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STATE OF WASHINGTON
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NO. 88546-0

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SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS and
THE STATE OF WASHINGTON,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION, et al.,

Respondents,

RESPONDENTS' ANSWER TO PETITIONERS'
STATEMENT OF GROUNDS FOR DIRECT REVIEW AND
RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Plaintiffs below do not oppose the State's request for discretionary review but oppose direct review by this court.

The main issue presented for review, the effectiveness of a Reservation of Rights in pension legislation, is already before the Court in what is commonly referred to as "the Gain-sharing case." *WEA v. Washington Department of Retirement Systems*, Supreme Court Case No. 87424-7. That case is almost fully briefed.¹ Permitting Defendants to add a second case on the exact same issue does not better inform the Court on the topic. Instead, such additional direct review will delay final adjudication of the issue, causing the Court and the parties in both cases to expend additional resources. Judicial economy requires that the Court deny direct review of the UCOLA case because the same issue will be resolved in the Gain-sharing case without additional delay.

The 1995 Legislature adopted a single Uniform Cost of Living Adjustment or UCOLA that adjusted retirement allowances of PERS and TRS Plan 1 retirees by 3% per year, beginning at age 66 in 1995. *See* Laws 1995, Ch. 345, codified as RCW 41.40.197 (PERS); RCW 41.32.489 (TRS). Unlike prior COLAs that pre-dated and were replaced by the Uniform COLA,

¹ The only brief remaining to be filed is the Reply brief of cross-appellants WEA and WFSE regarding the trial court's decision in Phase 2 of that case. That brief is to be filed on June 3, 2013. RAP 18.6.

this legislation purported to reserve to the legislature the right to repeal the UCOLA in the future. RCW 41.32.489 (6); RCW 41.40.197 (5). Fifteen years later, in 2011, the Washington Legislature repealed the UCOLA for all active and retired Plan 1 members. SHB 2021 (2011).

Plaintiffs' Consolidated Motion for Summary Judgment on Contract Impairment Claim, which the trial court granted and from which this appeal is taken, presented two issues.

First: Can the Legislature reserve the right to eliminate the UCOLA, even after the employee performs services with the expectation of receiving the benefit? This identical issue is posed in the Gain-sharing appeal. (See Supreme Court Case No. 87424-7). The language of the reservation of rights in both cases is virtually identical.

Second: Was the Legislature's repeal of the UCOLA an unconstitutional impairment of contract, since no comparable benefit was provided to class members who either lost the UCOLA, or the expected UCOLA benefit?

Thurston County Superior Court Judge Wickham's decision followed a long and unbroken line of cases, beginning with *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d (1956) and including *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3rd 221 (2008), all of which hold that the

State cannot modify or repeal a pension benefit without providing a comparable benefit. Since no comparable benefit was provided to replace the UCOLA, the trial court held its repeal failed to meet this well-established requirement for the modification of pension benefits.

The trial court also correctly ruled that the Reservation of Rights in the legislation creating the UCOLA was not effective, and that the elimination of the UCOLA benefit unconstitutionally impaired the contracts of TRS and PERS Plan 1 members. These two rulings are the only subjects of the State's motions for discretionary review and for direct review by this court.

II. NATURE OF CASE AND DECISION

The Legislature enacted the UCOLA in 1995 after several pre-existing COLAs were found to be too confusing to administer. ("The intent of this act is to ... [s]implify administration by reducing the number of plan 1 post retirement adjustments [COLAs] to one."). See Laws 1995, Ch. 345, §1(5). Thus, the replacement COLA was labeled a Uniform COLA. The statute creating the UCOLA contained reservation of rights (ROR) language even though no ROR provision was present in any of the earlier COLAs that were replaced by the UCOLA. The insertion of the ROR is the sole basis for the State's contention that, many years later, it was empowered to eliminate the UCOLA without replacing it with a comparable benefit.

While legislative modifications to a pension system may be constitutional for future employees, they run afoul of the constitution when the cuts eliminate deferred compensation.² See e.g., *Bakenhus v. Seattle, supra*; *Eagan v. Spellman*, 90 Wn.2d 248, 257-58, 581 P.2d 1038 (1978) (“Beginning with *Bakenhus*, we have protected the pension rights of public employees from unwarranted administrative and legislative tampering. We continue this protection ...”). Also see *County Officials v. State*, 89 Wn.2d 729, 575 P.2d 230 (1978); *WFSE v. State*, 98 Wn.2d 677, 658 P.2d 634 (1983); *Bowles v. DRS*, 121 Wn.2d 52, 847 P.2d 440 (1993); and *Navlet, supra*.

The ROR is ineffective because the UCOLA was a vested pension benefit to all Plan 1 members. Under the *Bakehus-Navlet* line of cases, the pension benefits in place at the time a public employee provides service work become vested, and may only be *modified* for the limited purposes of maintaining financial integrity and flexibility of the pension system. *Navlet*, 164 Wn.2d at 850. If vested benefits are modified, they must be replaced with comparable benefits. *Id.* Vested benefits cannot be outright repealed. *Id.*

The trial court agreed:

As a matter of law, the Court concludes that plaintiffs are entitled to a declaration that the repeal of the vested UCOLA benefit contained in SHB 2021 (2011) is an unconstitutional impairment of contract and is void and unenforceable. Under

² Art. 1 § 23.

the *Bakenhus* doctrine, our Supreme Court has held that modification to vested pension benefits after employment has started impairs the employment contract. In two later cases, *Jacoby v. Grays Harbor Chair & Manufacturing Co.*, 77 Wn.2d 911 (1970) and *Navlet v. Port of Seattle*, 164 Wn.2d 818 (2008), our Supreme Court rejected employers' attempts to reserve the right to unilaterally withdraw vested retirement benefits.

Order dated February 19, 2013. Since the State did not provide a comparable benefit to Plan 1 members when it repealed the vested UCOLA benefit, the trial court ruled that “[t]he State’s actions therefore violated existing law and summary judgment to the employees is warranted as a matter of law.”³

The effect of its repeal is to deprive those retired employees previously receiving the UCOLA as an annual adjustment to their pension of future increases to offset the diminishing impact of inflation on what is otherwise a fixed retirement income. For those employees who have either not yet retired and/or not reached age 66, the effect is to deprive them of ever receiving the adjustment to their pensions. The effect on these employees’ pensions is estimated to average around \$700 annually.⁴

³Plaintiffs’ complaint had also alleged that the State was estopped from repealing the UCOLA because DRS’ communications affirmatively represented that the UCOLA would be provided and employees relied on those representations by continuing to work. The State’s motion to dismiss this claim was denied, but this claim has not been certified for review and is therefore not before this court.

⁴ Petitioners’ Motion for Discretionary Review, at 4.

III. RESTATEMENT OF ISSUES FOR WHICH DIRECT REVIEW IS REQUESTED

1. Under the *Bakehus-Navlet* doctrine, is a public employer prohibited from completely eliminating a retirement benefit after the employee has provided services while the benefit was in place?

Answer: Yes

2. Should the Court depart from the rule that, because a Reservation of Right to eliminate a retirement benefit is fundamentally inconsistent with the nature of deferred compensation, the court will give no effect to the reservation?

Answer: No

3. If it were permissible for the Legislature to avoid the rule in *Bakenhus* by including in a retirement statute language that reserves the right to eliminate the benefit, is the Legislature nonetheless precluded from repealing the vested UCOLA benefit when it provided no comparable replacement benefit?

Answer: Yes

IV. GROUNDS WHY DIRECT REVIEW SHOULD NOT BE GRANTED

Discretionary review by the Court of Appeals is appropriate in this case. The State, however, seeks direct review by this Court, rather than the Court of Appeals, pursuant to RAP 4.2(a)(2) and (4). This Court should reject the State's motion for direct review since having this case heard with the Gain-sharing case will delay final adjudication of the issues common to

both lawsuits.⁵ While there are fundamental and urgent issues of broad public import which might otherwise be a basis for direct review under RAP 4.2(a)(4), those issues will be decided more quickly if this Court hears the Gain-sharing case which presents the same issues, without waiting for the UCOLA case to be briefed.

The Reservation of Rights language before the court in the Gain-sharing case is nearly identical to the Reservation of Rights language before the court in this case. The issue in that regard is identical as well: whether this court will give effect to a purported Reservation of Rights in legislation conferring a benefit in the form of deferred compensation [a pension benefit] to its employees.

Since the State is already before this Court in the Gain-sharing case making its legal arguments as to why the Court should give effect to Reservation of Rights language in pension legislation and permit the later elimination of pension benefits, there is no additional benefit to be gained by this Court hearing the UCOLA case on direct review. Rather, this Court's decision in the Gain-sharing case is likely to have a determinative precedential effect on the UCOLA case. In its Statement of Grounds for Direct Review, the State points to three Supreme Court decisions upon which the trial court

⁵ No injunction has yet been issued in this case to require the State to re-commence payment of the UCOLA benefit.

relied.⁶ The trial court in the Gain-sharing case relied upon these same three decisions.

Moreover, the Legislature's repeal of the UCOLA violates the constitution because it failed to provide a comparable replacement benefit to the employees. Pension benefits may only be modified or repealed if *each* of the following requirements is satisfied:

1. The modification is necessary to keep the pension system flexible;
2. The modification is necessary to maintain the integrity of the pension system; *and*
3. Any disadvantageous changes are offset by comparable new advantages.

Bowles, 121 Wn.2d at 65.

In its Statement of Grounds for Direct Review, the State focuses only on the effectiveness of the Reservation of Rights and ignores the other issues presented: specifically, the fact that it failed to offer any offsetting benefit. Rather, the State attempts to reframe the case to make it appear that the issue under review concerns fiscal integrity when that issue is not properly before this court.

For purposes of its motion for summary judgment before the trial court, Plaintiffs *assumed* that the State could meet the first two requirements. While there is ample evidence that none of these requirements exist

⁶ *Bakenhus*, *Navlet* and *Jacoby*, all cited previously herein.

in this case, because there was indisputably no comparable new advantage, the Plaintiffs' motion focused exclusively on the State's failure to meet that third requirement. Whether the repeal of the UCOLA was necessary to keep the system flexible or to maintain the integrity of the pension system was not litigated at the trial court.

That the State needed to offer comparable new advantages in order to eliminate a pension benefit is well-settled by this court's decisions and is neither an issue of first impression nor is there a split in the divisions of the Court of Appeals. RAP 4.2(a)(3). On numerous occasions, our courts, at all levels, have required that there be comparable new benefits to offset the loss of a pension benefit to which the employee would otherwise be entitled. See *Bakenhus* and its progeny cited previously herein.

The trial court found that without question, there was no offsetting benefit. In a motion for reconsideration, the State for the first time suggested that increasing the alternate minimum benefit for a small percentage of employees was a corresponding benefit.⁷ However, persons who currently receive that benefit are specifically excluded from the class. The vast majority of class members will never receive the alternative minimum benefit, because their pension will exceed the minimum, but they will lose the UCOLA

⁷ The motion was never argued and an Agreed Order denying the motion on this issue was entered.

nonetheless. By not citing to this issue in its Statement of Grounds for Direct Review, the State concedes that this issue is appropriate for review at the level of the Court of Appeals.

No other issues were presented to the trial court in Plaintiffs' Consolidated Motion for Summary Judgment. Despite the State's emphasis in its Statement of Grounds for Direct Review, the trial court was not asked to find that the modification was necessary to keep the pension system flexible or to maintain the integrity of the pension system, nor did it address any related financial issues. Thus, the State's asserted justifications for direct review in this regard must be disregarded as not relevant to the issues decided by the trial court and not properly before the appellate court.

Consequently, the State's Motion for Direct Review and its Statement of Grounds for Direct Review misses the mark. The State's argument that it needed to repeal the UCOLA for fiscal reasons is not properly before any appellate court and cannot form the basis for discretionary or direct review. The legal issue of greatest significance, the effectiveness of a Reservation of Rights in pension legislation, will be decided in the Gain-sharing case and this court should refuse direct review in this case.

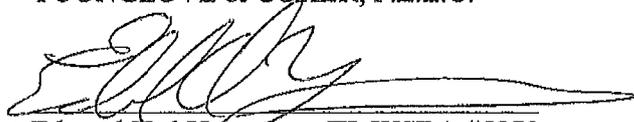
V. CONCLUSION

The State's Motion for Direct Review by this court should be denied and the case sent to the Court of Appeals for review on the issues appealed.

DATED this 13th day of May, 2013.

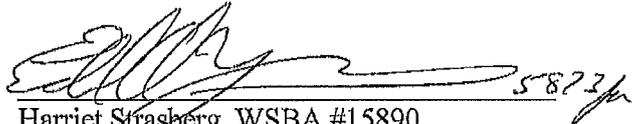
Respectfully submitted,

YOUNGLOVE & COKER, P.L.L.C.



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DECLARATION OF SERVICE

I certify that on the date below I served a copy of the Respondents' Answer to Petitioners' Statement of Grounds for Direct Review and Response to Motion for Discretionary Review to which this Declaration of Service is attached by email and U.S. mail, postage prepaid to:

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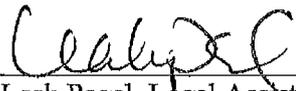
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of May, 2013, at Olympia, WA.



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Dear Supreme Court Clerk:

Attached for filing is a letter from Mr. Younglove to the Clerk, the Respondent's Answer to Petitioners' Statement of Grounds for Direct Review and Response to Motion for Discretionary Review, Gain-share Plaintiffs' Opposition to Petitioners' Motion for Companion Treatment and Declaration of James D. Oswald.

If you have any difficulty with the attached or have questions, please feel free to contact this office.