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FILED
COURT OF APPEALS

NOV 14 2011 11:05

SEATTLE WASHINGTON

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34978-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Ellen Hahn, Appellant

v.

Department of Retirement Systems of the State of Washington,
Respondent

APPELLANT'S REPLY BRIEF

Eric R. Hansen
Attorney for Appellant
WSBA 14733
PO Box 9100
Federal Way, WA 98063-9100
253-765-7024

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REPLY TO RESPONDENT'S COUNTER-STATEMENT OF THE CASE

The Department of Retirement Systems (the Department) states on page 7 of its brief that, "In many cases, the college kept the class size in Developmental Studies courses low to allow for individual in-class instruction and learning similar to a laboratory setting." In support of this statement, the Department cites Finding of Fact (FOF) 26 and Conclusion of Law (COL) 26 in the final order. However, these sections of the final order do not contain statements regarding the size of developmental studies classes. Moreover, there is nothing in the record in support of this statement.

On page 8 of its brief, the Department states that Ms. Hahn's quarterly contracts show a workload range of between 26 percent and 78 percent of a full-time load. The evidence in this case showed, however that the percentage figures were calculated before WAC 415-112-335 was enacted. Moreover, the figures assumed a full-time load of 330 contact hours per quarter. No one in the Developmental Studies Department at Highline Community College (the College) had a load of 330 contact hours per quarter when Ms. Hahn was employed in that department.

In footnote 8 of its brief, the Department states that even though Ms. Hahn has attached considerable significance to the workload ranges in the 1981-83 collective bargaining agreement, the agreement has minimal relevance because it was effective after the years in question. It is contrary to common sense to assume that the College would adopt workload ranges in its 1981-83 collective bargaining agreement that were a significant departure from prior practice.

On page 9 of its brief, the Department states that the number of classes taught by a full-time instructor could vary depending on that instructor's non-instructional duties. However, there is no evidence in the record that the full-time instructor in the Developmental Studies Department taught fewer classes because of additional non-instructional duties.

On page 10 of its brief, the Department states that the contract for a part-time instructor contained a blank, labeled FTE-F, indicating the percentage of a full-time load the part-time instructor had been contracted to teach. The Department also asserts that these percentage figures became part of a course description maintained in Highline's Course Master File and that the FTE-F figures were sent to the State Board of Community and Technical

College for approval. In support of this, the Department cites Finding of Fact 24 in the Final Order. Finding of Fact 24 states, in pertinent part, the following:

In...quarterly part-time instructor contracts, HCC compensated Ms. Hahn for classroom hours (lecture and laboratory) and non-classroom hours (extended preparation and student evaluation, office hours and other duties). The lecture and laboratory hour values for each numbered course came from a course master file maintained by the office of the HCC Dean of Instruction (those values having been approved by the course master file by the State Board of Community and Technical Colleges). The hour values for preparation, evaluation and other duties were authorized by the Salary Program (HCEA agreement) in effect for the particular academic year(s).

It is apparent that Finding of Fact 24 does not state that the FTE-F percentage figures on a particular part-time employee's contract became part of the course description in the master file and that they were sent to the State Board for approval. The FTE-F figure is the percentage of a full-time load a particular part-time instructor teaches. It would not make sense for the FTE-F figure to become part of the course master file. Moreover, it would be an onerous burden for the State Board to approve the percentage of a full-time load worked by every part-time instructor in community colleges of the state of Washington in a particular quarter. Further, it would

not make sense for the State Board to engage in that kind of activity.

In footnote 10 of its brief, the Department states that the FTE-F figures “were reliably used as the basis for calculating relief owed to each instructor under the terms of the Settlement Agreement.” However, this is precisely what the settlement agreement did not provide. The settlement agreement did provide that:

There are...Class Members who are members of TRS whose service credit allegedly is understated because only their in-class teaching hours were counted toward service credit in TRS. Absent evidence of actual hours, the State shall adjust the service credit of these Class members according to the method set forth in WAC 415-112-335... (AR 277)

Therefore, the settlement agreement provided that the Department was to calculate the service credit pursuant to its own regulation rather than rely on the FTE-F percentage figures contained in a contract for a particular quarter.

In footnote 11, the Department states that unlike a full-time faculty member, a part-time instructor had no non-instructional duties that would have served to increase his FTE-F beyond the sum of his individual classes. However, there is nothing in the

record to indicate that non-instructional duties of a full-time faculty member were used to calculate the FTE-F.

On page 14 of its brief, the Department states that in order to calculate the number of days worked by a part-time instructor in a particular month, the Department is required to determine the part-time instructor's workload as a percentage of the workload of a full-time instructor. The Department then states that in the case of Ms. Hahn, it merely adopted the percentage figures set forth on her quarterly contracts. However, WAC 415-112-335 requires the Department to perform a calculation independent of the calculation performed by a community college.

On page 15-16 of its brief, the Department states that it calculated Ms. Hahn's service credit according to her service during a fiscal year. The superior court held in its order the following:

It is further ordered that the Final Order of the Department is remanded pursuant to RCW 34.05.574(1) to review Ms. Hahn's service credit calculation to make certain that it is calculated according to the plain language of RCW 41.32.270, which requires that "service rendered for four-fifths of the official school year of the school district or institution be credited as a year's service regardless of the length of the school term, but in no case shall more than one year of service creditable for service rendered in one fiscal year. (CP 69).

The Department had the opportunity to file a cross appeal to this ruling by the Court. It did not do so. It cannot now choose to ignore that ruling by calculating Ms. Hahn's service credit according to the fiscal instead of the official school year.

REPLY TO RESPONDENT'S ARGUMENT

On page 22 of its brief, the Department attempts to skirt the central issue in this case by arguing that the real issue is whether a rigorous or "less" rigorous analysis can be applied to calculate Ms. Hahn's service credit. Because the amount of service credit earned by an instructor not designated as full-time depends on the percentage of a full-time load worked by the instructor, the central issue is the percentage of a full-time load worked by Ms. Hahn. It is apparent from the evidence in this case that during most of the years in question, Ms. Hahn's workload was the same as the instructor designated as full-time in the Developmental Studies Department. Accordingly, she is entitled to receive the service credit she earned as a full-time instructor.

The Department also argues that Ms. Hahn failed to calculate her days of service for each of the months in question. Once the percentage of a full-time load is calculated, calculation of the number of days worked in a month merely requires multiplying

the percentage of the full-time load by the number of working days in the month. Ms. Hahn does not take issue with the number of working days in each month at issue in this case. Her percentage of a full-time load for each official school year is set forth on pages 18 and 19 of her opening brief. It is also apparent that once the percentage of a full-time load for a particular year is calculated, a separate calculation of the number of days worked in a month would not yield a different result.

The Department argues on page 24 of its brief that because the statutes and regulations at issue in this case are not ambiguous, the principal of liberal construction does not apply. However, RCW 41.50.005(4) mandates that the granting of service credit itself be liberalized. In RCW 41.50.005, the legislature felt it was necessary to direct the Department to not arithmetically lower benefits and to grant service credit for all service rendered. In this case, the Department has done exactly what the legislature has prohibited.

The Department states in footnote 27 that Ms. Hahn has now been given credit for all out-of-class hours in the computation of her service credit. Most of Ms. Hahn's contracts set forth hours for extended planning and preparation and extended student

evaluation. (AR 309-340). It is apparent from the spread sheets attached to the Department's brief and contained in the record (AR 131-137) that none of these hours were considered by the Department in determining the number of days worked by Ms. Hahn.

The Department also states in footnote 27 that it used WAC 415-112-335 to compute Ms. Hahn's service credit even though the Mader settlement did not require it to do so prior to 1977. However, WAC 415-112-335 by its very terms applies prior to 1977. WAC 415-112-335 provides that, "This subsection adopts a method for estimating hours of work in order to determine membership eligibility and service credit in plan I and plan II." Under RCW 41.32.010(38), "Plan 1 means the teachers' retirement system, plan 1 providing the benefits and funding provisions covering persons who first became members of the system prior to October 1, 1977." Since plan 1 includes all teachers who began working prior to 1977, the terms of WAC 415-112-335 must apply prior to 1977 if it is to govern the calculation of service credit for faculty who are members of plan 1.

In footnote 27, it is stated that after the Mader settlement, the Department began to use the actual number of days in a school

year to calculate a faculty member's service credit. It is surprising that an agency charged with the administration of the retirement system did not do this prior to the Mader settlement.

Finally, the Department asserts that Ms. Hahn arbitrarily inserted 100 percent as her part-time work load even for quarters during which she taught one class. In the 1981-83 collective bargaining agreement, it is stated that the contact hour range for full-time instructors in the Developmental Studies Department on an annual basis was 660-990 contact hours. (AR 246). As stated previously, because there was no reason to believe that the college departed significantly from prior practice with regard to these ranges and because the contact hour load was set forth in the collective bargaining agreement on an annual basis, Ms. Hahn determined her percentage of a full-time load on an annual basis as well. Therefore, if she did indeed teach one class in a quarter during a year that she was teaching a full-time load on an annual basis, she was still teaching a full-time load during that year.

On page 24 of its brief, the Department suggests that Ms. Hahn used an "alternative methodology" to calculate her service credit and that the Department precisely followed the terms of WAC 415-112-335 when it calculated her service credit. In determining

the percentage of a full-time load Ms. Hahn worked, she used the contact hours required of full-time instructors on an annual basis based on the hours actually worked by the full-time instructor in the Developmental Studies Department and the contact hour ranges set forth in the 1981-83 collective bargaining agreement. In computing Ms. Hahn's work load, the Department adopted the FTE-F figures on Ms. Hahn's contracts. The Department admits that these figures were based on the assumption that a full-time load was 330 contact hours per quarter, even though it offered no evidence that any instructor at the College actually worked 330 contact hours per quarter.

The Department also suggests that it precisely followed the terms of WAC 415-112-335 and that Ms. Hahn followed the "alternative methodology". The only thing different about the methodologies used by the Department and Ms. Hahn is that Ms. Hahn chose to use the full-time work load actually followed by the College in calculating her service credit. The Department chose to use an inflated figure for the full-time workload.

In footnote 30 on page 25 the Department states that a full-time load for a faculty member would be 220 contact hours per quarter according to Ms. Hahn's analysis. Under the 1981-83

collective bargaining agreement, the contact hours required of full-time faculty in the Developmental Studies Department was 660-990 on an annual basis. (AR 246). Because these figures are on an annual basis, contact hours taught in the summer quarter should be included in the calculation as well. There are four quarters in an academic year. Therefore, the contact hour load requirement for employees working four quarters would be 165 contact hours per quarter. Moreover, as stated previously, there is nothing in the record to indicate that the contact hour requirements set forth in the 1981-83 were a departure from prior practice.

The Department asserts on page 26 of its brief that the 1975 and 1977 documents regarding work load (AR 178-181) are not hearsay because they have independent legal significance. In support of this argument, a number of cases are cited. In the cases cited by the Department, the words themselves created grounds for a cause of action. For example, defamatory statements amount to a cause of action for damages because the words themselves constitute grounds for relief. In this case, the 1977 and 1975 documents do not have independent legal significance. They were offered by the department for the truth of the matters asserted in them. Therefore, the documents are hearsay.

On page 27 of its brief the Department states that the “official” business document of the College regarding workloads is more credible than “Ms. Hahn’s self-interested recollection regarding the definition of a full-time load during this period.” The Department certainly had the opportunity to call witnesses to rebut Ms. Hahn’s testimony if there were such witnesses. Instead, it chose to rely on a hearsay document even though the evidence failed to show that an employee of the College ever actually worked a total of 330 contact hours in a quarter. The Department is also arguing that any member of the teachers’ retirement system who appeals one of its decisions is not credible as a witness and cannot be believed because they are self interested. This kind of presumption against a member of the teachers’ retirement system is particularly disturbing in light of the fact that the Department is an agency that is charged with the administration of the teachers’ retirement system for the benefit of its members. Moreover, the Department is in effect arguing that although a member has a due process right to be heard, it is presumed that they are not credible because they are acting in their self-interest.

The Department also argues that the 1977 document defining a full-time load to be 330 contact hours per quarter (AR

180-181), falls within a number of exceptions to the hearsay rule. Even if the documents fell within an exception to the hearsay rule, they were never properly authenticated by a witness with knowledge of the document. Moreover, no witness with personal knowledge ever testified to the elements of the business record hearsay exception.

On page 29, the Department argues that Ms. Hahn's self interested recollection a full-time load in the Developmental Studies department is not credible because she worked at the College almost thirty years ago and she could not have been aware of what a full-time load was in her Department over a period of six years. Ms. Hahn was not the only person who worked in the Developmental Studies Department during the years in question. The Department could have called other faculty members in the Developmental Studies Department as witnesses to rebut Ms. Hahn's testimony. Instead of doing so, it speculates as to why her testimony is not credible. This speculation is not based on evidence in the record. Moreover, Ms. Hahn was never asked questions during her cross examination regarding her alleged inability to recall the facts in question. Because there is no

evidence in the record regarding these issues, her credibility and memory is not in question.

The Department next argues that Ms. Hahn is trying to claim that the 330 contact hour load for full-time employees as reflected in the 1977 definitional document was some kind of “subterfuge”, intended to deprive part-time instructors of retirement benefits. It should be noted here that Ms. Hahn received absolutely no retirement benefits for her service at the College until after the class action lawsuit for such benefits was brought by part-time faculty in the community colleges. Moreover, Ms. Hahn was never told by anyone at the College that she was eligible to become a member of the Teachers’ Retirement System. (AR 456).

At page 29 of its brief, the Department states that “one might reasonably expect” that the instructional workload of the full-time employee in the Developmental Studies Department was reduced because, “the administrative responsibilities of overseeing work and insuring that the department’s instructional needs were covered from one quarter to the next would likely have been significant”. The Department cites no evidence in the record in support of its speculation that the administrative duties of the full-time employee would “likely” have been significant other than the speculation of its

own presiding officer. The importance of retirement benefits is beyond dispute. An agency should not have the discretion to deny those benefits to teachers who work twenty-five to thirty years to earn them based on speculation.

The Department argues that Ms. Hahn has no standing to challenge its interpretation of RCW 41.32.270 or whether it calculates service credit based on the "official" or "fiscal" school year under that statute. In this case, the superior court ordered the Department to calculate Ms. Hahn's service credit based on the official school year of the College instead of the fiscal year. The Department never argued in the appeal before the superior court that Ms. Hahn had no standing to challenge its interpretation of RCW 41.32.270. Moreover, the Department never filed a cross-appeal to appeal the superior court's ruling in this regard. Therefore, it must comply with the order of the Court.

CONCLUSION

As stated earlier, the importance of retirement benefits is beyond dispute. In the context of unemployment benefits, the legislature has recognized the importance of the community college system to the citizens of this state and the important role part-time faculty play in that system. RCW 50.44.055 provides the following:

The legislature finds the interests of the state and its citizens are best served by a strong community and technical college system. As described by their establishing legislation, these two-year institutions are an independent, unique and vital section of our state's higher education system, separate from both the common school system and other institutions of higher education. Paramount to that system's success is the attraction and retention of qualified instructors.... Over time, a change in hiring patterns has occurred, and for the last decade a substantial portion of community and technical college faculty are hired on a contingent, as needed basis.

Because of the importance of part-time faculty to the community college system and because the accrual of retirement benefits is important to the attraction and retention of those faculty members, all doubts regarding the accrual of retirement benefits should be resolved in favor of the part-time faculty member. In this case, the Department has gone beyond the record and the evidence before it to justify its denial of benefits to Ms. Hahn.

Faculty members working in the community college system do not earn a large sum of money for performing an important service to the citizens of this state as the record in this case indicates. (Please see Ms. Hahn's contracts of employment – AR 150-177). Therefore, they are entitled to have all doubts regarding the amount of their benefits resolved in their favor. In this case,

there is substantial evidence in favor of granting Ms. Hahn 5.67
years of service credit for her service at the College.

DATED this 6th day of October, 2006.



ERIC R. HANSEN
Attorney for Appellant
WSBA #14733

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the Appellant's Reply Brief in the above captioned matter upon the persons named below, or his/her authorized agent, by personal service, of ABC/Legal Messenger Service:

Sarah E. Blocki
Assistant Attorney General
905 Plum St SE, Bldg. #3
Olympia, WA 98504

DATED in Federal Way, Washington, this 9th day of October, 2006.



JENIFER PETERSEN

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