NO. 45128-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

JEFFREY PROBST, and a Class of similarly situated individuals,

Plaintiffs,

MICKEY FOWLER, et al., and a class of TRS Plan 3 members,

Plaintiffs-Appellants,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Defendant-Respondent.

ANSWERING BRIEF OF RESPONDENT DEPARTMENT OF RETIREMENT SYSTEMS

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I. INTRODUCTION

This Court decided the issues raised by Plaintiffs' appeal when it denied recall of the mandate. The Court should reject an appeal of the same issues that were adjudicated by the Court's decision on the motion to recall the mandate. The Court should allow the Department of Retirement Systems (DRS) to comply with the superior court order remanding the administrative decision to DRS for correction of the deficiency found by this Court on judicial review.

This case arose when Plaintiff class (Plaintiffs) appealed an administrative order denying additional interest on Plaintiffs' pension contributions. Plaintiffs transferred their contributions from a traditional pension plan to individual "member accounts" in a new hybrid plan.[1] Plaintiffs claimed that they should have received "common law daily interest," on the transferred sums, rather than interest calculated under a policy adopted by the Director of the Department of Retirement Systems (DRS) in 1977.

In 2012, this Court held that the Legislature delegated to the DRS Director the authority to develop interest policy on member contributions. DRS policy, and not common law daily interest, determined interest owed to transferring members. However, the Court also held that DRS had not "duly

[1] Traditional and hybrid public pension plans are explained below at pp. 5-6.

considered" its existing interest policy against other possible alternative policies, rendering application of the policy arbitrary and capricious. The Court remanded the administrative decision for further proceedings.

After remand, Plaintiffs asked the superior court to enter judgment awarding daily interest. DRS moved for an order confirming remand of the administrative decision to DRS to make a new decision on Plaintiffs' interest claim, after correcting the policy deficiency identified by the Court. The superior court denied Plaintiffs' motion to enter judgment and granted the DRS motion to remand. Plaintiffs moved to recall the mandate, asserting that "the trial court did not comply with its [this Court's] *Probst* decision."[2] The Court denied the motion to recall the mandate.

The three issues identified by Plaintiffs in this appeal relate to whether the superior court complied with this Court's mandate. Plaintiffs cannot bring the mandate issue before this court a second time as an appeal. After denial of the Motion to Recall the Mandate, the Court of Appeals lacks jurisdiction and the superior court order is now law of the case. The superior court's remand to DRS to correct the error found by the Court, and issue a new decision, is the action required by the Administrative Procedures Act (APA).

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[2] Motion to Recall Mandate and Require Compliance. This document is in the Court's file in No. 40861-II and not in the Clerk's Papers.

II. STATEMENT OF ISSUES

A. When Plaintiffs' appeal raises the same issues as their motion to recall the mandate, and Plaintiffs admit that their appeal is brought to enforce the mandate, does this Court have jurisdiction after the Court refused to recall the mandate?

B. Given this Court's denial of the motion to recall the mandate, is the superior court's order confirming the remand the "law of the case," preventing Plaintiffs' appeal contending that the superior court's remand order failed to comply with the Court's decision?

C. If Issues A and B do not determine this appeal, does the Administrative Procedures Act require this Court and the superior court to remand to DRS the discretionary decision regarding the interest policy for public pension system contributions?

III. STATEMENT OF THE CASE

A. Statement Of Facts

1. DRS Administers Public Pension Systems But Does Not Own, Use, Or Manage Pension Funds

DRS is a state agency created in 1976 to administer eight public pension systems. RCW 41.50.030. DRS collects pension contributions, determines service credit, and decides pension benefit eligibility. *See* RCW 41.50.270; 41.32.025 (teachers' system). DRS does not hold or

invest pension funds, which are in the custody of the State Treasurer and invested by the State Investment Board (SIB). RCW 41.50.077, .080. DRS administrative costs are paid from assessments on public employers and not from pension funds. RCW 41.50.110.

2. Member Contributions To Traditional Pension Plans Earn Regular Interest As Defined By Statute And DRS Policy

Employee members of public pension plan 2 must contribute a percentage of their compensation to the plan. *See, e.g.,* RCW 41.32.042. Although pension contributions are deposited into plan trust funds and invested by the SIB, for accounting purposes employee contributions are allocated to individual member accounts, and Plan 2 contributions are credited with "regular interest." *Id.* Member contributions plus regular interest are "accumulated contributions." *See, e.g.*, RCW 41.32.010(1). Members of Plan 2 may withdraw their accumulated contributions when they leave employment in lieu of receiving a monthly retirement allowance.[3] *See, e.g.*, RCW 41.32.820.

Prior to 1977, statutes largely governed crediting regular interest on contributions, with some latitude given to former individual pension system

[3] Employers also contribute to the pension plan, but their contributions are not included in accumulated contributions.

retirement boards[4] to set rates, within a range. *See* Laws of 1947, ch. 274, § 1; Laws of 1967, ch. 127, § 2. In 1977, the Legislature repealed previous laws governing regular interest on contributions and delegated determination of regular interest to the DRS Director. *See* RCW 41.32.010(38) (definition of regular interest). The Director issued a policy memorandum establishing the annual rate for regular interest at 5.5%, to be credited and compounded quarterly at the rate of 1.375% based on the balance from the prior quarter. Certified Administrative Record (CAR) at 877-78.

3. Plan 2 Accumulated Contributions Can Be Transferred To New Plan 3's

Beginning in the mid-1990's, the Legislature created new hybrid pension plans (Plan 3) in three public pension systems. *See, e.g.*, RCW 41.32.831-.950 (Teachers' Plan 3). In these systems, existing members of a traditional Plan 2 defined benefit[5] plan could transfer to a Plan 3, combining a smaller defined benefit with a member-directed retirement investment account that would earn market returns rather than interest. *Id.*

The new Plan 3 member accounts consisted of a member's accumulated contributions under Plan 2, plus all new mandatory and optional employee contributions for future years. RCW 41.32.840. The

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[4] The functions of individual pension system boards were transferred to DRS in 1976. RCW 41.50.030.

[5] A defined benefit plan pays a benefit set by a formula based on service time and salary.

accumulated contributions transferred to Plan 3 included the prior regular interest earned under the Director's 1977 policy.[6] CAR at 856-59. Upon retirement, disability, or termination, a Plan 3 member's account, including investment earnings, is distributed. RCW 41.34.070.

B. Correction Of Plaintiffs' Facts

Plaintiffs state facts, or fact characterizations, that are inaccurate. Some are contrary to statutes or to facts in the record, and some are representations that are not supported by the record.

1. DRS Does Not Profit From Interest On Pension Funds

Plaintiffs repeatedly state that DRS "[k]ept some of the interest that was earned on teachers' contributions" or "did not pay the teachers all of the interest earned." Opening Brief of Fowler Appellants (App. Br.) at 2, 3, 8, 9, 10, 24, 31, 33, 36, 42, 46, 47. The implication is that DRS improperly retained for its benefit interest that was owed to Plaintiffs. Plaintiffs' characterization of interest on contributions is inaccurate in two respects.

First, Plaintiffs' characterization depends on acceptance of their claim that the law requires DRS to pay daily interest. This Court rejected that claim when it held that the Legislature, as early as 1937 pension

[6] The laws creating the new accounts also provided that an additional sum of money would be added to the accumulated contributions for the initial transferees, as an incentive to change plans. See RCW 41.32.8401.

legislation, used the term "regular interest" in a manner inconsistent with daily interest, indicating abrogation of any daily interest rule. *Probst v. State Dep't. of Ret. Sys.*, 167 Wn. App. 180, 190-91, 271 P.3d 966 (2012). The Legislature reaffirmed the abrogation in 2007 legislation that "clarifi[ed] the legislature's intent regarding DRS authority" to set the interest rate and methods for crediting interest. *Probst*, 167 Wn. App. at 187-88.

The second inaccuracy is that DRS does not possess or manage, and is not funded by, the pension funds for the pension systems that it administers. *See supra*. pp. 3-4 (description of DRS functions and authority). Pension funds are in the custody of the State Treasurer and managed by the State Investment Board; DRS is funded by administrative assessments on employers. *Id.* Funds 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. Money that is not allocated to individual accounts as interest does not become owned by, or inure to the benefit of, DRS.

2. The Interest Policy On Pension Contributions Was Not Secret Or Undisclosed

Throughout their brief, Plaintiffs state that the interest policy for contributions was "secret" or "undisclosed." App. Br. at 7, 44, 45; 5, 27, 29,

45. The implication is that DRS hid wrongdoing or improper practice from pension system members.

Plaintiffs' citations to the record do not support their assertions of secrecy or lack of disclosure. The citations indicate only that the Fowlers claimed to be unaware of the interest policy and that the superior court, for purposes of the discovery rule, concluded that Plaintiffs were not subjectively aware of the details of the interest policy applied to pension contributions. *See* Clerk's Papers (CP) at 801, 1077-79. Plaintiffs provide no evidence that the Director's interest policy memorandum, and related documents, were not public records subject to disclosure, no evidence that DRS ever sought to hide the interest policy, and no evidence that anyone who inquired about the details of interest policy was misinformed.

In regard to disclosure, Plaintiffs point to no pension statutes that require DRS and pension plans to make "disclosure" to public employees who are in government pension systems. Disclosure is a concept that applies in areas of consumer choice involving loans, accounts, or investments. *See, e.g.,* RCW 19.146.030 (disclosures required for mortgage loan applications). Public pensions are government programs with benefits and procedures set by statute and rules or policies adopted to implement statutes. RCW 41.50.050(5). There is member choice only in areas allowed by law, such as retirement options. *See* RCW 41.32.530. There is no member

choice on the interest policy set under the legislative delegation to DRS and no "disclosure" requirement in the pension laws.

3. DRS Software Calculated Interest In Accordance With The Interest Policy

Plaintiffs state several times that DRS used computer software that had a "design flaw" or was inaccurate. App. Br. at 6, 9, 27, 28, 29. The implication of this representation is that there was some operational deficiency in DRS interest calculations in addition to Plaintiffs' disagreement with DRS over interest policy for contributions.

The citations Plaintiffs offer to support their claim of software errors do not show design flaws in the software, but only software that computes interest according to the Director's interest policy. *See* CAR at 253-59, 261, 320, 643. The claim of software problems is no different from the underlying claim that DRS is legally required to use daily interest rather than the Director's 1977 interest policy.

Plaintiffs also cite this Court's opinion in support of the assertion about flaws in DRS software. *See* App. Br. at 6, 28. However, the pages cited from the *Probst* opinion merely contain this Court's summary of Plaintiffs' claims (*Probst*, 167 Wn. App. at 183) and the Court's description of the manner in which DRS applied the interest policy in making its calculations (*Probst*, 167 Wn. App. at 193). This Court never

held that DRS software had a flaw. The fact that the software did not calculate interest using Plaintiffs' method does not render it defective.

C. Statement of Procedure

1. *Probst* Administrative Appeal

In 2004, Jeffrey Probst, a member of the Public Employees' Retirement System (PERS), filed an administrative appeal claiming he had a legal right to obtain additional (daily) interest on contributions transferred to his new PERS Plan 3 account in 2002. CAR at 1126-29. The hearing officer rejected his argument that retirement statutes required more interest than that calculated under the 1977 DRS policy. CAR at 058-063; 016-033 (administrative decision).

2. Conversion Of *Probst* Judicial Review To *Fowler* Judicial Review

Mr. Probst petitioned for judicial review of the administrative decision on behalf of himself and a class of PERS employees. CP 687-92. Although PERS claims were settled and dismissed, the superior court allowed amendment of the petition to substitute the Fowlers and a class of TRS members who transferred to TRS Plan 3 prior to January 20, 2002. CP 118-121; 290-294. The parties stipulated that the *Probst* administrative order and record would be the basis for the *Fowler* judicial review to the

extent relevant. *See Probst*, 167 Wn. App. at 184. The *Fowler* class was the subject of this Court's *Probst* decision. *Id.*

3. *Fowler* Judicial Review By Superior Court And Court Of Appeals

In 2010, the superior court reviewed the DRS Final Order and affirmed it. CP 670-86. The court concluded that DRS interest policy did not violate pension statutes and that DRS had not been arbitrary and capricious by following its historic policy. *Id.* On appeal, this Court held that the Legislature delegated interest policy to DRS, abrogating the common law daily interest rule advocated by the Fowlers. *Probst*, 167 Wn. App. at 186-91. However, this Court also concluded that the application of the 1977 "quarterly interest" policy to *Fowler* class members' contributions was arbitrary and capricious because DRS had not given "due consideration" to using a different interest policy. *Id.* at 191-94. The Court reversed the administrative decision based solely on the due consideration issue. *Id.* The Court then remanded the decision "for further proceedings." *Id.* at 194.

4. Superior Court Order Confirming Remand Of Administrative Decision

Plaintiffs and DRS disagreed over the meaning of the remand for further proceedings. Plaintiffs believed that the remand was for the purpose of entering an order requiring an award of daily interest on

contributions. CP 165-75. DRS believed this Court held that daily interest was *not* legally required but that DRS improperly adopted its interest policy, requiring, pursuant to the APA, remand to the agency to correct the deficient policy adoption. CP 136-50. The parties agreed to resolve their dispute at a hearing in Thurston County Superior Court. *Id.*

The superior court ruled that this Court did not require daily interest, but that *Probst* held DRS improperly exercised its delegated discretion to set interest policy. Report of Proceedings (RP) (June 20, 2013) at 9, 18-19. The superior court further ruled that it had no authority to exercise the discretion legislatively delegated to DRS, and that the APA required the court to remand the case to DRS to correct the deficiency in formulation of the interest policy. RP (June 20, 2013) at 15-16, 23. After entry of the remand order, DRS issued a preproposal statement of inquiry soliciting public comments on the subject of proposed rulemaking to determine the interest policy to replace the policy found invalid in the *Probst* decision. WSR 13-15-128.[7]

5. Plaintiffs' Motion To Recall Mandate

After the superior court confirmed remand of the administrative decision to DRS, Plaintiffs filed a motion to recall mandate. *Fowler* Appellants' Motion To Recall Mandate And Require Compliance (Motion

[7] For ease of reference, the rulemaking notice is attached to this brief as Appendix A.

to Recall), COA 40861-9-III. The ground for recall was that the superior court did not comply with this Court's decision in *Probst*. *Id.* at 1. The Court denied the motion.

IV. ARGUMENT IN SUPPORT OF JUDGMENT

A. Plaintiffs Cannot Challenge The Superior Court's Implementation Of The Mandate A Second Time

The Court has already decided whether the superior court's remand order complied with the *Probst* mandate. In their Motion to Recall Mandate and Require Compliance, Plaintiffs sought the following relief:

> Under RAP 12.9(a) the appellate court may recall its mandate to determine if the trial court has complied with an earlier decision of the appellate court in the same case. Here, the Court should recall the mandate because the trial court did not comply with its *Probst* decision; the trial court instead issued an order remanding the action to DRS for "rulemaking" to start the entire case over again.

Motion to Recall at 1. In this appeal, Plaintiffs state, "[T]he teachers' second appeal is brought to enforce this Court's mandate in *Probst*. App. Br. at 2. The relief sought in this appeal is identical to the relief that was sought in the motion to recall. Neither the Rules of Appellate Procedure nor prior appellate decisions allow an appeal challenging a judgment entered to implement an appellate court's mandate, after the appellate court has already declined to recall the mandate.

Review of lower court compliance with a mandate is governed by RAP 12.9. The portion of the rule governing lower court compliance with an appellate decision states:

> (a) **To Require Compliance With Decision.** The appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case. The question of compliance by the trial court may be raised by motion to recall the mandate, or by initiating a separate review of the lower court decision entered after issuance of the mandate.

RAP 12.9(a) (emphasis added). The rule provides two alternative ways for a party to ask an appellate court to determine if a lower court complied with the appellate court's decision. A party can move to recall the mandate *or* challenge lower court compliance in a second appeal. The use of the disjunctive word "or" between the two possible choices means, absent language indicating otherwise, that a party must choose one or the other option. *State v. Bolar*, 129 Wn.2d 361, 917 P.2d 125 (1996). The word "or" does not mean "and." *Id.* Thus, Plaintiffs' choice to move to recall the mandate eliminates the alternative of appealing the issue of lower court compliance with the mandate.

Plaintiffs' appeal is also prohibited by long-standing case law. In a utility rate setting case, cities petitioned for recall of a Supreme Court remittitur (mandate) on the ground that the trial court judgment governing

costs allowed in utility rates did not comply with the appellate decision. *City of Seattle v. Dep't. of Pub. Utils. Of WA*, 33 Wn.2d 896, 207 P.2d 712 (1949). The Supreme Court denied the recall. In the same long-running rate case, the cities then appealed a later trial court rate decision by again contending that the earlier trial court judgment did not comply with the Supreme Court decision. The Court held its denial of the motion to recall its remittitur meant that the earlier trial court judgment was the law of the case and could not be challenged a second time.

> When this court denied the petition for recall of remittitur and correction of the judgment, it in effect approved the judgment entered by the superior court.
>
> Regardless of any other consideration, it is our opinion that the judgment of the superior court, entered upon the remittitur in obedience to the order of this court, became the law of this case.

City of Seattle v. Dep't. of Pub. Utils., 33 Wn.2d at 903. Plaintiffs in this case cannot appeal Judge Wickham's remand order because this Court's denial of their motion to recall the mandate made Judge Wickham's remand order the law of the case.

The Supreme Court reached a similar conclusion in *Reeploeg v. Jensen*, 81 Wn.2d 541, 503 P.2d 99 (1972). In *Reeploeg*, the Court of Appeals denied recall of a remittitur. The denial became final after Supreme Court review. The Court of Appeals then granted a second

motion to recall the same remittitur, allowing a successful appeal. The Supreme Court reversed the decision because the Court of Appeals lost jurisdiction once its denial of the first motion to recall became final. *Reeploeg,* 81 Wn.2d at 549. At that point, the Court of Appeals had approved the order of dismissal entered by the trial court as complying with the Court's remittitur. *Id.* The Court of Appeals could not later disregard the superior court order that it had approved as complying with its decision.

Under *Reeploeg*, this Court does not have jurisdiction to consider Plaintiffs' appeal of Judge Wickham's order. The Court of Appeals lost jurisdiction over the case following the Court's denial of Plaintiffs' Motion to Recall Mandate.

B. The Trial Court Correctly Implemented The Mandate By Remanding The Administrative Decision To The Administrative Agency

The following argument is necessary only if the Court concludes that its denial of the motion to recall the mandate did not eliminate its jurisdiction over this appeal challenging the superior court's compliance with the mandate.

1. The APA Governs Remand Of Administrative Decisions For Further Proceedings

The APA provides the exclusive means for judicial review of administrative decisions by agencies. RCW 34.05.510; *Judd v. Am. Tel. and Tel. Co.*, 116 Wn. App. 761, 66 P.3d 1102 (2003). Courts reviewing administrative decisions act as appellate courts to review agency orders from adjudicative proceedings, agency rules, and "other agency action." RCW 34.05.570.

Each level of the court system reviews an administrative decision directly and does not review the decision of a previous reviewing court. *Mader v. Health Care Authority*, 149 Wn.2d 458, 70 P.3d 931 (2003). Therefore, when the Court of Appeals or Supreme Court remands an administrative decision for further proceedings, the remand ultimately is to the agency because there is no function for the lower reviewing court to perform. *See Manke Lumber Co. Inc. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998) (Court of Appeals remand of administrative decision to agency for further proceedings to apply law as determined by Court of Appeals).

Under both the old (1959) and new (1988) APA, courts remand administrative decisions to agencies for further proceedings when courts find deficiencies in the evidence, rule, or policies considered by agencies,

or conclude that the agency used the wrong law. *See Stempel v. Dep't. of Water Res.*, 82 Wn.2d 109, 508 P.2d 166 (1973); *Boeing Co. v. Gelman*, 102 Wn. App. 862, 10 P.3d 475 (2000). The new APA explicitly requires remand when the agency action under review is a matter within agency discretion and the result of the review is that a new decision is necessary. RCW 34.05.574(1) provides:

> (1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

RCW 34.05.574(1) (emphasis added). This statute requires that matters involving the invalidity of rules and policies be returned to agencies for a reformulation of the offending rule or policy and a new decision.

The operation of RCW 34.05.574(1) is illustrated by *Hillis v. Dep't. of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997). *Hillis* involved the procedures used by the Department of Ecology (Ecology) to process

applications for water rights. The Legislature delegated to Ecology the authority to develop these procedures. Ecology decided the completion of a watershed assessment was a prerequisite to processing water rights applications. On judicial review, the Court held Ecology failed to adopt a rule, which was necessary before it could make a watershed assessment a prerequisite for applications.[8] *Id.* at 400. In granting relief, the Supreme Court stated:

> RCW 34.05.574 provides that in reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law and shall not itself undertake to exercise the discretion that the Legislature has placed in the agency.
>
> . . .
>
> The remedy when an agency has made a decision which should have been made after engaging in rule-making procedures is invalidation of the action. *Failor's Pharmacy*, 125 Wn.2d at 497, 886 P.2d 147; RCW 34.05.570(2)(c). The remedy is not for the courts to make the decision or set the priorities for the agency. What priorities and procedures Ecology uses is within its discretion, after rule making has occurred.

Hillis, 131 Wn.2d at 395, 399-400 (emphasis added). The court remanded the appeal to Ecology to adopt rules, and then apply those rules to the water permit applications.

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[8] Generally, if an agency policy meets the APA definition of "rule," it must be adopted by formal rulemaking to be valid. *Hillis* at 398-399.

Remands to agencies for further proceedings are not a determination that the original decisions were wrong. *Gunstone v. Washington State Highway Comm'n*, 72 Wn.2d 673, 434 P.2d 734 (1967); *Skold v. Johnson*, 29 Wn. App. 541, 630 P.2d 456 (1981). Remands may be for several purposes, e.g., requiring the agency to consider additional matters, provide additional evidence to support a decision, or apply different legal standards. *Id.*; *Manke*, 91 Wn. App. at 793. After further proceedings on remand, the new or revised administrative decision can be appealed again for judicial review. *See Pierce Cnty. Sheriff* v. *Civil Serv. Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 658 P.2d 648 (1983).

2. The Remand To DRS Is The Appropriate Remedy Under The APA To Correct The Deficiency In Agency Policy Identified By The Court

The superior court's remand of the administrative decision to DRS correctly applies the law governing judicial review. The APA provides for a remand to the agency under the circumstances of this case.

In APA judicial reviews, two kinds of relief are "set[ting] aside agency action" and "remand[ing] the matter for further proceedings." RCW 34.05.574. In some reviews of agency decisions, a reversal resolves the case. For instance, a reversal of a denial of unemployment benefits, when the hearing record contains no substantial evidence supporting denial,

requires payment of the benefit. *See Becker v. Emp't Sec. Dep't.*, 63 Wn. App. 673, 821 P.2d 81 (1991). No further agency action is needed, other than payment of the benefit.

In other judicial reviews, usually involving errors by the agency in procedure, law, or evidence, the judicial review reverses the existing decision, but the benefit or obligation must be determined by a new decision. The APA provides that the court remands these kinds of administrative decisions to the agency to exercise its discretion. The agency renders a new decision after correcting the procedural, legal, or evidentiary error identified by the reviewing court. RCW 34.05.574(1); *Manke*, 91 Wn. App. at 793.

The *Fowler* review is a reversal and remand situation. This Court reversed based on a procedural deficiency related to the policy applied in the agency decision, i.e., the failure to consider other policies. The APA required the reviewing court to remand to the agency for a new decision. RCW 34.05.574(1). Moreover, the policy to be applied in the new decision is, itself, within agency discretion because the Legislature delegated to DRS the responsibility for determining interest policy for contributions. *Probst*, 167 Wn. App. at 191. Thus, the APA requires a remand to the agency not only to render a new decision, but to reconsider, under this Court's "due consideration" standard, the interest policy that should be

applied to member contributions in state pension funds.

This case is similar to *Hillis v. Dep't. of Ecology*, 131 Wn.2d 373, in which the Supreme Court held that a policy was invalid because it was not adopted by formal rule. The Supreme Court had no authority to adopt a replacement policy. The Court remanded the administrative decision to the agency for rulemaking to develop a valid policy, which could then be applied to the water rights applications. *Id.* at 400-401.

The *Fowler* judicial review is also similar to *Hillis* in that the issues remanded for reconsideration are broader than the specific pension decision reviewed by the court. Although that decision related only to interest credited to teachers' contributions transferred to new accounts from 1997 to 2002, the Court's decision questioned the procedural basis for an interest policy applied to contributions in all state retirement systems after 1977. Any changes in the interest policy applying to contributions will raise issues of pension system funding, vested rights, retrospective or prospective application, operational feasibility, and similar matters, in state pension systems. *See* WSR 13-15-128 (Appendix A). The courts do not have information needed to make pension policy. This is the underlying reason why the APA directs agencies to do fact-finding and policy making in the first instance, with the courts acting in a review capacity.

In remanding this administrative decision to DRS, the superior court understood its role as a reviewing court under the APA. Judge Wickham stated:

> THE COURT: Well, Counsel, I'm going to be perfectly frank with you. We get a lot of judicial reviews in this court under the Administrative Procedures Act, and I understand the role of Superior Court in this case is to be pretty limited, and it's not up to this court to determine what an agency should or shouldn't do and start exercising their discretion for them. My role, as I understand it, is to act as kind of an oversight to make sure that they are exercising their discretion within the bounds of the law. And when I read a decision like this that says that they were arbitrary and capricious, I mean, I've written decisions like that myself, but I don't make the decision for them. I send it back to them for them to make the decision in a way that is not arbitrary and capricious.

Appendix at 102 (emphasis added). The superior court's reasoning implements RCW 34.05.574(1), is consistent with the Supreme Court's resolution of the same issue in *Hillis*, and reflects the nature of the issues to be decided as a result of this Court's ruling on the DRS interest policy.

V. ARGUMENT IN RESPONSE TO APPELLANTS

A. The Remand Of The Administrative Decision To DRS Complies With The Mandate

Plaintiffs argue that the trial court's remand of the administrative decision fails to implement this Courts' decision in *Probst*. The Court already denied Plaintiffs' motion to recall the mandate. Under court rules and case law, the denial of the motion to recall the mandate makes the trial

court order the law of the case, and deprives the Court of jurisdiction over this appeal. *See supra.* pp. 13-16. The appeal should be dismissed on this ground.

Since the propriety of Plaintiffs' appeal will not be resolved until the Court's decision, DRS must respond to Plaintiffs' appeal. However, in so doing, DRS does not waive its argument that Plaintiffs' are bound by their decision to make their unsuccessful motion to recall the mandate.

1. *Probst* Did Not Require The Superior Court To Award Daily Interest Because *Probst* Did Not Decide That DRS Must Pay Daily Interest On Pension Contributions

The primary thrust of Plaintiffs' argument that the superior court disobeyed the *Probst* mandate, is that *Probst* "required the trial court to determine the interest due the teachers." App. Br. at 46. Plaintiffs contend that this Court held that DRS must pay daily interest on Plaintiffs' Plan 2 contributions:

> The only thing left for the trial court to do upon remand is to implement this Court's decision by requiring DRS to recalculate all the daily interest earned on the teachers' accounts. . . .

App. Br. at 24. Plaintiffs misconstrue the *Probst* decision.

Plaintiffs support their daily interest argument by using short phrases from the Court's opinion out of context. In essence, they argue: (i) the superior court held that DRS was not required to provide daily

interest; (ii) in the *Probst* opinion this Court stated that it "reversed" the trial court; and (iii) given that this Court "reversed," the opposite is true, i.e., DRS *is* required to pay daily interest. *Id.* Plaintiffs do not correctly apply the APA rules governing judicial review.

Under the APA, each court reviews administrative decisions directly and does not review decisions of the prior reviewing court. *Mader*, 149 Wn.2d at 458; *Manke*, 91 Wn. App. at 793. While it is true that this Court "reversed the decision of the superior court" in the sense that it came to a different decision than the superior court, this Court actually rendered the superior court decision moot by replacing it with this Court's own judicial review decision. *Id.* Thus, what matters is not the "reversal" of the superior court decision, but the reasoning of this Court as the final reviewing court.

In *Probst*, this Court explicitly rejected *a DRS* legal obligation to pay common law daily interest on pension contributions. The Court stated that "giving the DRS authority to determine how interest is earned is inconsistent with the common law rule that interest is earned daily, abrogating the common law rule." *Id.* at 190. The Court's ultimate holding was:

> Because there is clear evidence that the legislature intended to abrogate the common law, the Fowlers' arguments fail. We hold that the TRS statutes do not require the DRS to

> play [sic] daily interest on balances transferred from Plan 2 to Plan 3.

Id. at 191 (emphasis added). The Court stated that, not only was the daily interest rule abrogated, the Legislature expressly delegated to DRS the authority to determine the rate, method, and amount of interest. *Id.* at 187-189. Absent a change in statute, interest policy is determined by DRS, subject to judicial review under the APA.

Plaintiffs attempt to avoid the Court's rejection of a legal requirement for daily interest by arguing that the Court held that DRS acted arbitrarily and capriciously by not paying daily interest. Plaintiffs' state:

> In *Probst*, this Court held that it was arbitrary and capricious for DRS to fail to pay and transfer the daily interest earned on the teachers' contributions in their individual TRS Plan 2 accounts when they withdrew those funds and placed the funds in new TRS 3 individual retirement accounts. 167 Wn. App. at 183, 191-94. This Court specifically reversed the trial court and DRS on this point. *Id.* at 183 and n.1, 191, 194.

App. Br. at 12-13 (emphasis added). Plaintiffs support their arbitrary and capricious argument with citations to and quotes from *Probst.* These references to *Probst* do not establish that the Court held that failure to pay daily interest was itself arbitrary and capricious. Plaintiffs quote *Probst* as follows:

> And this Court also said, *Id.* at 919, "[w]e agree" with the teachers' argument "that if the DRS had discretion to determine how interest is reached, the way the DRS calculates interest is arbitrary and capricious[.]"

App. Br. at 18 (emphasis added). Plaintiffs' argument, based on this quote and similar quotes, fails to support their daily interest argument for two reasons.

First, the quotes do not state that DRS erred by failing to pay daily interest, but only that the quarterly interest method used was arbitrary and capricious. The Court's language here, and elsewhere in the opinion, does not order payment of daily interest to teachers.

Second, Plaintiffs delete language from the quotes to hide the basis for the Court's holding. The accurate quote from *Probst* at 191, is:

> [10] ¶ 24 The Fowlers next argue that, if the DRS had discretion to determine how interest is earned, the way the DRS calculates interest is arbitrary and capricious because it renders its decision to use the quarterly interest calculation method without due consideration. We agree.

Probst at 191 (emphasis added). This is consistent with the Court's summary of its holding:

> We reverse, holding that although the DRS had authority to decide how to calculate interest, the DRS's interest calculation method was arbitrary and capricious because the agency did not render a decision after due consideration.

Probst at 183 (emphasis added). By editing the words "without due

consideration" out of the quotes, Plaintiffs obscure that the Court did not find the DRS interest policy to be inherently wrong, but only that DRS erred by adopting it without considering alternative policies. This is a policy adoption problem that can be fixed by the agency on remand. *See Hillis v. Dep't. of Ecology,* 131 Wn.2d at 373. As Judge Wickham observed at the remand hearing, the role of a reviewing court is not to make discretionary decisions for agencies, but to determine if their decisions are within the bounds of the law, remanding those that are not proper to the agency for correction of the deficiency found by the reviewing court. RP (June 20, 2013) at 15.

As part of the mandate argument, Plaintiffs assert that DRS argued to the superior court that this Court left the arbitrary and capricious issue "unresolved." *See* App. Br. at 13, 17-19. DRS did not and does not argue that *Probst* failed to resolve Plaintiffs' claim that the DRS interest policy was arbitrary and capricious. *Probst* resolved the arbitrary and capricious issue by finding the DRS policy invalid. However, Plaintiffs refuse to accept that invalidation of the existing policy did not automatically create a new policy.

The invalidation of an existing administrative policy does not allow a court to create a new administrative policy. The Supreme Court has long accepted that "legislative" delegations to administrative agencies

do not allow courts to make policies in areas committed to administrative judgment. The court has stated:

> The court should not invalidate a legislative rule merely because it believes the rule is unwise:
>
> > [T]he court is not free to substitute its judgment as to the desirability or wisdom of the rule, for the legislative body, by its delegation to the agency, has committed those questions to administrative judgment and not to judicial judgment.1 K. Davis, Administrative Law Treatise § 5.50, at 315 (1958).

Weyerhaeuser v. Dep't. of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976). The creation of pension system policies is not a judicial function under the APA.

Plaintiffs also assert that the superior court remand order allows new evidence, contrary to a stipulation that the *Fowler* judicial review would be decided on the *Probst* administrative record. App. Br. at 19-21. This Court decided the *Fowler* review based on the *Probst* record, as agreed. *Probst*, 167 Wn. App. at 184. Any "new evidence" about alternative interest policies considered on remand is information considered as a result of the Court's decision to remand for further proceedings. It is not new evidence offered by DRS for judicial review of the *Probst* administrative decision.

Plaintiffs make a related claim that the denial of the DRS motion

for reconsideration in *Probst* prevents DRS from considering "new evidence" about interest policies during rulemaking following remand. App. Br. at 20-21. Plaintiffs' conclusion does not logically follow from the denial of reconsideration.

In its reconsideration motion, DRS argued that it had no opportunity to present argument on the "due consideration" issue because Plaintiffs had not raised that issue in their appeal. Plaintiffs now contend that, since the Court did not grant reconsideration, DRS cannot present "new evidence" in proceedings after remand. Plaintiffs' argument fails because the Court denied reconsideration without exploration, so the reason that the Court declined reconsideration is unknown. Even assuming that 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. The new proceedings are not a re-argument of the judicial review, but implement the Court's holding by following the process that the Court found lacking in the prior policy.

2. Remand To DRS For Rulemaking Is Required By The Procedural Posture Of The Case And The APA

Plaintiffs argue that the Department lacks authority on remand either to develop a new interest policy or to apply it to the Plaintiff class

because: (i) the proceeding is a civil action for monetary compensation, rather than a judicial review; and (ii) even if remand is appropriate, DRS previously stated that it cannot provide class-wide relief. App. Br. at 22-24. If a new policy can be developed on remand and applied to the class, Plaintiffs argue that the policy should not be developed through rulemaking. Plaintiffs misinterpret and misapply the APA.

First, Plaintiffs assert that "APA judicial review procedures do not apply to a civil action to obtain monetary compensation in a class action." App. Br. at 22 (emphasis in original). The superior court and the Court of Appeals contradicted the characterization of this case as a civil action for monetary compensation. Judge Casey described this case as a "class action [that] has come before me in the nature of a judicial review under the Administrative Procedure Act." CP 686. *Probst* stated this case is a judicial review of an administrative order:

> We review a final DRS order under the Administrative Procedure Act (APA). Under the APA, a party challenging agency action bears the burden of demonstrating that the action was invalid. RCW 34.05.570(1)(a).

Probst, 167 Wn. App. at 185 (case citations omitted). This administrative appeal is a class action only in the sense that RCW 34.05.510(2) allows judicial review of an agency decision for one person to apply to a class of persons who have a similar interest in the administrative decision under

review. The judicial review in this case decided whether daily interest applied to accumulated contributions of all teachers' retirement system members who transferred to Plan 3 between early 1997 and January 2002.

Second, Plaintiffs say that DRS has no authority on remand to decide the interest policy for the *Fowler* class because the DRS presiding officer in the *Probst* hearing said that she had no authority to entertain a class action. *See* App. Br. at 23. The presiding officer could not entertain a class action because the class action provision in the APA is part of judicial review procedures, not part of statutes governing agency hearings. *See* RCW 34.05.510(2). Only the superior court could certify a class of teachers who would be bound by the result reached on the judicial review of the administrative decision. The superior court has now certified a class, so the result of the *Fowler* judicial review, and the ultimate administrative decision, will apply to the class.

Finally, Plaintiffs assert that a remand to develop an interest policy through rulemaking is improper because rulemaking was not an issue in the judicial review of the *Probst* administrative decision. App. Br. at 18, 21-22. Plaintiffs misunderstand the reason that the *Probst* decision makes rulemaking the best way to implement the Court's decision on remand.

DRS adopted the 1977 quarterly interest methodology as a policy, rather than a rule. During the judicial review proceedings, Plaintiffs never

argued that the interest policy was invalid because it was not adopted as a rule. Arguably, any new interest methodology developed on remand could continue as a policy. However, RCW 34.05.230, enacted as part of the 1988 APA and well after the 1977 policy, now advises agencies to adopt policies as rules and it is in DRS and the public interest to do so. RCW 34.05.230 provides:

> Interpretive and policy statements. (1) An agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules.

RCW 34.05.230 (emphasis added). When policies are adopted as rules, there is an opportunity for public comment. A formal record of issues considered and reasons for adoption (which the Court found lacking for the 1977 DRS interest policy) is created. *See* RCW 34.05.320, .325, .370, .380. A record facilitates judicial review.

The statute encouraging agencies to adopt policies as rules was not law when DRS adopted the 1977 interest policy under the "old" 1959 APA. The 1959 APA had no provision for a rulemaking file or a record of reasons for rule or policy adoption. *See* Laws of 1959, ch. 234; former ch. 34.04 RCW (1988). Records of rule and policy adoption were unnecessary because the 1959 APA did not provide for review of rules and policies

under the arbitrary and capricious standard in current RCW 34.05.570. Under the 1959 APA, a court reviewed a rule or policy implementing a statutory delegation only under a legal standard of "reasonably consistent with the statutes that it purports to implement." *Weyerhaeuser*, 86 Wn.2d at 314. Such review did not require a record of "due consideration" of various policy alternatives. *Id.*

Older rules and policies are typically reviewed under standards of the 1959 APA, so evidence of the reasons for the administrative policy decision is not required to sustain policies.[9] RCW 34.05.092; *Washington Independent Tele. Ass'n. v. WA Utils. and Transp. Comm'n,* 148 Wn.2d 887, 64 P.3d 606 (2003). In this case, the Court used to use a review standard from the 1988 APA to review and invalidate a policy adopted under the 1959 APA. This level of scrutiny creates a need for DRS to adopt its replacement interest policy using the rulemaking process of the new APA, to create the record of alternative policy consideration found lacking for the 1977 policy.

B. Plaintiffs Have No "Takings" Or Vested Rights Entitlement To More Pension Interest

Separate from their mandate arguments, Plaintiffs argue that they

[9] Administrative policies adopted pursuant to a direct legislative delegation of authority are treated as rules for purposes of judicial review, even in situations in which the APA does not require that administrative policies be adopted through formal rulemaking. *See Mills v. W. WA. Univ.*, 170 Wn.2d 903, 246 P.3d 1254 (2011).

are entitled to obtain daily interest based on taking of property and vested rights theories. In regard to their takings argument, Plaintiffs explicitly ask the Court to consider their argument even if the Court does not recall the mandate. They do not make the same request for their vested rights argument, but it must be assumed because the vested rights argument would be unnecessary if the Court recalled the mandate on the ground of Plaintiffs' request (that they are entitled to daily interest under the *Probst* decision).

Plaintiffs' constitutional arguments are on the merits of issues that were not decided, or not raised, in *Probst*. They cannot be within the scope of this appeal "brought to enforce this Court's mandate in *Probst*"[10] and governed by RAP 12.9.

By responding to Plaintiffs' constitutional arguments, DRS does not waive its argument that these issues cannot be raised in this appeal. The Court already rendered its opinion deciding the judicial review. After the Court issued a mandate, the Court cannot revisit its decision, but can only consider whether the trial court judgment complies with the Court's decision. *Frye v. King Cnty.*, 157 Wash. 291, 289 P. 18 (1930). If the trial court judgment complies with this Court's decision, the judgment is law of the case and not subject to reconsideration. *Tucker v. Brown*, 20 Wn.2d

[10] App. Br. at 1.

740, 150 P.2d 604 (1944); *Kosten v. Fleming*, 17 Wn.2d 500, 136 P.2d 449 (1943). Thus, the only issue in this appeal is whether the trial court remand complies with the Court's decision, and that issue should be foreclosed by the Court's prior denial of the Plaintiffs' motion to recall the mandate. *See supra* pp. 13-16.

1. The DRS Interest Policy Does Not Cause A Taking Of Interest Earned On Pension Contributions

Plaintiffs argue that "DRS's failure to pay the daily interest earned on the teachers' funds is an unconstitutional taking." App. Br. at 30. The decision in *Probst* eliminated the reason for this argument.

When the Court reversed the administrative decision denying additional interest to Plaintiffs, there was no longer an agency decision subject to constitutional challenge. After reversal of the administrative decision on APA grounds, there was no reason to consider a constitutional challenge to a decision based on an interest policy that could no longer be applied. The Court followed the accepted rule that it should avoid deciding constitutional issues when the case could be decided on other grounds. *Probst*, 167 Wn. App. at 183.

The Court's decision also eliminated the foundation for Plaintiffs' constitutional claim. Plaintiffs' argument that DRS took their property (the additional interest) depended on the contention that common law

required DRS to pay daily interest on pension contributions, rather than the amount of interest determined under DRS interest policy. The Court rejected Plaintiffs' contention that they had a right to daily interest, holding that the Legislature abrogated the common law by delegating to DRS the determination of interest earned on pension contributions.[11] *Probst*, 167 Wn. App. at 183, 186-91. As a result, DRS owes no additional interest to Plaintiffs unless DRS adopts a new policy that provides for additional interest on pension contributions.

Plaintiffs cite cases holding that prisoners and legal clients have a property right in interest that accrues on their funds held by government.[12] These cases do not establish that Plaintiffs have a right to earn interest on funds held by the government, but only a right to collect interest that is actually earned on such funds. *Dean v. Lehman*, 143 Wn.2d at 35-36. ("Of course, nothing in *Schneider [v. CA Dep't. of Corr.]* precluded the California Department of Corrections from placing inmate funds in noninterest bearing accounts.")

Here, there is no interest earned beyond the interest earned under

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[11] As discussed above at pp. 26-28, there is also nothing in *Probst* supporting Plaintiffs' claim that they are entitled to daily interest because this Court held that failure to pay daily interest was arbitrary and capricious.

[12] *Dean v. Lehman*, 143 Wn.2d 12, 18 P.3d 523 (2001); *Schneider v. CA Dep't. of Corr.*, 151 F.3d 1194 (9th Cir. 1998); *Phillips v. WA Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925, 141 L.Ed.2d 174 (1998).

the policy adopted pursuant to the legislative delegation of interest policy to DRS. Washington law provides that Plaintiffs receive this interest, so there is no government taking of Plaintiffs' property.

2. Plaintiffs Have No Vested Right to Receive Interest Beyond Interest Provided By Policies Adopted To Implement Pension Laws

a. Administrative Programs Are Creatures Of Statute And Any Details Not Governed By Statute Are Determined By The Agency Exercising Its Delegated Authority

Plaintiffs argue that there is a "gap" in statutory law because the Court found that the long-standing DRS interest policy lacked due consideration. App. Br. at 38. They then assert that common law fills the gap in pension system statutes created by invalidation of the policy. *Id.* Finally, they assert that the new DRS interest policy applying to their contributions must be common law daily interest, because their right to such interest vested when common law daily interest filled the gap created by the Court. *Id.* at 41-42.

The major flaw in Plaintiffs' argument is that the Court found the Legislature abrogated common law daily interest for public pension systems. *Probst*, 167 Wn. App. at 191. The Legislature first replaced common law interest with a statutory definition of interest in 1937, and later delegated the authority to set interest to the agency administering

public pension systems. *Id,* at 189-91. Since common law daily interest has been legislatively abrogated, and interest policy delegated to DRS, only a new DRS interest policy can fill any gap created by the Court's decision.[13]

The same "gap filling" by administrative policy occurs under established principles of administrative law. Public agencies that administer government programs are strictly creatures of statute. *Puget Sound Navigation v. Dep't. of Transp.*, 33 Wn.2d 448, 472, 206 P.2d 456 (1949). Their operations are governed by statutes, and statutes give them "every power proper and necessary to the exercise of the powers and duties expressly given and imposed." *Id.* at 481.

Administration of statutory programs is not in the province of common law. Insofar as statutes do not govern every aspect of an agency's operations, agencies fill in the details needed for the programs to operate; the details added by the agency must be within their delegated

[13] Plaintiffs complain that any policy adopted by DRS to implement the *Probst* decision would be "retroactive" implying that this would be improper. Any retroactivity is a consequence of the Court's invalidation of the historic 1977 interest policy and the need for DRS to adopt the replacement policy required to manage state pension systems. A replacement policy would be a problem only if there were vested rights in the original policy. However, as stated below at pp. 42-43, pension rights can vest only for benefits authorized by law. Thus, no right to the former interest policy could vest because the Court determined that the adoption of the interest policy had not met the "due consideration" legal standard. *See, generally, King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974) and *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984) (arbitrary and capricious decisions or decisions made without following legally required procedures are unlawful).

authority, and procedural safeguards, such as the APA, must exist. *Hama Hama v. Shoreline Hrg. Bd.,* 85 Wn.2d 441, 448, 536 P.2d 157 (1975); *Barry & Barry, Inc., v. State Dep't. of Motor Vehicles*, 81 Wn.2d 155, 159, 164, 500 P.2d 540 (1972). As a result of these established principles of administrative law, administrative policies within the parameters of delegated authority must fill any gaps in the statutes governing administrative programs. *Id.*

Plaintiffs rely on several cases purportedly supporting the proposition that the common law fills gaps in programs governed by statutes. App. Br. at 39-40. Plaintiffs' cases do not state that common law governs features of comprehensive administrative programs, such as public pension systems, that are entirely creatures of statute. Instead, the cases involve matters traditionally governed by common law, but also subject to regulation by statute. The question in these cases is whether the Legislature intended the statutes to completely displace common law, or whether common law survives to govern areas of activity not explicitly regulated by statutes.

The principle case cited by Plaintiffs is *In re Parentage of L.B.*, 155 Wn.2d 676, 122 P.3d 161 (2005). In that case, a plaintiff claimed certain parental rights for the child of a former same-sex partner. Parental rights in Washington are traditionally determined by common law equity

principles, but some aspects of the relationship are governed by statute. *Id.* at 689. The Supreme Court held that common law defining parental rights continues to apply in areas not expressly governed by parental rights statutes, unless the Legislature intended such statutes to be the "exclusive means of obtaining parental rights and enforcing parental responsibilities." *Id.* at 696.

Plaintiffs also cite two similar cases to support their claim that common law daily interest applies within public pension systems. In the first case, the Court simply held that the Legislature did not clearly intend a state patrol hearing process for vehicle impoundments to displace the traditional common law remedy of conversion. *Potter v. WA State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008). The Court stated "where common law predates the statutory remedy, the Court infers the statutory remedy is cumulative, not exclusive." *Id.* at 702. The second case held only that arbitrations provided under a contract remain governed by common law contract principles, unless the contract provides that arbitration is done under statutory arbitration procedures. *Dep't. of Soc. and Health Srvs. v. State Pers. Bd.*, 61 Wn. App. 778, 812 P.2d 500 (1991).

The three cases relied on by Plaintiffs did not involve administrative programs that were solely a product of legislation and never existed in common law. These cases do not establish that common law

governs details of public programs that are strictly statutory.

b. Vested Rights Can Be Created Only By Statutes Or By Agency Practice Under Delegated Authority And Not By Statements Of Public Employees Contrary To Statute Or Authorized Practice

Plaintiffs argue that they have a vested right to daily interest because DRS "promised" annual or per annum interest. App. Br. at 43. They contend that law from other jurisdictions requires calculation of annual interest on a daily basis. *Id.*

The alleged promise of annual interest is not supported by documents in the record. Even if such evidence existed, Plaintiffs do not provide authority establishing that agencies can make promises of pension benefits beyond the benefits provided by pension statutes, or provided by the policies and practices validly adopted to implement pension statutes.

Plaintiffs cite to only two DRS documents in support of their statement that DRS promised annual or per annum interest. *See* CAR at 207, CP 900. The documents contain no mention of annual interest, but state only that contributions earn "5.5 percent interest compounded quarterly." *Id.* A third citation is to an admission that DRS pays 5.5 annual interest. CAR at 232. However, the request for admission did not state that Plaintiffs meant the term "annual interest" in the request to mean "daily interest." Further, the admission does not say that DRS ever

promised Plaintiffs either daily or annual interest, or that such was ever paid. *Id.* The documents cited by Plaintiffs fail to support their contention.

Plaintiffs' argument that they had a vested right to "promised" daily interest depends on the premise that state pension systems could be bound to pay benefits that were "promised" by agencies, even if those benefits were not authorized by pension laws or duly adopted policies. This argument disregards the principle that the basis for vested rights is the legislation authorizing the pension.

> An employee who accepts a job to which a pension and relief plan or system is applicable contracts for a pension and relief plan or system substantially in accord with the then existing legislation governing the same.

Eisenbacher v. City of Tacoma, 53 Wn.2d 280, 283-84, 333 P.2d 642 (1958) (emphasis added). A pension benefit must be authorized by law in order to vest.

Agencies have the authority to interpret and supplement statutes in the course of administering them, but only as long as the agency interpretation and implementation is within its delegated power to act and is consistent with the statutes. *Tuerck v. Dep't. of Licensing,* 123 Wn.2d 120, 864 P.2d 1382 (1994). Under these circumstances, DRS can create vested pension rights by long-standing administrative practice. *Washington Ass'n of County Officials v. Washington Public Emp.*

Retirement Bd., 89 Wn.2d 729, 575 P.2d 230 (1978). In this case, DRS had no practice of paying daily interest. Such payments would be beyond the authority granted by the policy DRS adopted to implement the delegated authority to determine regular interest.

There has been no action taken by DRS that would create a vested right for Plaintiffs to receive interest on contributions, other than interest provided under DRS policy. To the extent that Plaintiffs rely on statements or promises by public employees to create pension obligations, statements and promises by public employees cannot create obligations contrary to or beyond what is provided by state law. *Murphy v. State*, 115 Wn. App. 297, 52 P.2d 533 (2003). State agencies and employees cannot create duties by making *ultra vires* promises. *McGuire v. State*, 52 Wn. App. 195, 791 P.2d 929 (1990).

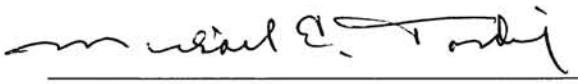
VI. CONCLUSION

Respondent Department of Retirement Systems respectfully requests the Court to dismiss this appeal for lack of jurisdiction over a matter that the Court already decided by denying Plaintiffs' Motion to Recall the Mandate. If the appeal is not decided on this ground, the DRS

respectfully requests that the Court deny again Plaintiffs' request to recall the mandate.

RESPECTFULLY SUBMITTED this 13th day of February, 2014.

FREIMUND JACKSON & TARDIF, PLLC



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CERTIFICATE OF SERVICE

I certify that I served a copy of *Answering Brief of Respondent Department of Retirement Systems* on all parties or their counsel of record on the date below as follows:

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

DATED this 13th day of February, 2014, at Olympia, WA.

Fran DePalma

FRAN DEPALMA

APPENDIX A

WASHINGTON STATE REGISTER
13-15-128

PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (June 2004)
(Implements RCW 34.05.310)
Do **NOT** use for expedited rule making

Agency: Department of Retirement Systems

Subject of possible rule making:

Calculating and crediting regular interest in the defined benefit member accounts of the public employees' retirement system, the teachers' retirement system, the school employees' retirement system, the public safety employees' retirement system, the law enforcement officers' and firefighters' retirement system, and the Washington state patrol retirement system. This action may affect both the rate and methodology for calculating and crediting interest.

Statutes authorizing the agency to adopt rules on this subject: RCW 41.50.050; RCW 41.50.033

Reasons why rules on this subject may be needed and what they might accomplish:

See Attachment A

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies:

The retirement systems administered by the Department are subject to the provisions for tax-qualified pension plans under Title 26 section 401(a) of the U.S. Code.

Process for developing new rule (check all that apply):

- ☐ Negotiated rule making
- ☐ Pilot rule making
- ☒ Agency study
- ☐ Other (describe)

How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication:

Comments and information can be provided on all or any of the issues identified above or other issues perceived by individuals or organizations submitting comments. The Department will consider the comments and information in developing and analyzing alterative interest policies and then selecting from those alternatives a policy to be incorporated into a proposed rule for consideration through the rule-making process.

Written comments and information prior to the development of the draft rules can be provided to the Rules Coordinator at jilenes@drs.wa.gov. Please provide this information by September 30, 2013. The Department will hold a public hearing once the draft rules have been developed. Please contact the Rules Coordinator to be on the distribution list for the draft rules.

DATE
July 22, 2013

NAME (TYPE OR PRINT)
Jilene Siegel

SIGNATURE

TITLE
Rules Coordinator

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: July 22, 2013
TIME: 3:59 PM

WSR 13-15-128

Attachment A

The Legislature delegated to the Department the authority to determine the interest credited to individual members' pension accounts. This policy is currently, and has been since the director adopted it in 1977, to credit interest at the rate of 5.5% per year, compounded quarterly. At the end of each quarter interest is calculated based on the balance in the member's account at the end of the prior quarter.

In Fowler v. DRS, the Court of Appeals held that the policy could not be applied to transfers from TRS Plan 2 to TRS Plan 3 because there was no evidence that the Department had considered other policies. The Court remanded to the Department the determination of the interest policy for the accounts containing funds that were transferred from TRS Plan 2 to TRS Plan 3.

Because the individual accounts that were transferred to TRS Plan 3 are the same kind of accounts that exist for all pension system members, any policy adopted must apply to all individual accounts and not just to those that were transferred to TRS 3. The issues to be considered in adopting an interest policy for individual member accounts include, but might not be limited to the following.

1) What is an appropriate interest rate and methodology?
2) Should the interest policy for current accounts and those for which the interest owing is unresolved due to the Fowler decision be the same or different from the policy for accounts established for future pension system members?
3) What is the effect of vested rights on the ability to change interest policies on existing accounts?
4) What are the fiscal consequences to the pension systems of various policies for current and future accounts?
5) What are the administrative and operational consequences to the pension systems of the various policies for current and future accounts?