No. 45128-0-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

MICKEY FOWLER, *et al.*, , and a class of TRS Plan 3 members,
Appellants/Plaintiffs (in Supplemental Complaint),
JEFFREY PROBST, and a class of similarly situated individuals,

Appellants

v.

DEPARTMENT OF RETIREMENT SYSTEMS,
Respondent

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The thousands of public school teachers in the *Fowler* class (the "teachers") submit this reply. The Department of Retirement Systems ("DRS") opposition is based on its argument that the *Probst* mandate does not require DRS to pay the teachers the daily interest that was earned on their retirement contributions. DRS's argument is contrary to the express language in the *Probst* decision specifically reversing the DRS decision that DRS was not required to pay daily interest. The *Probst* court agreed with the teachers that DRS's failure to pay daily interest was arbitrary and capricious, and the *Probst* court said it decided the case on this ground. The *Probst* court did not remand this class action case to DRS to renew through in *ex parte* rulemaking the very interest practice the court determined was arbitrary and capricious.

DRS's position is also contrary to the Constitution because it would perpetuate an unauthorized taking of the daily interest earned on the teachers' funds, and the proposal for 2014 rulemaking to determine interest owed to the teachers in 1997-2002 is contrary to the teachers' vested rights. Opening Br. at 9 (DRS previously settled claims of teachers who transferred after January 20, 2002).

This Court should reverse the trial court and remand with instructions to calculate the interest owed to the teachers.

ARGUMENT

I. THE *PROBST* COURT DECIDED THAT DRS'S FAILURE TO CALCULATE AND PAY DAILY INTEREST WAS ARBITRARY AND CAPRICIOUS; THE COURT MADE A FINAL DECISION AND DID NOT REMAND THIS CLASS ACTION TO DRS FOR RULEMAKING.

A. DRS's Position is Contrary to the *Probst* Mandate.

DRS's position is that the *Probst* court ruled in its favor, *against* providing TRS members daily interest, while remanding to DRS to put its historical interest calculation method into the form of a rule. DRS Br. 25-29. It contends (*id.* at 6-10, 16-34) that the court did not make a final decision when it determined that DRS's continuing to use its historical interest calculation method was arbitrary and capricious. *Probst v. DRS,* 167 Wn. App. 180, 183, 191, 193-94, 271 P.3d 966 (2012). DRS says the court reversed the agency's decision to continue using that method due to "a procedural deficiency," *i.e.,* the failure to consider other policies back in 1977, when DRS originally adopted an interest rate policy. DRS Br. at 21, 22. It says this "policy adoption problem . . . can be fixed by the agency on remand" by DRS enacting as a rule the same quarterly interest calculation method the *Probst* court determined is arbitrary and capricious. *Id.* at 28. Leaving aside the many constitutional problems with DRS's position (see *infra* at 10-19), DRS's argument is contrary to the *Probst* decision and mandate.

DRS contends that "*Probst* did not decide that DRS must pay daily

interest on pension contributions." DRS Br. at 24, 24-30 (bold and capital letters removed). Contrary to DRS's argument, the *Probst* court concluded by stating that it "reverse[d] the DRS's order as it pertains to the class that the Fowlers represent and remand[ed] for further proceedings." 167 Wn. App. at 194. And the specific DRS order that the *Probst* court reversed was "DRS's decision that the DRS was not required to pay daily interest[.]" *Id.* at 185. Because the *Probst* court reversed the DRS decision that "DRS was not required to pay daily interest" (*id.*), DRS must pay daily interest on the teachers' funds.

DRS's argument that *Probst* did not really decide the issue of daily interest is also contrary to the opinion's introductory paragraph, which said the court reversed the trial court's decision dismissing the teachers' claim that DRS was "required to pay class members daily interest[.]" 167 Wn. App. at 182. And the court said it "decide[d] this case on the grounds of arbitrary and capricious agency action," *id.* at 183 n. 1, and it described the agency action challenged as arbitrary and capricious as "DRS's failure to pay daily interest[.]" *Id.* at 182-183.

DRS argues, however, that the *Probst* court did not decide that "DRS erred by failing to pay daily interest, but only that the quarterly interest method used was arbitrary and capricious." DRS Br. at 27, 28 ("*Probst* resolved the arbitrary and capricious issue by finding the DRS

policy invalid"). But this argument ignores the *Probst* court's express language above reversing the DRS administrative decision denying daily interest and the language describing DRS's failure to pay daily interest as arbitrary and capricious. 167 Wn. App. at 182-83, 185, 194. It also disregards the fact that in 10 years of litigation the parties only discussed two methods for calculating interest — (1) the industry standard daily method, and (2) DRS's unique quarterly interest calculation. *See, e.g.*, CP 864-94. And when the *Probst* court held DRS's quarterly interest calculation was arbitrary and capricious and invalid (as DRS acknowledges, DRS Br. at 27 and 28), it necessarily also held that the daily method applied. This result is consistent with the language in the opinion concerning the court specifically reversing DRS's decision denying daily interest. *See supra* at 2-3 (quoting language).

The *Probst* court did not intend its decision to be a mere prelude to many more years of litigation, starting with DRS creating a retroactive rule, based on newly created evidence, to renew the same quarterly interest method the court determined was arbitrary and capricious. CP 148. The *Probst* court said the case is resolved and "[b]ecause *we decide this case* on the grounds of arbitrary and capricious agency action, we do not reach the Fowlers' constitutional takings argument." 167 Wn. App. at 183 n. 1 (emphasis added).

The *Probst* court further said that the question it decided was whether, due to DRS's failure to pay the teachers the daily interest earned on their funds, DRS "acted in willful and unreasoning disregard of the facts and circumstances." 167 Wn. App. at 191 n. 9. The court held that it did — DRS's decision "to *continue using its historical interest calculation method without due consideration of the facts and circumstances*" was arbitrary and capricious. 167 Wn. App. at 194 (emphasis added).

The *Probst* court thus reviewed the DRS decision denying the teachers interest based on whether it resulted from "willful and unreasoning disregard of the facts and circumstances." 167 Wn. App. at 191-92. And the court said that DRS knew that its quarterly interest calculation method was unfair — referring to "the *recognized unfairness*" of the method. 167 Wn. App. at 193 (emphasis added). The teachers' opening brief sets forth the facts in the record on which the *Probst* court found the recognized unfairness of DRS's quarterly method:

- DRS had a double standard on interest: when teachers owed DRS interest for restoring contributions DRS charged the teachers daily interest, but when DRS owed the teachers interest on contributions DRS did not pay the teachers daily interest. Opening Br. at 26-27.
- DRS's undisclosed computer program for calculating interest inaccurately calculated interest in multiple ways, including failing to pay interest for an entire quarter due to the program showing the teachers' funds had transferred from the account prior to the end of the quarter, when in fact the teachers' funds remained in the account for

the entire quarter and transferred *after* the quarter ended.[1] Opening Br. at 6-7, 27.

- DRS's full-quarter interest method did not calculate and add interest on employee deposits on an annualized basis, despite promising the teachers annual interest on their contributions. Opening Br. at 27.

- DRS knew of the problems and unfairness with the full-quarter method, DRS could have paid the teachers the daily interest earned on their contributions simply by changing its computer program, but DRS took no action. Opening Br. at 28-29.

DRS also kept its interest calculation method secret from retirement system members, even though it knew it should inform them of the practice because it was material to a member's decision on when to transfer from a Plan 2 to a Plan 3 (at the beginning of a new quarter when the loss of interest would be lower, as opposed to at the end of the quarter when the member could lose an entire quarter's interest).[2] AR 70, 151,

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[1] Re-arguing the arbitrary and capricious decision in *Probst*, DRS quarrels with details of the deficiencies in its computer program. DRS Br. at 9. It asserts that the software properly computed interest in accordance with the quarterly interest method. *Id.* The record, however, shows that the software did not calculate interest correctly under even DRS's method because it calculated that no interest was due at the end of a quarter even when the funds were in a member's account for longer than that full quarter — even when the funds remained in the account for more than a month after the quarter ended. AR 45-46, 660; Opening Br. at 6-7.

[2] DRS quarrels at this late date (DRS Br. at 7-8) with the trial court's finding in 2010 that DRS kept its interest calculation method secret from retirement plan members. CP 1077-79 (trial court's decision). DRS did not appeal the order with that finding, nor did it assign error to that finding. Even now, DRS cites nothing in the record to support its contention (DRS Br. at 8) that documents describing the interest calculation method were publicly available upon request. The record shows that DRS actually withheld many pertinent documents when they were requested both under the Public Records Act ("PRA") and in discovery. AR 141-45. DRS withheld the documents unlawfully, and provided them to the plaintiff only when DRS decided to use them itself in the administrative litigation. *Id.* Consequently, DRS agreed to a substantial fine in the PRA case. *Probst v. DRS*, Thurston County Superior Court, No. 05-2-01341-6, Sub No. 21.

292-93, 312. The points listed above showing DRS's arbitrary and capricious agency action were all before the *Probst* court in the first appeal. *Probst v. DRS,* No. 40861-9-II, Br. of Appellants at 42-47 and Reply Br. of Appellants at 20-24.

Accordingly, the facts and circumstances in the *Probst* record show multiple reasons why the court ruled that DRS's quarterly interest calculation method was arbitrary and capricious. 167 Wn. App. at 182-83, 185, 193-94. The *Probst* court therefore did not remand the case to DRS to reconsider the teachers' claim through rulemaking, but remanded to the trial court for further proceedings.[3]

B. The APA Does Not Require Remand to DRS; the APA Requires that the Teachers Obtain Relief.

As an alternative argument, DRS argues a remand for rulemaking is required under the APA. But DRS acknowledges that in "some reviews of agency decisions, a reversal resolves the case." DRS Br. at 20. Courts can "set aside agency action" and "order an agency to take action required by law" under RCW 34.05.574(1). And this is precisely what the *Probst* court did — it set aside agency action when it "reversed" DRS's

[3] In all the cases DRS cites (DRS Br. at 17-25) for remanding cases to agencies, rather than to the lower court, the courts quite specifically remanded to the agencies. For example, in *Mader v. HCA*, 149 Wn.2d 458, 477, 70 P.3d 931 (2003) (DRS Br. at 17, 25), the Supreme Court said: "We therefore remand to the HCA for a determination, consistent with this opinion, of Mader's and Knudsen's eligibility for health care coverage." No such remand to the agency (DRS) was in the *Probst* opinion.

administrative order denying the teachers' claim for daily interest. 167 Wn. App. at 183, 194. And, the court said, the arbitrary and capricious decision "decide[d] the case." *Id.* at 183 n. 1.

Accordingly, to the extent the APA is relevant here, RCW 34.05.570(3) requires that the "court *shall grant relief*" if it finds agency action arbitrary and capricious. (Emphasis added.) The word "shall" indicates a mandatory duty. *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011). The trial court's remand to DRS, which wants to conduct rulemaking with *post hoc* rationalizations for failing to pay the teachers the interest earned on their accounts more than 15 years ago — a historical agency action that the *Probst* court already determined is arbitrary and capricious — is contrary to the APA because it is not relief for the teachers. RCW 34.05.570(3).

DRS's argument that it essentially prevailed in *Probst,* and under the decision the "policy adoption problem . . . can be fixed by the agency on remand" (DRS Br. at 28), is also foreclosed by the *Probst* court's denial of DRS's motion for reconsideration. CP 37-101, 132-33. In its motion for reconsideration, DRS argued at length that there were multiple reasons its failure to pay daily interest was not arbitrary and capricious and with "due consideration" (CP 49-56), and the *Probst* court denied the motion. CP 132-33. DRS now argues that to the extent "the Court made a

decision not to allow additional argument on the due consideration issue, there is no reason the Court's decision to deny re-argument in the judicial review would preclude the consideration of evidence in the subsequent proceedings." DRS Br. at 30.

DRS's argument is legally wrong because the *Probst* mandate includes not only the opinion, but also its order denying reconsideration and its order on costs determining that the teachers are the prevailing parties. Opening Br. at 14-15 (citing *Gudmundson v. Commercial Bank & Trust Co.*, 160 Wash. 489, 498-99, 295 P. 167 (1931); *Reeploeg v. Jensen*, 81 Wn.2d 541, 548, 563 P.2d 99 (1972)). And the mandate includes those matters raised, even if not directly addressed by the court. *Id.* The *Probst* court's denial of DRS's motion for reconsideration and its award of costs to the teachers as the prevailing parties therefore control subsequent proceedings in the case and prevent DRS from rearguing the fact that it acted arbitrary and capriciously. *Id.*

DRS nonetheless argues that remand to the agency was required under RCW 34.05.574(1) because DRS supposedly needs to exercise discretion to adopt a new interest rate policy. DRS Br. 17-23, *citing Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997) (rulemaking case). The trial court accepted DRS's argument, saying it had no authority to exercise discretion. VRP [6/20/13] at 15-16. The trial court erred

because there was no discretion for the trial court to exercise on remand.[4] The trial court needed only to implement the *Probst* mandate by requiring DRS to calculate and transfer the daily interest the teachers' funds had earned, but that DRS did not pay under its arbitrary and capricious quarterly interest method. *Id.* at 18; *Probst*, 167 Wn. App. at 182-83, 183 n. 1, 191-94. The trial court thus erred when it did not effectuate the *Probst* mandate by directing DRS to re-calculate the interest, as the teachers requested, CP 133, 186. See also Opening Br. at 47 (relief requested).

II. DRS'S FAILURE TO PAY THE TEACHERS ALL THE INTEREST THAT THEIR CONTRIBUTIONS EARNED AT THE RATE OF 5.5 PERCENT ANNUAL INTEREST, COMPOUNDED QUARTERLY, VIOLATES THE TAKINGS CLAUSE AND THEIR VESTED PROPERTY RIGHTS PROTECTED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The teachers' opening brief explained that DRS's failure to pay the teachers all the interest that their contributions earned at the rate of 5.5% annual interest compounded quarterly violated the United States Constitution in three separate ways. Opening Br. at 30-44. DRS contends that the teachers' constitutional rights are not violated. DRS's arguments

[4] DRS argues that all the issues, including the constitutional issues and those reserved to the courts by RCW 34.05.510, were remanded to DRS itself. DRS Br. at 22, 31-32. The *Probst* court surely did not anticipate a class action with constitutional claims for monetary compensation to be decided by the defendant itself in a rulemaking procedure. Under RCW 34.05.510, these matters are decided under the civil rules. Opening Br. at 21-25.

are erroneous as explained below for each separate violation.[5]

A. DRS Violated the Takings Clause Because DRS Admits Only Part of the Interest Earned by the Teachers Is Allocated to Them.

DRS does not dispute that the teachers' funds in their accounts are the teachers' property and they are not public funds. *Bowles v. DRS*, 121 Wn.2d 52, 74-75, 847 P.2d 440 (1993), and *State ex rel. State Ret. Brd. v. Yelle*, 31 Wn.2d 87, 111, 113, 201 P.2d 172 (1948), discussed in Opening Br. at 33-36. (Previously, DRS argued that the teachers' accounts were public funds, but it has abandoned that argument.)

DRS also does not dispute that one of the core property rights that Americans have is that interest follows principal and therefore a person has a protected property right in the interest income of that person's principal. The government therefore violates the Takings Clause of the Fifth Amendment when it does not provide interest earned on the principal to the owner of that principal.[6]

DRS argues that the court in *Probst* threw out its interest policy in

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[5] If this Court finds that DRS's failure to pay the teachers daily interest earned on their funds violates the *Probst* mandate, then the Court need not reach the teachers' constitutional arguments. *Probst,* 167 Wn. App. at 183 n. 1. DRS contends that the teachers cannot raise their constitutional arguments. DRS Br. at 35. But they are independent claims that the Court would have to reach, if the case were not resolved on arbitrary and capricious grounds. *Probst,* 167 Wn. App. at 183 n. 1.

[6] See Opening Br. at 31-33 (discussing *Dean v. Lehman*, 143 Wn.2d 12, 33-36, 18 P.3d 523 (2001); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165-67 and n. 5, 118 S. Ct. 1925, 141 L.Ed. 2d 174 (1988); *Schneider v. Dept. of Corrections*, 151 F.3d 1194, 1198-1201 (9th Cir. 1998)).

its entirety, and there is therefore "no longer any agency decision subject to constitutional challenge" under the Takings Clause. DRS Br. at 36. DRS is wrong about what the court did in *Probst*, but its argument is also irrelevant because the teachers challenged DRS's *action* in 1997-2002 in failing to provide teachers who transferred from TRS Plan 2 to Plan 3 all the interest they had earned at the agreed 5.5% annual interest rate. And there is no dispute that DRS did not provide the teachers with all the interest that their funds earned at the 5.5% annual interest rate. See Opening Br. at 6-7, 33-34 n. 18. Indeed, there were periods of up to six months where the teachers' funds earned returns, but the teachers received *no* interest (not 5.5% annual interest or any other amount). *Id.* (citing AR 577, 624-27, 643, 791-94, 800).

DRS acknowledges that it "allocated" this portion of the interest, not to the TRS Plan 3 members' individual retirement accounts, but to the TRS Plan 2/3 account to fund all TRS members' defined benefits: "[f]unds that are not allocated to Plan 2 individual accounts as regular interest will be used to pay defined benefit pensions to TRS Plan 2 and 3 members." DRS Br. at 7. The interest earned on the teachers' Plan 2 member individual accounts that DRS allocated to the entire Plan 2/3 defined benefit account were thus *not* transferred to fund the teachers' Plan 3 individual defined contribution accounts. *Id.*

On its face this is a Takings Clause violation because the teachers are entitled to all the interest earned on their principal at the 5.5% annual interest rate, not just the portions that DRS decides to allocate to the teachers. *Dean*, 143 Wn.2d at 34-36; *Phillips*, 524 U.S. 165-67 and n. 5; *Schneider*, 151 F.3d at 1196, 1198-1201.

DRS contends that its re-allocation of the interest earned on the teachers' Plan 2 funds was not an unconstitutional taking because the interest "that is not allocated to [the teachers'] individual accounts as interest does not become earned by, or inure to the benefit of DRS." DRS Br. at 6-7. But this is irrelevant because it does not matter whether the seized interest benefits DRS itself, TRS employers in general, or other public employees. In *Dean* our Supreme Court rejected the Department of Corrections' seizure of inmates' interest that went into an "Inmate Betterment Fund" that could benefit the impacted inmates in some manner, as well as inmates generally. 143 Wn.2d at 33.

Here, the situation is much worse than in *Dean* because the interest that DRS took (re-allocated) is used to fulfill employer responsibilities to fund pensions generally, while the teachers' funds should be in their individual accounts to help fund each teacher's Plan 3 individual retirement account. Teacher Mickey Fowler explained the impact of DRS's action (CP 803):

> The amount transferred from TRS Plan 2 to Plan 3 is very important to me and many other teachers because it formed the principal amount in our accounts on which future investment returns are earned. If all interest earned on my contributions were not transferred to TRS Plan 3, then this would negatively affect future investment returns and the total amount of money available to me and other teachers when we retire.

Accordingly, DRS's "not allocated" argument is actually an admission to a Takings Clause violation because DRS admits that only part of the interest earned by the teachers' principal at the agreed 5.5% rate is allocated to those teachers. The remaining interest is *not* "allocated" to the teachers (not put in their individual member accounts), but is instead "allocated" (re-directed) to the State and other employers to fund defined benefit pensions for other employees. This violates the Takings Clause because *all* interest earned on the teachers' accounts at the rate of 5.5% per year, compounded quarterly, belongs to the teachers, not just part of the interest. The fact that the withheld interest may be used by the State to benefit public employers or other public employees is not a defense to the Takings Clause violation. *Dean*, 143 Wn.2d at 33-36; *Schneider*, 151 F.3d at 1196, 1198-1201; *Phillips*, 524 U.S. 165-67.

B. Under the Common Law the Teachers Have a Vested Right to the Daily Interest Earned on their Funds More than 15 Years Ago, and this Vested Right Cannot be Interfered with by a 2014 Administrative Rule Based on a 2007 Statute.

The teachers' opening brief explained the common law rule that interest is earned daily is the only rule of law that existed in 1997-2002

because DRS agrees that its quarterly interest calculation method was invalid and the retirement statutes were silent on how interest was earned on the teachers' contributions.[7] Opening Br. at 37-42. Under the law protecting vested rights, DRS cannot now issue a rule in 2014 under a 2007 statute that would retroactively interfere with the teachers' property rights to the daily interest earned more than 15 years earlier. *Id.*[8]

DRS's response asserts that there is no vested right under the common law because it says "[t]he major flaw in Plaintiff's argument is that the Court found the Legislature abrogated common law daily interest for public pension systems." DRS Br. at 38.

Although the *Probst* court held that under the TRS statutes common law daily interest is not required, and that DRS has authority under the 2007 statute to determine that interest is earned in a manner inconsistent with the traditional common law daily interest rule, the court did *not* hold that the TRS statutes *prohibit* DRS from paying daily interest on members' funds or that the common law daily interest rule does not

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[7] DRS does not dispute that under the common law interest is earned daily on funds held in an account regardless of when the interest is paid or posted to an account. Opening Br. at 39-40. The *Probst* court said that "DRS does not contest" the common law daily interest rule. 167 Wn. App. at 189 n. 6.

[8] Statutes and rules may not be given retroactive effect, "regardless of the intent of the legislature, when the effect would be to interfere with vested rights." *Gillis v. King County,* 42 Wn.2d 373, 376, 255 P.2d 546 (1953); *Caritas Services v. DSHS*, 123 Wn.2d 391, 414-15, 869 P.2d 28 (1994); And vested rights include legal or equitable rights to property. *Id.*

apply when there was no other method for calculating interest in effect.[9] 167 Wn. App. at 188-91. The common law daily interest rule thus applied in 1997-2002 because the *Probst* court determined that DRS's alternative quarterly interest calculation method is invalid and there is no other rule governing how interest is earned on the teachers' funds (and even now, almost 20 years later in 2014, there is still no valid rule under the 2007 statute other than the common law).

As a fall-back argument, DRS erroneously argues — without citation to authority — that the common law does not apply to "[a]dministration of statutory programs[.]" DRS Br. at 39-40. DRS's argument has the law completely backwards. The common law applies in Washington, it predates statehood, and it is "the rule of decision" in all cases. RCW 4.04.010; *State v. Kurtz,* 178 Wn.2d 466, 473-77, 309 P.3d 472 (2013); *Potter v. Washington St. Patrol*, 165 Wn.2d 67, 76, n. 7, 196 P.3d 691 (2008); *In re Hudson*, 13 Wn.2d 673, 685, 126 P.2d 765 (1942). The common law applies to the administration of statutory programs. *Id.*

Accordingly, DRS cannot issue a rule in 2014 that would

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[9] In *Probst*, the court said: "We hold that the TRS statutes do not require DRS to pay daily interest on balances transferred from Plan 2 to Plan 3." 167 Wn. App. at 191; *id.* at 189 (the court did not accept the teachers' argument that "the TRS statutes incorporate the common law rule that interest is earned daily"). The *Probst* court said this decision was primarily based on the 2007 statute which, the court said, gives "DRS authority to determine how interest is earned[.]" *Id.* at 190.

retroactively interfere with the teachers' vested rights to the daily interest their accounts earned more than 15 years ago.[10]

C. DRS Promised the Teachers 5.5% Annual Interest, Compounded Quarterly, Which Definitionally Requires Daily Interest, and this Pension Promise Created a Vested Right That Cannot Be Revoked.

DRS does not dispute that when an employee works in a job with a retirement plan, the employee has vested rights to the promises concerning the retirement plan and those rights cannot be later modified. See Opening Br. at 42, citing *Bakenhus v. Seattle,* 48 Wn.2d 695, 701, 296 P.2d 536 (1956), and *Navlet v. Port of Seattle*, 164 Wn.2d 818, 835, 194 P.3d 221 (2008). DRS also does not really dispute that a promised annual or yearly rate of interest necessarily includes daily interest because an "annual" or "per year" interest rate means that interest must be calculated using a 365-day year, rather than fractions of the year as DRS did under its full-quarter-only method. Opening Br. at 45.

DRS instead disputes that it promised the teachers annual interest, saying "[t]he alleged promise of annual interest is not supported by documents in the record." DRS Br. at 42. Contrary to DRS's position, the promise of 5.5% annual interest is confirmed in DRS's answer to the teachers' class action complaint (CP 542 ¶ 5(b)), in DRS's response to a

[10] DRS blames this Court for the retroactivity — "Any retroactivity is a consequence of the Court's invalidation of the historic policy and the need for DRS to adopt the replacement policy[.]" DRS Br. at 39 n. 13.

Request for Admission (AR 232), and in official DRS documents (CP 902).[11]

DRS argues that the teachers did not tell DRS that the term "annual interest" includes "daily interest" when it admitted that it promised 5.5% annual interest (DRS. Br. at 42), but this meaning is established by the objective meaning of annual interest, not DRS's subjective understanding, if there were one. *Multicare Medical Ctr. V. DSHS*, 114 Wn.2d 572, 586-87, 790 P.2d 124 (1990) (hospitals bound by objective meaning of regulation setting payment rates, not their subjective understanding.) DRS fails to present any explanation whatsoever for why its promise of 5.5% "annual interest" would not include daily interest. DRS Br. at 42-44.

DRS also argues there is no authority "establishing that agencies can make promises of pension benefits beyond the benefits provided by pension statutes" (*id.* at 42) and it would be *ultra vires* for it to provide the annual interest it promised. *Id.* at 44. But providing annual interest cannot be *ultra vires* when the Legislature gave DRS the authority to determine the regular rate of interest, RCW 41.32.010(38), and that established regular rate — 5.5% annual (per year) interest compounded

[11] Answer CP 542 ¶ 5: regular rate of interest is "5.5% per year compounded quarterly"; Admission No. 1, AR 232: regular rate of interest is "5.5 per cent annual interest compounded quarterly"; official DRS document, CP 902: "DRS pays 5.5 per cent annual interest . . . compounded quarterly."

quarterly — means that interest is earned daily.[12] Indeed, the trial court found that the teachers expected that their contributions earned daily interest at the 5.5% annual rate because that is normal. CP 1078-79.

Accordingly, the fact that DRS is admittedly not paying 5.5% annual interest (re-allocating part of it) is a violation of the teachers' vested pension rights, not a defense. *Navlet*, 164 Wn.2d at 837-38.

III. DRS DOES NOT DISPUTE THAT THE *PROBST* COURT ERRED IN ITS UNDERSTANDING OF THE ACCRUED INTEREST STATUTE, RCW 41.04.445, WHICH IS SIGNIFICANT BECAUSE THE STATUTE CONFIRMED THE LEGISLATURE'S INTENT THAT THE TEACHERS RECEIVE ALL INTEREST EARNED ON THEIR CONTRIBUTIONS, WHETHER CREDITED OR NOT.

The teachers pointed out in their opening brief that the *Probst* court erred in disregarding RCW 41.04.445(4) because it believed that the

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[12] The opening brief cited *Chern v. Bank of America,* 544 P.2d 1310, 1312, 15 Cal.3d 866 (Cal. 1976); *Silverstein v. Shadow Lawn Savings & Loan Assn.*, 237 A.2d 474, 481, 51 N.J. 30 (N. J. 1968) and *In re Oil Spill* by the "Amoco Cadiz" 794 F.Supp. 261, 264-66 (N.D. Ill. 1992). DRS has no contrary authority, and it dismisses the cases simply by saying they concern "law from other jurisdictions." DRS Br. at 42. DRS does not explain how the law of Washington is supposedly different, and DRS itself uses a 365-day calendar year to determine interest owed to it by employers, employees and others. CP 876. In fact, Washington law is the same: annual interest or interest per annum means that interest is earned each day at the annual rate. *Banuelos v. TSA Wash. Inc.*, 134 Wn. App. 603, 614, 141 P.3d 652 (2006) (under RCW 19.52.010 the trial court was required to apply 12% interest per annum because no other rate was agreed upon by the parties, and using the 12% annual rate the trial court properly awarded interest for 13 days, which interest equaled $4.27); *Sharbono v. Universal Underwriters*, 158 Wn. App. 963, 973, 247 P.3d 430 (2010) (trial court directed to calculate post-judgment interest at the annual rate of 12% from May 20, 2005 (day judgment was obtained) until the defendant pays in full); *In re Bailey's Estate*, 56 Wn.2d 623, 625-26, 628-29, 354 P.2d 920 (1960) (affirming trial court order requiring the defendant to pay judgment interest at the rate of 6% per annum from the date judgment was entered on December 1, 1958 until May 1, 1959, when the judgment was paid).

statute did not apply to TRS. Opening Br. at 33 n. 17 and 41 n. 24.[13] DRS does not dispute that the *Probst* court erred, nor could it. When the DRS presiding officer made the same error in the *Probst* administrative litigation, DRS itself asked the DRS presiding officer to correct this specific part of her decision. AR 948-49.

This error in *Probst* is quite significant. RCW 41.05.445(4) provides that upon a teachers' withdrawal of funds, the teacher "shall" receive all "accrued interest" on their contributions. "Accrued interest" is not defined, so the term has its ordinary dictionary meaning. *Quadrant Corp. v. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). And DRS agreed that the dictionary definition of "accrued interest" controls. AR 713. "Accrued interest" means "*interest earned, though not credited or otherwise paid.*" *Dictionary of Banking Terms* (4th ed. 2000), p. 7, AR 684 (emphasis added).[14]

In *Dean*, our Supreme Court held that a very similar statute providing that inmates shall receive "accrued interest" on their deposits

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[13] The Court does not need to reach this argument if it agrees with any of the teachers' preceding arguments.

[14] Other dictionaries agree. "Accrued interest" is "interest earned since the last settlement date but not yet due or payable." *Webster's Third New International Dictionary* (1976), p. 13, AR 662. *Black's Law Dictionary* (7th ed. 1999), "accrued interest" means "interest that is earned but not yet paid." AR 668 (Black's definition of accrued interest was cited by DRS, AR 714). "Accrued interest" is "[i]nterest earned but not yet due and payable." *Dictionary of Banking* (1994), p. 5; AR 672.

upon their release created a constitutionally protected property right to receive all the interest earned in their accounts. *Dean*, 143 Wn.2d at 34-35. The teachers therefore, like the inmates, also have a statutorily created and constitutionally protected property right to all the interest earned at the promised rate of 5.5% annual interest compounded quarterly, not merely the interest that DRS decides to credit or allocate. Indeed, DRS admits that it did not provide the teachers interest that accrued on their funds because DRS says it allocated this interest to the TRS Plan 2/3 defined benefit fund "to pay defined benefit pensions to TRS Plan 2 and 3 members." DRS Br. at 7; Opening Br. at 33-34.

DRS's response is that the only interest the teachers earned was the amount of interest that was actually credited to their accounts. DRS Br. at 37-38. The words in a statute, however, should not be construed to be meaningless. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 656, 294 P.3d 695 (2013). Under DRS's argument there could never be any interest earned, but not yet credited, *i.e.*, "accrued interest." This would render meaningless the Legislature's requirement that DRS pay "accrued interest" to members when they withdraw their funds from a TRS account. RCW 41.04.445(4).

The *Probst* court erred by disregarding RCW 41.04.445(4), and its requirement that the teachers shall receive "accrued interest" on their

contributions when they withdrew their contributions from Plan 2 accounts and transferred the funds to Plan 3. 167 Wn. App. at 189 n. 7. The teachers should therefore also have received under RCW 41.04.445(4) the interest that accrued on their funds, but that DRS did not credit to their accounts because it erroneously allocated or credited the interest to the Plan 2/3 defined benefit fund.

IV. THIS COURT HAS JURISDICTION TO DECIDE THE TEACHERS' APPEAL — SUMMARY DENIAL OF A MOTION TO RECALL A MANDATE IS A PROCEDURAL DECISION, NOT A DECISION ON THE MERITS.

DRS argues that this Court does not have jurisdiction to decide the teachers' appeal. DRS Br. 2, 3, 16. DRS says the "same issues" here were previously "adjudicated by the Court's decision on the motion to recall the mandate."[15] *Id.* at 1, 2, 13.

DRS is wrong to argue the issues in this appeal were adjudicated by denying a motion to recall the mandate. Under RAP 12.7(a) an appellate court has no jurisdiction over a case once the mandate is issued. Karl B. Tegland, 3 *Wash Prac.* (2011), p. 189, citing *Frye v. King County*, 157 Wash 291, 294, 289 P.18 (1930); *see also Greene v. Rothschild*, 68

[15] The teachers sought review of the trial court's order remanding the matter to DRS for rulemaking with both a motion to recall the mandate in the previous appeal (No. 40861-9-II) and an appeal from that order in this appeal No. 45128-0-II. In their motion, the teachers expressly noted their separate appeal, but urged the court to use the procedure of recalling the mandate to obtain jurisdiction, rather than the appeal, because recalling the mandate would likely be faster. Motion to Recall Mandate, p. 1, n. 1. Before DRS answered, the court summarily denied the motion to recall the mandate.

Wn.2d 1, 10-11, 414 P.2d 1013 (1966). Under RAP 12.9(a) the "appellate court *may* recall a mandate [*i.e.*, regain jurisdiction over the case] . . . to determine if the trial court complied with an earlier decision of the appellate court in the same case." (Emphasis added.) But this is a discretionary procedural decision (*id.*), similar to the procedural decision on whether to accept discretionary review. RAP 2.3(b) ("discretionary review *may* be accepted only in the following circumstances . . ." [emphasis added]).

Accordingly, when a party files a motion to recall a mandate under RAP 12.9(a), the appellate court regains jurisdiction over the matter only if and when it *grants* the motion to recall the mandate (a decision that is separate from the decision whether the trial court complied with the mandate). Several appellate decisions illustrate this point. *Bank of America v. Owens, et al.*, 177 Wn. App. 181, 188, 311 P.3d 594 (2013); *State v. Hoa Van Tran*, 149 Wn. App. 144, 146, 202 P.3d 969 (2009).[16]

In *Bank of America*, the Supreme Court ruled in favor of the defendant Treiger. 177 Wn. App. at 187. Upon remand, the trial court entered an order that Trieger contended violated the Supreme Court's

[16] See also *Deweerth v. Baldinger,* 38 F.3d 1266, 1271 (2nd Cir. 1994) (summary denial of motion to recall the mandate is a discretionary procedural ruling, not a ruling on merits to which the law of the case doctrine applies). *Accord, Prudential Ins. Co. of America v. HMO Partners*, 413 F.3d 897, 903-04 (8th Cir. 2005); *Wilmer v. Brd. Of County Commissioners of Leavenworth County*, 69 F.3d 406, 409 (10th Cir. 1995).

mandate. *Id.* at 188. Treiger both filed a motion to recall the mandate and appealed the order (*id.*), which are the same actions the teachers took here (see *supra* p. 22 n. 15). The Supreme Court denied the motion to recall the mandate and transferred the appeal to the Court of Appeals. The Court of Appeals then decided in the appeal that the trial court had violated the mandate. 177 Wn. App. at 188; *see also State v. Hoa Van Tran*, 149 Wn. App. at 146 (appellate court granted motion to recall the mandate, but then denied the moving party's arguments on the merits).[17]

In contrast to a motion to recall the mandate, when a notice of appeal is filed, this Court automatically obtains jurisdiction. RAP 2.2 and 2.4; see also *Greene*, 68 Wn.2d at 10-11. And RAP 12.9(a) states that a trial court's failure to comply with the mandate may be appealed, which gives this Court jurisdiction over a "separate review of the lower court's decision entered after issuance of the mandate" -- *i.e.*, it is not review within the original appeal as with a motion to recall a mandate. (This is a change from prior law, which did not allow an appeal. *Frye*, 157 Wash at 294.)

Accordingly, because the *Probst* court denied the teachers' motion

[17] DRS relies only on two pre-RAP cases — *State ex rel Seattle v. Dept. of P.U.*, 33 Wn.2d 896, 207 P.2d 712 (1949), and *Reeploeg*, 81 Wn.2d 541 — that are quite different because the appellate courts plainly had jurisdiction under the rules then in effect and the courts actually decided whether the mandate was violated after full briefing and argument.

to recall the mandate, the court never regained jurisdiction over the case to render a decision on the merits establishing the law of the case.[18] But this Court now has jurisdiction in this separate appeal to decide whether the trial court's decision violated the mandate of the earlier appeal. *Bank of America,* 177 Wn. App. at 188.

CONCLUSION

The trial court's remand to DRS is contrary to the *Probst* mandate. The *Probst* court held that DRS's failure to pay the teachers daily interest on their retirement contributions due to its quarterly interest calculation is arbitrary and capricious. DRS's failure to pay the teachers the interest earned on their contributions at the agreed 5.5% annual rate is also contrary to the Constitution in multiple ways. This Court should reverse and remand with specific instructions so that the teachers obtain relief on this 2005 case. Opening Br. at 47.

Respectfully submitted this 24 day of March, 2014.

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[18] In contrast, because the appellate court has jurisdiction over the case when it denies a motion to reconsider, the denial is a decision on the merits even if the order denying reconsideration does not expressly mention the matters raised in the motion. *Gudmundson*, 160 Wash. at 498-99; *Reeploeg*, 81 Wn.2d at 548; *accord*, *Deweerth*, 38 F.3d at 1271.

PROOF OR SERVICE

I, Monica Dragoiu, declare under penalty of perjury that I am over the age of 18 and competent to testify and that defendant, Department of Retirement Systems, was served as follows:

On Friday, March 21, 2014, I personally served a true and correct copy of Appellants' Reply and this Certificate of Service as follows:

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In accordance with the laws of the State of Washington, the original and one copy of Appellants' Reply and this Certificate of Service were filed on March 21, 2014 via USPS regular mail as follows:

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

DATED: March 21, 2014 at Seattle, Washington.

MONICA DRAGOIU
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