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**SUPREME COURT OF THE STATE OF WASHINGTON**

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RICHARD E. SWANSON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF RETIREMENT  
SYSTEMS,

Respondent.

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**RESPONDENT DEPARTMENT OF RETIREMENT SYSTEMS'  
ANSWER TO PETITION FOR DISCRETIONARY REVIEW**

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 ORIGINAL

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## I. INTRODUCTION

Petitioner Richard Swanson is a retired state employee who is challenging the Department of Retirement Systems' correction of an error in calculating his pension benefit. He contends that the Department's application of a "first-in-first-out" accounting principle violated his vested pension rights. After the Department corrected its error, Mr. Swanson failed to initiate the Department's administrative appeal process, thereby ignoring the Administrative Procedure Act (APA) and Washington's pension statutes. Instead, Mr. Swanson filed two lawsuits against the Department—after the statutory filing deadline had passed. He filed what he calls his Damages Case<sup>1</sup> more than two months after the statutory filing deadline and failed to serve the Department. He filed what he calls his Rules Revision Case almost four months after the statutory filing deadline.

The superior court dismissed both cases for failure to invoke the court's subject matter jurisdiction and, in addition, dismissed the Rules Revision Case for failure to exhaust administrative remedies or establish the futility exemption. The Court of Appeals affirmed dismissal of both lawsuits. Mr. Swanson now seeks discretionary review in this Court.

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<sup>1</sup> For the Court's ease of reference, the Department will refer to the two lawsuits by the names selected by Mr. Swanson. These names, however, do not accurately represent the nature of the cases or the legal remedies available to Mr. Swanson

This Court's discretionary review is not warranted. The appellate court's unpublished decision is fact-specific, entirely consistent with settled Washington law, and establishes no precedent. Mr. Swanson provides no reasonable argument to support his contention that the issues in this case present significant constitutional questions, conflict with a decision of the Court of Appeals, or qualify as issues of substantial public interest requiring further guidance by this Court. Accordingly, this Court should deny review.

## **II. ISSUES PRESENTED FOR REVIEW**

As explained in Section III herein, the issues raised in Mr. Swanson's Petition are inappropriate for review under RAP 13.4(b). However, if this Court were to grant review, the issues before the Court would be:

1. With certain exceptions not applicable here, Washington's APA provides the exclusive means for judicial review of agency action. RCW 34.05.510. Did the superior court properly dismiss Mr. Swanson's lawsuits challenging agency action, when Mr. Swanson had failed to file either suit within the APA's mandatory 30-day filing period, and, in the Damages Case, had failed to serve the Department at all?
2. Did the superior court properly dismiss Mr. Swanson's Rules Revision Case based not only on his failure to file within the 30-day period for judicial review of agency action, but also because Mr. Swanson failed to exhaust administrative remedies, where the Department had procedures in place for administrative review and Mr. Swanson made no attempt to use those procedures?

3. Even if Mr. Swanson had complied with the 30-day filing deadline in the Rules Revision Case, which he did not, is the Department nonetheless entitled to summary judgment because Mr. Swanson failed to proffer material, non-speculative evidence that the Department's action violated Mr. Swanson's vested pension rights?

### III. RESTATEMENT OF THE CASE

#### A. Background on Pension Benefit Calculations

1. **The Department calculates PERS Plan 1 members' retirement benefits according to a statutory formula that may include compensation for unused annual leave**

Mr. Swanson is a Public Employees' Retirement System (PERS) Plan 1 retiree. Under the statutory provisions governing PERS Plan 1, Mr. Swanson's retirement benefits are calculated based on his years of service (*i.e.*, service credit) and his average final compensation (AFC). CP at 619, RCW 41.40.185.<sup>2</sup> AFC is his average monthly compensation during his two consecutive highest earning years. RCW 41.40.010(6)(a); RCW 41.40.010(8)(a). In some circumstances, AFC may include compensation paid for accrued annual leave that remains unused at the time of retirement. RCW 41.40.010(8)(a) and (b); WAC 415-108-443; WAC 415-108-510(1); Att'y Gen. Op. 1 at 10 (1976).

Accrued annual leave is included in AFC only if actually earned during the two-year AFC period. Att'y Gen. Op. 1 at 11 (1976); *see also*

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<sup>2</sup> Specifically, a PERS Plan 1 member's monthly retirement benefit is calculated using the following formula:  $2\% \times \text{service credit} \times \text{AFC} = \text{monthly retirement benefit}$ . RCW 41.40.185(2).

*Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 63-64, 847 P.2d 440 (1993). Because annual leave is not only *earned* during the AFC period, but may also be *used* during an employee's career—either during the two-year AFC period or at some other time—for decades AFC has included only annual leave that is earned during the AFC period and that remains unused as of the date of retirement. *Id.*; see also *Wash. Ass'n of Cnty. Officials v. Wash. Pub. Emp's Ret. Sys. Bd.*, 89 Wn.2d 729, 731-2, 575 P.2d 230 (1978). The portion of annual leave that remains unused is determined by applying a first-in-first-out principle, *i.e.*, employees are deemed to use their annual leave in the order that it was earned: first-in, first-out. Att'y Gen. Op. 1 at 11 (1976).<sup>3</sup>

Consistent with this legal authority, the Department promulgated its first-in-first-out rule in 1987. CP at 164, 167. The rule currently states in pertinent part:

When an employer provides cash compensation in lieu of unused annual . . . leave, the department [of Retirement Systems] applies a first-in-first-out accounting method to determine when the compensated leave was earned, and when or whether the leave was used or cashed out, with the following exceptions [not applicable to Mr. Swanson].

WAC 415-108-510(2).

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<sup>3</sup> For a more detailed explanation of how unused leave is calculated for purposes of determining AFC, see Response Brief for Department of Retirement Systems filed in the Court of Appeals, at footnote 4.

Mr. Swanson is incorrect that the Department promulgated the rule after he retired in 1999. Pet. at 3.<sup>4</sup> Likewise, Mr. Swanson is incorrect that the Department has described the first-in-first-out rule as “proscrib[ing] consideration of annual leave in computing a PERS [Plan] 1 retiree’s AFC in a situation where AFC was not in the last two years immediately preceding retirement.” Pet. at 4.<sup>5</sup>

**2. State pension law and the APA require persons aggrieved by a department decision to obtain an administrative hearing before seeking judicial review, and to seek judicial review within 30 days**

Under the APA, Mr. Swanson must prove compliance with the procedural prerequisites to judicial review. RCW 34.05.546(6); *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 118 Wn. App. 212, 219-220, 75 P.3d 975 (2003), *rev’d on other grounds*, 153 Wn.2d 207, 103 P.3d 193 (2004). The procedural prerequisites are in RCW 41.40 (the PERS statutes) and the APA. The PERS statutes state: “[a]ny person aggrieved by a decision of the [D]epartment affecting his or her legal rights, duties, or privileges *must before he or she appeals to the courts*, file with the director [of the Department] . . . a notice for hearing before the director’s

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<sup>4</sup> As a codified rule, the contents of the rule have remained essentially unchanged since 1987. In 1987, the rule stated in pertinent part, “[w]hen an employer provides cash compensation in lieu of unused leave, the department applies a first-in-first-out accounting method to determine when the compensated leave was earned, unless the employer has in place a . . . written policy statement [which is not applicable in this case].” CP at 164, 167.

<sup>5</sup> This language is Mr. Swanson’s *own* description of the first-in-first-out rule in his Public Records Act request, and not a statement by the Department. CP at 134, 138.

designee,” RCW 41.40.068 (emphasis added), and “[j]udicial review of any final decision and order by the director is governed by the provisions of chapter 34.05 RCW [the APA].” RCW 41.40.078. The APA requires that appeals of the Department’s orders and actions be filed within 30 days of the Department’s action. RCW 34.05.542(2) and (3).

**B. The Department Recalculated Mr. Swanson’s Retirement Benefits in 2010 Because When Mr. Swanson Retired in 1999, the Department Erroneously Failed to Apply the First-In-First-Out Rule to Its Calculation of His Retirement Benefit**

Mr. Swanson retired from state service in January 1999. CP at 406, ¶ 6. It is undisputed that Mr. Swanson’s AFC years were not the two years immediately preceding his 1999 retirement, but instead were the years 1990 to 1992. CP at 406-407, ¶ 6; Pet. at 4. Using that 1990-92 AFC period, in 1999 the Department calculated Mr. Swanson’s AFC and his monthly retirement benefit. CP at 407, ¶ 6. However, in doing this calculation the Department mistakenly included in Mr. Swanson’s AFC the entire amount of annual leave he cashed out when he retired, rather than the amount of unused annual leave that he had earned during his 1990-92 AFC period. CP at 407-408, ¶¶ 7-8.<sup>6</sup> As the Department would

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<sup>6</sup> Mr. Swanson is incorrect about what occurred in 1999 when he states, “this [1999] version of [Mr. Swanson’s] AFC included a credit for unused annual leave accumulated during his high two (2) years of annual compensation.” Pet. at 3. Mr. Swanson does not actually dispute that in 1999 the Department erroneously included in Mr. Swanson’s AFC his *entire* annual leave balance as it existed when he retired and

subsequently discover, none of Mr. Swanson's 1999 annual leave balance was attributable to the 1990-92 AFC period. CP at 407-408, ¶ 8.

The Department's inclusion of Mr. Swanson's entire final annual leave cashout in his AFC was a mistake, not Department policy or practice. CP at 419, ¶¶ 6-7. When Mr. Swanson retired, the Department was correctly applying the first-in-first-out rule to other, similarly situated employees. CP at 409, ¶ 12.

In 2010, the Department realized that it had made an error in 1999<sup>7</sup> and that Mr. Swanson's correct statutory retirement benefit under the statute was approximately \$160 per month less than previously calculated. CP at 408, ¶ 9.

Upon discovery of its 1999 error, and as required by law,<sup>8</sup> the Department advised Mr. Swanson on August 23, 2010 that it was correcting his retirement benefit and provided options for Mr. Swanson to repay the overpayment made during the preceding three years. CP at 408, ¶ 10.<sup>9</sup>

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that Mr. Swanson's 1999 annual leave balance did not contain *any* amount of annual leave attributable to the 1990-1992 AFC period. CP at 407-408, ¶ 8.

<sup>7</sup> CP at 407-408, ¶ 8.

<sup>8</sup> The Department must correct its error by recovering past overpayments and prospectively reducing benefits to reflect the proper calculations. RCW 41.50.130.

<sup>9</sup> Pursuant to the correction of errors statute, the Department may generally recover only those overpayments made within three years of discovery of the Department's mistake. RCW 41.50.130(2). The Department will not recover any overpayment made to Mr. Swanson between 1999 and 2007.

Mr. Swanson did not respond, and he concedes that he never initiated the administrative appeal process required by the PERS statutes and the APA. CP at 408-409, ¶ 11 (Mr. Swanson's failure to respond), Pet. at 5 (Mr. Swanson's concession), RCW 41.40.068, RCW 41.40.078.

**C. Mr. Swanson Challenged the Department's Action by Filing Two Lawsuits After the Statutory Filing Deadline Had Passed**

The Department notified Mr. Swanson of its error on August 23, 2010. Mr. Swanson did not seek administrative review of this decision; nor did he file an appeal under the APA within 30 days. Instead, Mr. Swanson filed his first lawsuit (the Damages Case) on December 9, 2010, more than two months after the agency action he was disputing. Pet. at 4-5; CP at 6.<sup>10</sup> He did not serve the Department. CP at 54 n.12; 64-96, 104-105; 108; RCW 34.05.542(6).

The Damages Case challenged the Department's application of the first-in-first-out rule to Mr. Swanson, not the rule itself or a threatened application of the rule. Pet. at 4-5; CP at 6-10. The Department sought dismissal on multiple grounds, including Mr. Swanson's failure to file and serve his petition within the statutory deadline. CP at 39-40, 53-54. The

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<sup>10</sup> Mr. Swanson also challenged the Department's application of the first-in-first-out rule to an alleged class of similarly situated individuals but never brought a motion seeking class certification, and no class was certified by the superior court.

superior court dismissed the Damages Case for failure to invoke the superior court's subject matter jurisdiction.<sup>11</sup>

Mr. Swanson filed his Rules Revision Case on January 19, 2011, almost four months after the statutory filing deadline under the APA. Pet. at 5; CP at 618-644, 367-394. The Rules Revision Case again challenged the Department's action of applying the first-in-first-out rule to him, not the rule itself or a threatened application of the rule. Pet. at 5; CP at 367-370. The Rules Revision Case for the first time contended that the Department's action was an unconstitutional violation of Mr. Swanson's vested pension rights under the *Bowles* case. CP at 369, ¶ 1.11.

The Department sought dismissal of the Rules Revision Case because Mr. Swanson's violation of the 30-day filing deadline resulted in his failure to invoke the superior court's appellate jurisdiction. CP at 540-544. The Department also argued in the alternative that even if Mr. Swanson had successfully invoked the court's appellate jurisdiction, dismissal was nonetheless required for failure to exhaust administrative remedies or demonstrate the futility of exhaustion. CP at 544-545. The

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<sup>11</sup> CP at 331-332, 333-334. Mr. Swanson is thus incorrect when he contends that the superior court dismissed the Damages Case for failure to exhaust his administrative remedies. Pet. at 5.

superior court dismissed the Rules Revision Case on both of the grounds argued by the Department. CP at 614-615.<sup>12</sup>

On appeal, Mr. Swanson contended that the APA's 30-day statutory filing deadline was inapplicable to his lawsuits because he was alleging improper rulemaking<sup>13</sup> and bringing an as-applied challenge to the first-in-first-out rule.<sup>14</sup> His apparent position was that his lawsuits were rule challenges under RCW 34.05.570(2)(b)(i) and that RCW 34.05.542(1) therefore eliminates any filing deadline.

However, RCW 34.05.570(2)(b)(i) defines rule challenges to which no filing deadline applies as: (1) challenges to a rule itself, or (2) challenges to the "threatened application" of a rule. It is undisputed that Mr. Swanson is not challenging the first-in-first-out rule itself,<sup>15</sup> and he has made no claim that he is challenging a "threatened application" of the first-in-first-out rule to him. CP at 6-31 (Damages Case); CP at 367-394 (Rules Revision Case). He is plainly challenging an actual Department action. *Id.*, Appellant's Am. Opening Br. filed in the Court of Appeals at 1, 2, 4, 10, 11.

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<sup>12</sup> Mr. Swanson is thus incorrect when he implies that the superior court dismissed the Rules Revision Case only for failure to exhaust administrative remedies, Pet. at 5, and later states that the issue in this case is whether a rule challenge "may be dismissed for failure to exhaust administrative remedies within 30 days," Pet. at 8. The superior court's first stated reason for dismissal of the Rules Revision Case was failure to invoke the court's appellate subject matter jurisdiction. CP at 614.

<sup>13</sup> Appellant's Am. Opening Br. filed in the Court of Appeals at 10-12.

<sup>14</sup> Appellant's Mot. for Recons. filed in the Court of Appeals at 2.

<sup>15</sup> *Id.* at 3-4.

The Court of Appeals rejected Mr. Swanson's argument because challenges to agency action, such as the Department's action here, must be filed within 30 days. RCW 34.05.542(3). *Richard Swanson v. State Dep't of Ret. Sys.*, No. 43114-9-II, slip op. at 5-6, 7 (August 13, 2013).<sup>16</sup>

#### **IV. REASONS WHY REVIEW SHOULD BE DENIED**

##### **A. The Court of Appeals' Unpublished Decision Applied the Plain Meaning of the APA and Settled Law to Undisputed Facts**

This case involves straightforward application of the plain language of the APA and settled principles of law to the undisputed relevant facts. The Court of Appeals' unpublished decision rejected Mr. Swanson's contention that his lawsuits fell within the ambit of RCW 34.05.570(2)(b)(i) as a rule challenge to which RCW 34.05.542(1) makes no filing deadline applicable. *Swanson*, slip op. at 5-6, 7.

The Court of Appeals was correct that those statutes, by their own terms, eliminate the 30-day filing deadline for challenges to two things only: challenges to a rule itself and challenges to the "threatened application" of a rule, neither of which is what Mr. Swanson is challenging. The Court of Appeals correctly determined that Mr. Swanson is challenging the Department's action applying the first-in-first-out rule to him; that the 30-day filing deadline in RCW 34.05.542(3) applied to

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<sup>16</sup> Mr. Swanson filed a motion for reconsideration in the Court of Appeals. Contrary to the contention in his Petition, that motion is not pending. Pet. at 6. The Court of Appeals denied his motion on September 12, 2013.

that challenge; and that Mr. Swanson missed that filing deadline when he filed his lawsuits in December 2010 and January 2011. *Id.*

The Court of Appeals also correctly applied settled law when it determined that Mr. Swanson's failure to timely file his lawsuits resulted in a failure to invoke the superior court's subject matter jurisdiction. *Swanson*, slip op. at 1, 5-6, 7. Courts have repeatedly held that strict compliance with the APA's filing and service requirements are necessary to invoke the court's appellate subject matter jurisdiction. *Diehl*, 153 Wn.2d at 217; *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998); *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617-18, 902 P.2d 1247 (1995).

Finally, the Court of Appeals properly applied settled law when it affirmed that failure to invoke the superior court's subject matter jurisdiction required dismissal. *Swanson*, slip op. at 1, 7. Courts have repeatedly held that when a court lacks subject matter jurisdiction, dismissal is the only permissible action the court may take. *Knight v. City of Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973 (2011); *Skagit Surveyors*, 135 Wn.2d at 556.

**B. Mr. Swanson’s Petition Does Not Identify Any Significant Constitutional Issue; There Is None in This Case**

Mr. Swanson contends that this Court should grant review under RAP 13.4(b)(3) for three reasons: (1) his lawsuits were “premised upon constitutional issues raised by the case of *Bowles*,” (2) dismissal for failure to exhaust remedies prevented him from asserting his *Bowles* claim, and (3) dismissal violated his due process rights to “effect discovery and cross-examination” and to participate in an orderly proceeding. Pet. at 6. Mr. Swanson has failed to demonstrate that any of his three contentions raise significant constitutional issues warranting review under RAP 13.4(b)(3).

First, Mr. Swanson has not justified discretionary review on the basis that his Rules Revision Case included a substantive constitutional claim<sup>17</sup> under *Bowles*.<sup>18</sup> His constitutional claim played no role in the decisions below because settled law required dismissal of the Rules Revision Case when Mr. Swanson failed to comply with the APA 30-day filing deadline. He provides no citation to authority or reasoned argument

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<sup>17</sup> CP at 369, ¶ 1.11. Mr. Swanson contended that the Department’s action was an unconstitutional violation of his vested pension rights. Mr. Swanson did not assert that claim in his Damages Case. CP at 6-30. As a result, Mr. Swanson cannot justify review of the Damages Case on the basis that the Damages Case raises a significant constitutional issue.

<sup>18</sup> The *Bowles* case held that the Department generally may not change a consistently applied administrative practice because doing so would violate public employees’ vested contractual pension rights. *Bowles*, 121 Wn.2d at 65, 68. As explained in the Response Brief of the Department of Retirement Systems at 37-43, filed in the Court of Appeals, Mr. Swanson’s claims regarding *Bowles* lack merit.

that such a dismissal raises a significant constitutional issue justifying discretionary review whenever a dismissed lawsuit contains a constitutional claim.

Second, Mr. Swanson has not justified discretionary review on the basis that a significant constitutional issue is raised whenever a lawsuit containing a constitutional claim is dismissed for failure to exhaust administrative remedies. At the outset, Mr. Swanson's argument is based on an incomplete description of the superior court's decision. As described above, the superior court dismissed Mr. Swanson's lawsuits for failure to invoke the court's subject matter jurisdiction, not because he failed to exhaust his administrative remedies. *Swanson*, slip op. at 1.

Although in the Rules Revision Case, the superior court also dismissed for failure to exhaust remedies, dismissal of Mr. Swanson's lawsuits was required nonetheless for failure to comply with the APA. The court's alternate ground for dismissal in the Rules Revision Case was essentially superfluous and not grounds for accepting review.

Moreover, even if the superior court had dismissed exclusively for failure to exhaust remedies, Mr. Swanson did not assign error or argue below that dismissal for failure to exhaust remedies is constitutionally impermissible whenever a lawsuit includes a constitutional claim. Appellant's Am. Opening Br. at 1-2, 14-15, filed in the Court of Appeals.

He also provides no citation to authority or reasoned argument that such a dismissal raises a significant constitutional question justifying discretionary review.

Third, Mr. Swanson's contention that discretionary review is justified because dismissal denied him a procedural due process "right to effect discovery and cross-examination" and to an orderly proceeding below is fatally flawed on multiple grounds. Pet. at 6, 8. He did not assign error below on this basis.<sup>19</sup> His right to discovery in superior court was unrestricted, and he freely exercised that right. CP at 583-595.

If he had complied with the pension statutes and the APA, he would have had an additional right to discovery during the administrative review process before the Department. WAC 415-08-280. He had no right to cross-examination because judicial review under the APA is on the record. RCW 34.05.558, RCW 34.05.562.

He had access to—but refused to exercise—his right to an orderly proceeding in the Department's administrative review process,<sup>20</sup> and he has not explained how dismissal for failure to invoke the superior court's subject matter jurisdiction constitutes a proceeding that is not orderly under procedural due process principles.

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<sup>19</sup> Appellant's Am. Opening Br. at 1-2 filed in the Court of Appeals.

<sup>20</sup> RCW 34.05.413-476; WAC 415-04; WAC 415-08.

Moreover, the two cases Mr. Swanson cites do not support his argument. The supreme court in *Cuddy v. State, Dep't of Pub. Assistance*, 74 Wn.2d 17, 19, 442 P.2d 617 (1968), reiterated that procedural due process requires fair administrative hearings, including an opportunity to be heard in an orderly proceeding and to know and meet opposing claims. The court in *Little v. Rhay*, 8 Wn. App. 725, 729, 509 P.2d 92 (1973), held that a habeas corpus petitioner had been denied a full and fair evidentiary hearing on an alleged waiver of a right to jury trial when the trial court denied the writ application based solely on conflicting affidavits. Neither *Cuddy* nor *Little* involved or discussed procedural due process when a court dismisses a lawsuit for failure to comply with statutory deadlines for appealing under the APA.<sup>21</sup>

**C. Mr. Swanson's Petition Does Not Identify Any Conflict Between the Court of Appeals' Decision and Any Other Court of Appeals Decision**

Mr. Swanson next contends that discretionary review is proper under RAP 13.4(b)(2) because the Court of Appeals' decision conflicts with two other Court of Appeals decisions: *Alpine Lakes Prot. Soc'y v. Wash. State Dep't of Ecology*, 135 Wn. App. 376, 144 P.3d 385 (2006) and *Schreiber v. Riemcke*, 11 Wn. App. 873, 526 P.2d 904 (1974).

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<sup>21</sup> Indeed, had Mr. Swanson sought an administrative hearing before the Department as required, he would have been accorded exactly the sort of fair hearing described in *Cuddy*. RCW 34.05.410-.476; WAC 415-08.

Pet. at 8. His contention is meritless because neither case conflicts with the Court of Appeals' decision here.

*Alpine Lakes* contains a straightforward analysis of the substantive propriety of agency rulemaking and denial of a petition for rulemaking. 135 Wn. App. at 379, 381. *Schreiber* reiterates that exhaustion of remedies is required unless one of the exceptions to the requirement applies. 11 Wn. App. at 906. Neither case addressed the basis for the Court of Appeals' decision here: statutory filing deadlines under the APA and dismissal for failure to invoke a reviewing court's subject matter jurisdiction. Thus, there is no conflict.

Moreover, even if the court had dismissed for failure to exhaust, there would be no conflict because *Alpine Lakes* doesn't address exhaustion, and *Schreiber* allows (but does not require) a trial court to excuse exhaustions where the issue is purely legal and beyond the expertise of the agency. Here, the issue was neither purely legal nor beyond the expertise of the agency because the claim was that the Department had improperly calculated Mr. Swanson's benefits. There is no conflict with *Alpine Lakes*, *Schreiber*, or any other relevant appellate decision.

**D. The Petition Does Not Involve an Issue of Substantial Public Interest Requiring a Determination by This Court**

Mr. Swanson's final contention is that discretionary review is appropriate under RAP 13.4(b)(4) because his lawsuits involve an issue of substantial public interest. He has not demonstrated that his petition involves any issue of substantial public interest justifying discretionary review.

He first states that the case is a class action and dismissal of his case is public in nature because "numerous persons are similarly situated to the Appellant." Pet. at 9-10. However, he does not support this contention with any citation to the record. To the contrary, a class was never certified, and the evidence in the record is that: (1) the Department's action was an isolated mistake rather than Department policy or practice; and (2) the Department correctly applied the first-in-first-out rule to similarly situated employees. CP at 419, ¶ 6-7; CP at 409, ¶ 12. Thus, Mr. Swanson has not demonstrated any "likelihood that additional plaintiffs have been or will be injured in exactly the same fashion." Pet. at 9-10.

He then states that authoritative guidance from this Court is necessary because the Department trained its employees to apply its first-in-first-out rule. Pet. at 10. The fact that the Department trained its

employees to apply the first-in-first-out rule is irrelevant with regard to whether dismissal of Mr. Swanson's lawsuits was required when he failed to invoke the superior court's subject matter jurisdiction. On this issue, the Court of Appeals correctly applied the plain and ordinary meaning of the APA and the pension statutes to the undisputed facts of this case. There is no conflict with any other decision of the Court of Appeals. As a result, there is no need for authoritative guidance from this Court.

Finally, Mr. Swanson seems to contend that the issues in his lawsuits are likely to recur; at the same time, however, he expressly concedes that he "cannot point to any case where that might occur." Pet. at 10. The only purported evidence he offers regarding recurrence is his speculation that "it is not inconceivable that that case is still out there." *Id.* These statements do not establish that a recurrence is likely.

## V. CONCLUSION

For the reasons stated above, the Department asks the Court to deny Mr. Swanson's Petition.

RESPECTFULLY SUBMITTED this 11th day of October, 2013.

ROBERT W. FERGUSON  
Attorney General

/s/ Ann C. Essko  
ANN C. ESSKO, WSBA No. 15472  
Assistant Attorney General

Attorneys for Department of Retirement Systems

**PROOF OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that on October 11, 2013, I caused the attached Respondent Department of Retirement Systems' Answer to Petition for Discretionary Review to be served as follows:

US Mail Postage Prepaid via Consolidated Mail Service to:

Jeffrey D. Stier  
1801 West Bay Dr. NW, Ste. 205  
Olympia, WA 98502-4311

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of October, 2013, at Olympia, WA.

/s/ Keely Tafoya  
KEELY TAFOYA  
Legal Assistant

## OFFICE RECEPTIONIST, CLERK

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**To:** Tafoya, Keely (ATG)  
**Cc:** Essko, Ann (ATG); stierlaw@gmail.com  
**Subject:** RE: Richard Swanson v. DRS, No. 89309-8, filings with Supreme Court

Our email was down on Friday and this will be rec'd as coming in on Friday, October 11<sup>th</sup> if the email was sent prior to 5:00 p.m.

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

**From:** Tafoya, Keely (ATG) [<mailto:KeelyT@ATG.WA.GOV>]  
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**Cc:** Essko, Ann (ATG); [stierlaw@gmail.com](mailto:stierlaw@gmail.com)  
**Subject:** Richard Swanson v. DRS, No. 89309-8, filings with Supreme Court

Good afternoon,

On behalf of Assistant Attorney General Ann Essko, WSBA #15472, 360-586-3633, attorney for the Respondent State of Washington Department of Retirement Systems, please find attached for filing the Respondent Department of Retirement Systems' Answer to Petition for Discretionary Review.

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