No. 43114-9-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

RICHARD E. SWANSON, Appellant,

vs.

DEPARTMENT OF RETIREMENT SYSTEMS, Respondent.

AMENDED OPENING BRIEF OF APPELLANT

JEFFREY D. STIER, WSBA No. 6911
Attorney for Richard E. Swanson

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WASHINGTON STATE COURT OF APPEALS, DIV. II

RICHARD E. SWANSON, Appellant, vs. DEPARTMENT OF RETIREMENT SYSTEMS, Respondent.	COA, Div. II No. 43114-9-II Superior Court No. 10-2-02666-2 AMENDED OPENING BRIEF OF APPELLANT

I.
ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Error of law in ruling that Appellant insufficiently invoked the Court's limited appellate subject matter jurisdiction in this case by challenging application of a rule to Appellant and those similarly situated.

I.A.1. Issues:

a. Is the Appellant correct in his argument that the defect in the agency's interpretation of the law in this case violates the constitution?

b. Did the Appellant make it clear to the agency that he was challenging the rule, as interpreted by the agency?

c. Is it for the Courts, or the agency, to determine whether 6the agency's interpretation of a rule follows the law?

2. Error of law and in fact in ruling that it was not futile for Appellant to challenge DRS' application of a rule to Appellant and those similarly situated.

I.A.2, Issues:

a. Is an agency bound by its prior interpretation of the law where it elects to follow that interpretation?

b. Would it be a vain and useless act for Appellant to pursue his case in an administrative forum when the agency has already made it clear what its interpretation of the law will be?

c. Did the Court err by its failure to rule upon the futility exemption in the Damages case?

d. Did the Court err by ignoring the evidence that was not controverted that the agency had already made up its mind as to its interpretation of the law in the Rules Case?

II.
STATEMENT OF THE CASE

Plaintiff is a Public Employees' Retirement System Plan 1 ("PERS I") retiree who retired from state service on January 1, 1999 after exactly 30 years of employment. CP 398.

Pursuant to RCW 41.40.020 the Department of Retirement Services ("DRS" or "Respondent" interchangeably) has the responsibility to administer and manage governmental retirement systems according to the provisions of Ch. 41.40 RCW, including the calculation of monthly retirement benefits for Plan 1 members at the time they retire. A Plan 1 member's retirement benefit is based on a formula of 2% x service credit x Average Annual Compensation ("AFC"). See RCW 41.40.185(2) and CP 98 and 405. A Plan 1 member's AFC is the annual average of that member's compensation during his or her two consecutive highest earning years. RCW 41.40.010(8)(a).

In the case of Mr. Swanson his PERS 1 retirement benefit was calculated at the rate of $3,080.53. CP 101 and 408.

On May 5, 1999, DRS sent a letter to Appellant indicating that a post-retirement audit had been performed that indicated that Appellant's AFC was $5,134.21. CP 398. According to Respondent, this version of Mr. Swanson's AFC included a credit for unused annual leave

accumulated during his high two (2) years of annual compensation. CP 100 and 407. Accordingly, Appellant received a monthly "defined payment" benefit from DRS based upon his of $5,134.21 (subject to various survivorship elections) from the date of his retirement on January 1, 1999, until DRS reconsidered that finding in August 2010. CP 100 and 407.

Unbeknownst to Appellant, allegedly following a statutory mandate, DRS promulgated WAC 415-108-510 on July 25, 1999 (after Appellant's retirement date), which, according to DRS, provided that the "first-in, first-out" rule ("FIFO") should have excluded consideration of annual leave because that annual leave was used up by the time of Mr. Swanson's retirement. CP 124-139 and 564. Despite this fact, Appellant has continued to receive his monthly retirement benefit calculated with respect to his AFC of $5,134.21 to August 31, 2010, with applicable cost of living and survivorship adjustments. CP 100-103 and 407-410.

In 2010, the plaintiff contacted the Department to advise that he had remarried. Apparently as a result of that and following contacts, DRS recalculated Appellant's retirement benefit. CP 102 and 407.

This case began with DRS' August 23, 2010, decision (memorialized by letters to Appellant dated August 23, 2010) to reduce Appellant's AFC to $4,860.98 retroactively to the date of his retirement

(subject to the 3-year statute of limitations) and in the future so long as he continued living. This version of his AFC did not include a credit for unused annual leave accumulated during his high two (2) years of annual compensation, being June 1, 1990, through May 31, 1992. See CP 122, 126-129 564.

DRS responded to a Public Records Request of Appellant ("PDR Response" by letter dated October 13, 2010, indicating that the FIFO promulgated after Appellants retirement in WAC 415-108-510 proscribes consideration of annual leave in computing a PERS 1 retiree's AFC in a situation where AFC was not in the last two years immediately preceding retirement. CP 123, 134-148 and 564. In that PDR Response, DRS included an e-mail to an interested person dated May 3, 2010, stating:

> In determining your benefit calculation, we are only able to use the salary and leave earned during your highest 24-month AFC period. For most individuals, this is the last 24-month period prior to retirement. However, in some situations-like yours, the highest 24-month period may not be the last 24 months of employment. The FIFO accounting rule allows us to determine in which months the cashed out leave was earned. With the FIFO rule, the leave you used while still employed is considered to be the oldest leave accrued. The leave that is paid out at retirement is considered to be the unused leave that was earned during your employment and is therefore reportable compensation to DRS.

CP 138 and 564.

DRS' October 13, 2010, PDR Response also included copies of power point training to DRS staff members to the effect that under the FIFO rule, DRS could exclude a portion of, or all, annual leave in the AFC calculation where a retiree's AFC was calculated on a two (2) year period that did not immediately precede his/her retirement. CP 139-146 and 564.

On December 9, 2010, Appellant commenced a Damages lawsuit (the "Damages Case") in Thurston County Superior Court Cause No. 10-2-02666-2 seeking to provide damages in the case of lost retirement benefits upon invalidation of the application of WAC 415-108-510 to Appellant and those similarly situated. CP 6-30. On January 19, 2011, Appellant commenced another case, Thurston County Superior Court Cause No. 11-2-00169-2 (the "Rules Revision Case") to invalidate the contention that WAC 415-108-510 required Respondent to ignore annual leave that was cashed out in AFC years under FIFO. That case also involved a potential class action for those retirees who were similarly situated. CP 618-645. Appellant did not seek an administrative hearing under RCW 34.05.542(2) prior to filing either lawsuit.

Both cases were eventually dismissed by the trial court (the Damages case on May 13, 2011, and the Rules Revision Case on January 27, 2012, 2011), for a failure to exhaust administrative remedies-i.e. for

Appellant's failure to appeal the administrative decision within thirty (30) days. CP 331-332 and 614-615. In addition, the dismissal order for the Rules Case specifically found that ". . . Petitioner has failed to establish the futility exception to the exhaustion of remedies requirement." CP 615.

III.
ARGUMENT

A. Summary of Argument.

Appellant contends that *Bowles v Retirements System*, 121 Wn. 2d 52, 847 P. 2d 440 (1993) case is applicable to the instant case. *Bowles* recognized the seminal rule that the State cannot constitutionally infringe on the retiree's right to contract by restricting any retirement rights that a PERS 1 employee (and eventual retiree) worked for prior to retirement, without offering a corresponding benefit.

Bowles looked at the "duration and nature of the administrative practice" in question, holding that because DRS had "consistently and routinely refused to take into account employers' [leave cash out lids] for a period of 4 to 10 years after learning of the existence of these limitations," the Department could not formally change its "established policy."

Here is why the *Bowles* rationales is relevant here:

1. Appellant[1] started his career with the State before the FIFO rule was enacted. CP 99-100 and 406-407. Essentially, he "contractually" relied on the fact that 100% of his vacation pay would be used to determine his AFC.

2. After Appellant started his career with the State, the FIFO rule was promulgated without an offer to a "corresponding benefit" by DRS to Appellant, or those similarly situated.[2]

3. Respondent states that it applied FIFO long before Appellant was first employed by the State. CP 40-63 and 369-394. That is contradicted by at least two (2) facts: a. the date of promulgation of WAC 415-108-510; and b. the fact that Respondent calculated Appellant's AFC without using FIFO. CP 106-107 and 407-408.

The Damages and Rules Cases both were dismissed on a simple "failure to exhaust administrative remedies" argument: that Appellant had failed to seek administrative review within thirty (30) days of Respondent's retroactive decision to cut back Appellant's retirement benefits by applying FIFO.

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[1] And presumably most of those similarly situated.
[2] The entire briefing of Respondent at the trial level concedes this point-indicating that no "corresponding benefit" was necessary. CP 38-63 and 367-394.

Appellant argues below that 1. It is not necessary to exhaust administrative remedies when the Court is asked to review the application of a rule to Appellant; and 2. It is futile to look to the administrative remedies of the agency when court interpretation of a regulation and constitutional infirmities of that regulation are necessary.

B. Standard of Review.

As stated herein, this appeal is solely to decide if the Superior Court's dismissal of these cases for failure to exhaust administrative remedies was appropriate under the inherent jurisdiction of the Court to decide issues involving the legality of regulations (especially where an issue of constitutionality is involved) and the futility exception to the exhaustion of administrative remedies doctrine.

As stated above, the Court dismissed both of these cases on Motions for Summary Judgment of Respondent, for failure to exhaust administrative remedies.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a

material fact and that, as a matter of law, summary judgment is proper. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

The court will consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist.*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) In the case of questions of law, the appellate court will consider the issue de novo. *Evans v Employment Security*, 72 Wn.App. 862, 866 P.2d 687 (1994).

C. Appellant sufficiently invoked the Court's limited appellate subject matter jurisdiction in this case by challenging application of a rule to Appellant and those similarly situated.

The Court clearly ruled in both cases that Appellant did not exhaust administrative remedies before the agency. Appellant readily concedes that it did not seek an administrative appeal within thirty (30) days of the August 23, 2010, notice letters because he has challenged the application of the FIFO rule to Appellant, and those similarly situated, on constitutional grounds.

This challenge to WAC 415-108-510 was made exceedingly clear in both petitions of Appellant, to wit:

1. **Damages Case:** the Damages Complaint made it clear that that application of the FIFO to Plaintiff's situation was not warranted. CP 6-10. For example, in the prayer of that Complaint Plaintiff asks for:

> Injunctive relief prohibiting DRS from calculating and recalculating AFC of future and past PERS 1 retirees whose high two (2) years are not their last two (2) years of service using the "first-in, first-out" rule to exclude some, or all, of annual leave benefits in the calculation of such AFC.

CP 10.

2. **Rule Revision Case:** Likewise, the Rules Petition also made it clear that that application of the FIFO to Plaintiff's situation was not warranted, to wit:

a. The 1st Cause of Action is entitled "IMPROPER RULE-MAKING ALLOWING FOR RECALCULATION OF FUTURE RETIREMENT BENEFITS FOR PETITIONER SWANSON" and Paragraph 1.11 states that "DRS application of the "first-in, first-out" rule set forth in WAC 415-108-510 proscribing consideration of Petitioner Swanson's annual leave in computing Petitioner Swanson's AFC violated requirements enunciated in *Bowles*, Supra. CP 367, 369.

2. The 2nd Cause of Action is titled "IMPROPER RULE-MAKING ALLOWING FOR RECALCULATION OF PAST

RETIREMENT BENEFITS FOR PETITIONER SWANSON" and its Paragraph 2.1 incorporates all prior paragraphs (including ¶ 1.11). CP 370.

3. The 3rd Cause of Action is titled "IMPROPER RULE-MAKING ALLOWING FOR RECALCULATION OF PAST AND FUTURE RETIREMENT BENEFITS FOR SIMILARLY SITUATED PERS 1 RETIREES" and its Paragraph 3.1 incorporates all prior paragraphs (including ¶ 1.11). CP 370.

4. The prayer of Appellant's Rule Challenge Petition includes requests for "A Declaratory Judgment prohibiting DRS from relying on WAC 415-108-510 to recalculate his AFC using the "first-in, first-out" rule to exclude some, or all, of annual leave benefits" (§A & C.1); "An Injunction prohibiting DRS from relying on WAC 415-108-510 to recalculate his AFC using the "first-in, first-out" rule to exclude some, or all, of annual leave benefits" (§A & C.2) for Appellant and those similarly situated. CP 372.

Finally, DRS seems to be able to understand and note the allegations of "improper rule-making" as it devotes a large part of its brief to the merits of Appellant's claims on the subject. CP 545-549.

RCW 34.05.570(2)(a) specifically authorizes declaratory relief whenever a statute or rule is attacked and RCW 34.05.570(2)(b)(i) provides that:

> The validity of any rule may be determined upon petition for a declaratory judgment addressed to the ***superior court*** of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the Appellant. The declaratory judgment order may be entered whether or not the Appellant has first requested the agency to pass upon the validity of the rule in question.

(Emphasis added)

DRS is compelled to follow the law in any administrative proceeding and it cannot modify or alter the statute by regulations. *Fisher Flouring Mills Co. v State*, 35 Wn.2d 482, 213 P.2d 938 (1950). DRS clearly has asserted that it believes that the law compels it to apply the FIFO Rule whenever "AFC is not in the last 24 months of employment." Construction of a law is something for the courts to do (*Yakima Clean Air v Glascam Builders*, 85 Wn.2d 255, 534 P.2d 33 (1975)) and that is exactly what Appellant has asked this Court to do in this proceeding.

In addition, it is for the courts to decide if a collection effort by the State against a beneficiary is unconstitutional. *Yakima Clean Air*, Id.

Finally, Appellant is not contesting the amount of the recalculated retirement benefit or the amount of the overpayment assessment. There is

no factual challenge involved in either case. All that is being challenged in these cases is the oft-stated assumption that the FIFO Rule as enunciated in WAC 415-108-530 compels DRS to apply the FIFO Rule whenever AFC is not in the last 24 months of employment.

D. It was futile for Appellant to challenge DRS' application of a rule to Appellant and those similarly situated.

RCW 34.05.534(3)(b) states that it is not necessary to exhaust administrative remedies where the exhaustion of remedies would be futile (the "Futility Exception"). The futility exception to the exhaustion of administrative remedies requirement requires a showing that pursuing an administrative appeal would be a vain and useless act. *D/O Center v. Department of Ecology*, 119 Wn.2d 761, 778, 837 P.2d 1007 (1992).

In the instant case pursuing administrative remedies would be a vain and useless act. Respondent has stated in many contexts the application of the FIFO rule to Appellant and those similarly situated-e.g. DRS' August 2010 letters to Appellant (See CP 122-123, 126-129 and 464[3]) to DRS' PDR response (See CP 123, 134-150 and 464[4]) indicating that the FIFO rule applied to Plaintiff's. Due to that, and to Respondent's

[3] In preparing this Opening Brief, Mr. Stier discovered that the Clerk of Thurston County Superior Court may not have included his Declaration of Jeffrey D. Stier in Response to Motion to Dismiss Rules Case dated on or about November 21, 2011, that was incorporated by reference by ¶4 of Mr. Stier's Declaration in Response to Second Motion to Dismiss Rules Case. Effort will be expended to correct this error.

[4] Refer to comments in footnote 3

extensive briefing on the merits that the FIFO policy did not infringe upon the constitutional rights of Appellant, or those similarly situated, it is obvious that the Respondent knows, understands, and is bound by its interpretation of the law on this point.

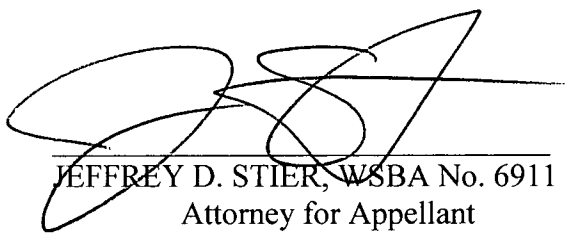
All an administrative agency can do is follow the law that the agency has found to be applicable. *Brown v State*, 136 Wn.App. 895, 151 P.3d 285 (2007). This limitation underscores why it would be a vain and useless act for Appellant to pursue his case in an administrative forum and, in fact, the administrative agency is not able to contradict its own interpretation of law that has been oft-stated in these proceedings.

In the Rules Case the Court made an explicit finding that seeking relief before the administrative agency would not be a futile act. There is no evidence at all in the record that supports that conclusion. As stated above, Respondent has stated in many contexts that FIFO applies to Appellant and those similarly situated. In addition, a question whether a requirement to exhaust administrative remedies is a question of law (*Scott v Petett*, 63 Wn.App. 50, 816 P.2d 1229 (1991)) and must be decided de novo. *Evans,* Supra.

IV.
CONCLUSION

A brief summary of Appellant's arguments is contained §III.A (p. 7-9) above.

RESPECTFULLY SUBMITTED this 31st day of May, 2012.



JEFFREY D. STIER, WSBA No. 6911
Attorney for Appellant
Westhill Office Park II, Bldg. 15
1800 Cooper Point Rd. SW
Olympia, WA 98502

WASHINGTON STATE COURT OF APPEALS, DIV. II

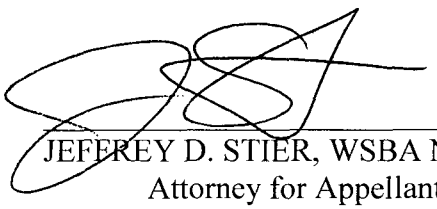
RICHARD E. SWANSON, Appellant, vs. DEPARTMENT OF RETIREMENT SYSTEMS, Respondent.	COA, Div. II No. 43114-9-II Superior Court No. 10-2-02666-2 DECARATION OF SERVICE OF AMENDED OPENING BRIEF OF APPELLANT

I, Jeffrey D. Stier, am over the age of eighteen (18) years and I am competent to make the following Declaration to my best information and belief:

On May 31, 2012, I caused the Amended Cover Sheet, Amended Table of Contents, and the Amended Opening Brief of Appellant to be delivered to the offices of Anne Essko, attorney of record for Respondent in this matter.

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

RESPECTFULLY SUBMITTED this 1st day of June, 2012.



JEFFREY D. STIER, WSBA No. 6911
Attorney for Appellant
Westhill Office Park II, Bldg. 15
1800 Cooper Point Rd. SW
Olympia, WA 98502