Under *Bakenhus* and its progeny, this disadvantage imposing extra costs beyond the requirement of RCW 41.18 must be accompanied by a comparable advantage, or the Supreme Court's dictates in the above cases have been violated. The City of Bellevue's action in reducing the McAllisters' pension benefits under RCW 41.18 took away the comparable advantage, leaving the McAllisters with only the disadvantage of higher pension costs. The Court of Appeals' decision

upholding the City's action is in conflict with the *Bakenhus* line of cases decided by the Supreme Court.

2. McAllister Presents a Significant Question of Law Under the Constitution of the State of Washington.

The *Bakenhus* line of cases were decided based on the provision contained in the Constitution of the State of Washington found under Article I, § 23, prohibiting any form of legislative action impairing existing obligations. *Bates v. City of Richland*, 112 Wn.App. 919, 51 P.3d 816 (2002). The Legislature, in its effort to pass LEOFF, was well aware of the constitutional limitations requiring preservation of existing pension rights. As the Court of Appeals pointed out:

As the Washington Supreme Court noted in *Mulholland v. City of Tacoma*, 83 Wn.2d 782, 522 P.2d 1157 (1974), RCW 41.26.040(2) was, in effect, a codification of the decision in *Bakenhus*. In *Mulholland*, the Court held that the purpose of RCW 41.26.040(2) is to ensure that a firefighter who retires under LEOFF will not suffer any diminution in the benefits that would have been available if LEOFF had not been enacted. [Emphasis added]

Further illustrative of the Legislature's eye on constitutional compliance was the debate on the floor of the House of Representatives, recalled in the case of *Mulholland v. City of Tacoma*, 83 Wn.2d 782, 522 P.2d 1157 (1974), as follows:

Representative Kuehnle stated on a point of inquiry as follows:

This new law will transfer present members of police and firemen pension systems into the new system without any choice on his part. I wish you would clarify for me how his rights under the existing systems will be protected. *House Journal 1477 (1969)*.

Representative Richardson responded:

It is the intent of the legislature that presently employed police officers and firefighters, now covered under chapter 41.20 and chapter 41.18 RCW who are to have his membership transferred mandatorily from those existing acts to Engrossed Substitute Senate Bill No. 74 (LEOFF), will have all the rights and all benefits preserved completely as now provided by those prior acts. *House Journal 1477 (1969)*. [Emphasis added]

Based upon this preservation of rights and benefits, so as not to impair existing obligations under Article I, §23, the Legislature was finally able to pass RCW 41.26 (LEOFF). In so doing, consistent with the House debate, and to preserve completely the rights and benefits of firefighters, the Legislature did not terminate the Pension Act but gave pensioners a choice to elect benefits under LEOFF or, alternatively, under the Pension Act, as though his membership had never been transferred to LEOFF.

When presented for signature, Governor Evans vetoed two items explaining:

. . . This bill created a unified statewide retirement system for law enforcement officers and fire fighters. It is one of the significant accomplishments of the 1969 legislature and I heartily endorse the purposes of this legislation . . .

Sections 28 and 29 of the act contain amendments to the existing firemen's pension system. The intent of section 32 is to permit all firemen who are employed prior to March 1, 1970, the effective date of the new pension system, to participate in the benefits of the existing firemen's pension system. However, as drafted, section 32 will actually allow persons who become firemen subsequent to March 1, 1970, to participate in the benefits of the existing firemen's pension system. This is in direct conflict with section 4(1) of the bill, which specifically excludes all fire fighters employed subsequent to March 1, 1970, from any pension system existing under any prior act.

In order to conform section 32 to the clear intent of this legislation, I have vetoed two items in that section to make clear that firemen employed subsequent to March 1, 1970, will not participate in the existing firemen's pension system.

The remainder of the bill is approved.

As originally enacted, RCW 41.26.040(2) read:

(2) Any employee who has made retirement contributions under any prior act shall have his membership transferred to the system established by this chapter on March 1, 1970: *Provided, however,* that for purposes of employee contribution rate, creditability of service, eligibility for service or disability retirement and survivor and all other benefits, such employee shall also continue to

be covered by the provisions of such prior act which relate thereto, as if this transfer of membership had not occurred. Upon retirement for service or for disability or death of any such employee, his retirement benefits earned under this chapter shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had continued to be a member of the retirement system covered thereby and these benefits, including survivor's benefits, offset by all benefits payable under this chapter, shall be paid to him by the county, city, town or district by which he was employed at the time of his retirement. [Emphasis added]

Included within the umbrella of preserved rights and benefits and in recognition of constitutional requirements was the express language guaranteeing the Pension Act "contribution rate." (RCW 41.26.040(2) quoted above.) Again, as applied to McAllisters, they had a right to contribute at a rate not to exceed six percent (6%) of a battalion chief's salary.

The Court of Appeals has ruled, without any citation to authority, that because the above legislation was amended prior to March 1, 1970, (see footnote 2), and the right to a contribution rate removed, the McAllisters had no right to have their contributions capped.

The Court of Appeals' analysis seems to miss the point and in so doing, frames the constitutional question. It is not what the Legislature did that is controlling, but, instead, did the Legislature act within the restrictions imposed by Article I, §23 and *Bakenhus*. Clearly, uncapping

the McAllisters' contributions falls outside those restrictions. The retention of the contribution rate in the original LEOFF legislation was a recognition of the preservation of the employees' rights and benefits; abrogation of the contribution rate in subsequent legislation is in derogation of an employee's rights and benefits and does not pass constitutional muster. This was made clear in the *Bakenhus*' holding that prevented the diminution of pension benefits by subsequent amending legislation.

3. Inconsistency With Appellate Court Decisions.

The issue in the McAllister case relating to the computation of benefits under RCW 41.18 is an issue affecting all individuals within the state of Washington that were members of a municipal fire service hired before March 1970, that retired above the rank of battalion chief. While there are no inconsistent rulings among the division of the Court of Appeals, there is presently pending before Division II of the Court of Appeals the case of *Conklin v. City of Tacoma*, cause number 36677-1-II. In the *Conklin* case, the trial court has ruled in favor of Conklin, a former fire service employee retiring at the rank of deputy chief, on the same issue before the Court in McAllister. In the *Conklin* case, the Court found that because Conklin paid at an increased rate, the comparable advantage was an increase in pension benefits commensurate with the increased

contribution rate. Such an increase in benefits was necessary to satisfy *Bakenhus* and constitutional requirements. The City of Tacoma has appealed that decision.

4. Public Interest.

The public interest in this case comes from retired members of the municipal fire services within the state of Washington. Numerous requests for representation have been made, and in addition to the *Conklin* case, there is pending in the Superior Court of Washington for Clark County the same issue in the case of *Steele v. City of Vancouver*, cause number 07-2-00827-0. The *Steele* case is presently stayed pending this Petition for Review.

The issue in the *McAllister* case is also being closely followed by the Washington State Association of Firefighters and the Retired Firefighters' Association.

**F. CONCLUSION**

The issues in the *McAllister* case warrant review by the Supreme Court based upon the criteria set forth in RAP 13.4(b). The rights and benefits specifically retained by the initial LEOFF legislation in recognition of constitutional limitation and the *Bakenhus* line of cases have been taken away. The contribution rate, once guaranteed, has been removed. Unless the statutory language can be read to provide a

corresponding benefit, contrary to the decision of the Court of Appeals, constitutional violation is apparent.

The interest within the fire service community is significant, and other cases are pending before the Court within the state of Washington.

McAllisters ask the Court to accept review of the Court of Appeals' decision, reverse that decision and reinstate the McAllisters' pension benefits.

DATED this 14<sup>th</sup> day of January, 2008.

Respectfully Submitted,



Hans E. Johnsen, WSBA #6621  
Attorney for Appellants



enacted. David McAllister and Ken McAllister challenge the City of Bellevue Firemen's Pension Board (Pension Board) decision to prospectively calculate the benefits they would have received under their prior pension plan, the "Firemen's Relief and Pensions-1955 Act," chapter 41.18 RCW (1955 Act), using the 1955 Act salary definition instead of the salary definition under LEOFF. Because we conclude the Pension Board did not err, we affirm.

The facts are not in dispute. In January 1965, the City of Bellevue Fire Department hired David McAllister and Ken McAllister. As required by the 1955 Act, the McAllisters and the City each contributed to Firemen's Pension Fund. The 1955 Act required every firefighter to contribute 6 percent of his basic salary to the pension fund. The contribution was capped at the salary of a battalion chief. RCW 41.18.030, defines "basic salary" as:

[T]he 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.

In 1969, the legislature replaced the municipal police and firemen pension plans with LEOFF, a single statewide pension system administered by the Department of Retirement Systems. On March 1, 1970, the McAllisters and all other full time firefighters and law enforcement officers became members of LEOFF, "to the exclusion of any pension system existing under any prior act." RCW 41.26.040(1).

Under LEOFF, the 6 percent contribution rate for firefighters is not capped at the

Battalion Chief salary as it was under the 1955 Act. RCW 41.26.030(13) defines

“basic salary” as:

[T]he basic monthly rate of salary or wages, including longevity pay but not including overtime earnings or special salary or wages, upon which pension or retirement benefits will be computed and upon which employer contributions and salary deductions will be based.

To make sure that a firefighter or law enforcement officer who made contributions under a previous pension act would suffer no diminution in benefits, RCW 41.26.040(2) provides for an “excess” payment. Under RCW 41.26.040(2), firefighters and law enforcement officers are entitled to an “excess” payment if his pension, as computed under the previous pension act, would have been greater than the pension as computed under LEOFF. If the firefighter is entitled to an excess payment, the City is responsible for payment. RCW 41.26.040.

On February 1, 1975, David McAllister retired from the Bellevue Fire Department on a work-related disability. When David McAllister retired, he was the Chief of the Bellevue Fire Department. On May 6, 1983, Ken McAllister retired from the Bellevue Fire Department on a work-related disability. When Ken McAllister retired, he was the Deputy Chief of the Bellevue Fire Department.

In 1997, the City determined that the excess payments for a number of the retired firefighters, including David and Ken McAllister, were incorrectly calculated. In determining the excess payment for the McAllisters, the City had calculated the benefits they would have received under the 1955 Act by using the Chief and Deputy

Fire Chief salary instead of using a battalion chief's salary as required by the 1955 Act. The resulting overpayment to the McAllisters totaled approximately \$500,000.

In 2003, the City retained an actuarial firm to conduct an audit of their calculation of the excess payments. As a result of the audit, the City recommended that the Pension Board correctly calculate the excess payments under LEOFF for David and Ken McAllister by using the Battalion Chief salary as required by the 1955 Act.

On November 26, 2003, the Pension Board voted to correct the error in calculating the McAllister's benefits effective January 1, 2004. The Pension Board concluded the City had miscalculated the McAllisters' pension benefits for determining excess payments by using the definition of "basic salary" from LEOFF instead of the "basic salary" definition from the 1955 Act. The Pension Board decided to correct the error prospectively and to not seek reimbursement from the McAllisters for the overpayments.

The McAllisters appealed the Pension Board's decision to the Hearing Examiner. The Hearing Examiner denied the appeal. The Examiner concluded the Pension Board did not err in deciding to calculate whether the McAllisters were entitled to an excess payment under LEOFF by using the salary of a battalion chief under the 1955 Act. On February 22, 2005, the Pension Board adopted the recommendation of the Hearing Examiner.

On February 24, the McAllisters filed a Writ of Review. The superior court concluded the Firemen's Pension Board did not err and denied the Writ of Review.

The McAllisters appeal the order denying the Writ of Review and the decision of the Pension Board.

The McAllisters do not contend that the LEOFF statute is unconstitutional. Instead, the McAllisters argue that because the contributions they made under LEOFF were 6 percent of their actual salary rather than 6 percent of a battalion chief, the Pension Board's decision to calculate the benefits they would have received under the 1955 Act is unlawful. Relying on Bakenhus, 48 Wn.2d 695, Dailey v. City of Seattle, 54 Wn.2d 733, 344 P.2d 718 (1959), and an earlier version of RCW 41.26.040(2), the McAllisters assert the Pension Board must use the salary definition in LEOFF to calculate the amount they would have received under the 1955 Act in determining whether they are entitled to an excess payment. Neither the LEOFF statutes nor case law support the McAllister's argument.

The court sits in the same position as the superior court when reviewing an administrative decision. Swoboda v. Town of La Conner, 97 Wn. App. 613, 617, 987 P.2d 103 (1999). We review the factual findings to determine whether they are supported by competent and substantial evidence. We review the conclusions of law de novo. Bierman v. City of Spokane, 90 Wn. App. 816, 821, 960 P.2d 434 (1998).

Interpretation of a statute is a question of law that we review de novo. Dep't of Ecology v. Campbell & Gwinn LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The primary objective in statutory interpretation "is to ascertain and give effect to the intent of the legislature." King County v. Taxpayers of King County, 104 Wn.2d 1, 7, 700 P.2d 1143

(1985). If the language of a statute is clear and unambiguous, we must give effect to that plain meaning as an expression of legislative intent and there is no room for judicial interpretation. Campbell & Gwinn, 146 Wn.2d at 9-10. “[T]he court should assume that the legislature means exactly what it says. Plain words do not require construction.” City of Kent v. Jenkins, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000).

In Bakenhus, the Court held that pension rights are contractual in nature and a public employee has a right to receive the pension benefits in effect at the time the employee was hired. Bakenhus, 48 Wn.2d at 701. In Dailey, the Court held that the members of a pension system “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.” Dailey, 54 Wn.2d at 738. In determining whether a change in pension rights is equitable, the change must be weighed against pre-existing rights to determine whether it is reasonable. Dailey, 54 Wn.2d at 721.

RCW 41.26.040(2) provides in pertinent part:

(2) Any employee serving as a law enforcement officer or fire fighter on March 1, 1970, who is then making retirement contributions under any prior act shall have his membership transferred to the system established by this chapter as of such date. Upon retirement for service or for disability, or death, of any such employee, his retirement benefits earned under this chapter shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had not transferred. For the purpose of such computations, the employee's creditability of service and eligibility for service or disability retirement and survivor and all other benefits shall continue to be as provided in such prior retirement act, as if transfer of membership had not occurred. The

excess, if any, of the benefits so computed, giving full value to survivor benefits, over the benefits payable under this chapter shall be paid whether or not the employee has made application under the prior act. . . . payment of such excess shall be made by the employer which was the member's employer when his transfer of membership occurred.

As the Washington Supreme Court noted in Mulholland v. City of Tacoma, 83 Wn.2d 782, 522 P.2d 1157 (1974), RCW 41.26.040(2) was, in effect, a codification of the decision in Bakenhus. In Mulholland, the Court held that the purpose of RCW 41.26.040(2) is to ensure that a firefighter who retires under LEOFF will not suffer any diminution in the benefits that would have been available if LEOFF had not been enacted.

Under the plain and unambiguous language of RCW 41.26.040(2), the McAllisters had the right to be treated as if they had retired under the 1955 Act. The statute requires the Pension Board to calculate the benefits under the 1955 Act and then compare that amount to what the McAllisters would receive under LEOFF. If the amount is greater under the 1955 Act, the retiree is entitled to an excess benefit payment. RCW 41.26.040(2). Under the 1955 Act, each fireman contributed "a sum equal to six percent of his basic salary," and was entitled to receive a monthly sum equal to 50 percent of his or her salary up to the position of battalion chief at the date of retirement. RCW 41.18.030; RCW 41.18.010(4); RCW 41.18.060.

For purposes of determining whether the McAllisters were entitled to an excess benefit payment under LEOFF, RCW 41.26.040(2) requires the City to calculate the amount the McAllisters would have received under the 1955 Act as if the transfer to

LEOFF had not occurred. Under the plain and unambiguous language of RCW 41.26.040(2), the City must use the definitions of the 1955 Act, including the 1955 Act salary definition, to calculate the amount the McAllisters would have received to determine whether the McAllisters are entitled to an excess payment. While the salary definition of LEOFF is used to calculate the amount the McAllisters are entitled to under LEOFF, using the LEOFF salary definition to calculate the benefits for the 1955 Act is contrary to the plain language of the statute.

We also conclude that the City's calculation does not violate Bakenhus or Dailey. While there is no dispute that the McAllisters' contribution rate under LEOFF was more than the contribution rate under the 1955 Act, according to the unchallenged conclusion of the Hearing Examiner and the Pension Board, the McAllisters received increased benefits under LEOFF, including medical coverage for life and a survivor benefit of 100 percent of the retiree's pension.<sup>1</sup>

The McAllisters rely on an earlier version of RCW 41.26.040(2) to argue that the City must use the contribution rate under the 1955 Act in calculating the excess payment under LEOFF. The McAllisters' argument is also misplaced.

The first version of RCW 41.26.040(2), that was enacted on July 1, 1969, did not change the contribution rate. RCW 41.26.040(2) provided in pertinent part that:

...[a]ny employee who has made retirement contributions under any prior act shall have his membership transferred to the system established by this 1969 amendatory act on March 1, 1970:  
PROVIDED, HOWEVER, That for purposes of employee

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<sup>1</sup> To the extent the McAllisters' are challenging the increased contribution rate under LEOFF, their claim is against the State not the Pension Board.

contribution rate, creditability of service, eligibility for service or disability retirement, and survivor and all other benefits, such employee shall also continue to be covered by the provisions of such prior act which relate thereto, as if this transfer of membership had not occurred.<sup>2</sup>

Laws Ex. Sess., Ch. 209 § 4 (1969).

But before the effective date of March 1, 1970 for transferring membership to LEOFF, the legislature amended RCW 41.26.040(2). This amended version, enacted on February 12, 1970, deletes any reference to "employee contribution rate:

(2) Any employee servicing as a law enforcement officer or fire fighter on March 1, 1970, who ((has made)) is then making retirement contributions under any prior act shall have his membership transferred to the system established by this chapter ((on March 1, 1970: PROVIDED, HOWEVER, That for purposes of ~~employee contribution rate, creditability of service, eligibility for service or disability retirement, and survivor and all other benefits, such employee shall also continue to be covered by the provisions of such prior act which relate thereto, as if this transfer of membership had not occurred~~)) as of such date.

Laws Ex. Sess., Ch. 6 § 2 (1970).

Because the legislature amended RCW 41.26.040(2) before the LEOFF retirement system took effect, the McAllisters do not have a right to the contribution rate under the 1955 Act.

We affirm the Pension Board and the superior court decision to dismiss the writ.

Schindler, ACS

WE CONCUR:

Appelwick, J.  
<sup>2</sup> Emphasis added

Ajda, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

DAVID McALLISTER and KEN )  
McALLISTER, ) No. 57869-3-I  
 )  
Appellants, )  
 )  
v. )  
 )  
CITY OF BELLEVUE FIREMEN'S ) ORDER GRANTING  
PENSION BOARD, ) RESPONDENT'S MOTION TO  
 ) PUBLISH  
 )  
Respondent. )

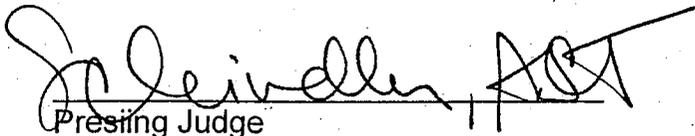
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City of Bellevue Firemen's Pension Board, respondent, filed a motion to publish the opinion filed on November 19, 2007, and based on RAP 12.3(e) an answer was filed by the appellants. A majority of the panel has determined that the motion should be granted; Now, therefore, it is hereby

ORDERED that respondent's motion to publish the opinion is hereby granted.

DATED this 17<sup>th</sup> day of December, 2007.

FOR THE PANEL:

  
Presiding Judge

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 DEC 17 PM 1:52