No. 53054-6-II

98349-6

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

DONALD SLOMA,

Petitioner

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Donald Sloma asks this Court to accept review of the decision designated in Part B of this Petition.

B. DECISION

The Published Opinion of the Court of Appeals, Division II, filed on March 3, 2020, attached as Appendix A, hereto. The Opinion affirmed a Final Order of the Department of Retirement Systems (DRS) (Appendix B hereto). That Order denied Mr. Sloma the right to base his Public Employees' Retirement System, Plan 1[1] retirement benefit on his highest two years of Average Final Compensation (AFC).[2]

C. ISSUES PRESENTED FOR REVIEW

1. Do RCW 41.40.191, RCW 41.40.023, RCW 41.40.037(3) and RCW 41.40.010(6), when liberally construed, give Mr. Sloma the right to have his second retirement based on the salary he earned after he rejoined PERS 1?

2. When Mr. Sloma rejoined PERS 1 membership and remained employed for three and one-half years, relying on

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[1] Hereinafter PERS 1
[2] RCW 41.40.010(6)(a)

written advice provided him by DRS, is DRS estopped from denying him the retirement benefit DRS advised him he would receive?

3. Was Mr. Sloma's election to utilize RCW 41.40.191 contrary to public policy and void by virtue of Vallet v. City of Seattle, 77 Wn.2d 12, 459 P.2d 407 (1969).

4. Can Mr. Sloma waive or abandon his constitutional right to return to service after retirement and base his second retirement on the salary earned after his return to membership, without knowing he had done so?

D. STATEMENT OF THE CASE

Mr. Sloma began this action to compel the Department of Retirement Systems (DRS) to calculate his pension, using the AFC from his last PERS 1 covered job. (A2, p. 12, Finding 45).

Mr. Sloma retired from PERS 1 covered state service in 2004.[3] He was granted a Public Employees Retirement System (PERS) pension, of $3,895.68 a month. (A2, p. 5, Finding 17). Over eight years later, on May 1, 2012, Mr. Sloma accepted a job with Thurston County. (A2, p. 8, Finding 30). At that time, he

[3] Appendix 2, Final Order, p. 5, Finding 15. Future Final Order references will be referred to as A2, then page and finding or conclusion.

believed the higher salary of his County employment would enable him to rebase his PERS retirement, when he re-retired. (A2, pp. 7-8, Findings 2 & 3; A2, p. 8, Finding 31). DRS told him, in writing, that the calculation of his benefits when he re-retired, would use the higher County salary as his AFC. (A2, pp. 8-9, Finding 32). Mr. Sloma rejoined PERS membership an hour after receiving the DRS written advice. (A2, p. 9, Finding 34). Mr. Sloma stopped his social security benefits, repaid some benefits he had received and began contributing to PERS. (A2, p. 9, Finding 36).

In June or early July, 2015, DRS told Mr. Sloma, in telephone conversations, that his Thurston County salary would be used in the calculation of his new retirement benefit, which would be $6,110.00 per month. (A2, pp. 9-10, Finding 38).

In early July 2015, DRS contacted Mr. Sloma and told him that instead, his retirement benefit would only be $3,895.68 per month, a reduction of $2,214.00. (A2, p. 1, Findings 39 and 40). DRS told Mr. Sloma he had given up his right to use the higher County salary back in 2004, because, when he first retired, he had made an irrevocable election, under RCW 41.40.191, to receive a pension calculated on his AFC at 30 years of service. (A2, pp. 10-11, Finding 41). Mr. Sloma had accepted the County position

believing the higher salary of his County position would be used to rebase his benefit when he retired later. (A2, p. 8, Finding 31). Mr. Sloma's re-retirement, after three and one-half years of PERS covered work for Thurston County, was based on his 2004 AFC. (A2, p. 10, Finding 39).

Mr. Sloma appealed the DRS decision and sought benefits calculated on his Thurston County AFC. (A2, p. 12, Finding 45). DRS' Final Order granted DRS' Motion for Summary Judgment. (A2, p. 20, Conclusion). Mr. Sloma appealed to the Thurston County Superior Court, which affirmed the DRS Final Order. (Appendix C, hereto). The Court of Appeals also affirmed the DRS Final Order and Mr. Sloma is asking this Court to correct those decisions, and protect his pension rights.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case involves statutory interpretation and equity. But, at its heart, is the question of the continued validity of this Court's decision of Vallet v. City of Seattle, supra.

With the exception of Finding 10 (A2, pp. 7-8, Finding 10), which should be considered a Conclusion of Law, Mr. Sloma

agrees with the Findings of Fact, contained in the DRS Final Order.[4]

Since this Court sits in the same position as the Superior Court, in reviewing actions under the Administrative Procedure Act, no deference is given to lower court's decisions. Thurston County v. W. Wash. Growth Management Hrg's Board, 164 Wn.2d 329, 190 P.3d 38 (2008).

The basis for reversing the Court of Appeals' decision and the DRS Order is contained in the Administrative Procedure Act at RCW 34.05.570(3) (Appendix D hereto):

(a) The order or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied. RCW 34.05.570(3)(a); (b) DRS has erroneously interpreted or applied the law. RCW 34.05.570(3)(d); (c) The DRS Order is inconsistent with DRS rules and especially WAC 415-108-710(6) and RCW 34.05.570(3)(i); and (d) DRS was estopped to deny Mr. Sloma the recalculation of his average final compensation. RCW 34.05.570(3)(d).

[4] The factual findings, except Finding 10, are therefore verities on appeal. Fuller v. Employment Security Department, 52 Wn.App. 603, 762 P.2d 367 (1988).

1. PERS Statutes Support Mr. Sloma

This case requires harmonizing several confusing PERS statutes. If statutes appear to be in conflict, courts attempt to harmonize their respective provisions. City of Pasco v. Department of Retirement Systems, 110 Wn.App. 582, 42 P.3d 992 (2002).

RCW 41.40.191 provides as follows:

> A member may make the irrevocable election under this section no later than six months after attaining thirty years of service. The election shall become effective at the beginning of the calendar month following department receipt of employee notification.
> (1) The sum of member contributions made for periods of service after the effective date of the election plus seven and one-half percent interest shall be paid to the member at retirement without a reduction in the member's monthly retirement benefit as determined under RCW 41.40.185.
>
> (2) Upon retirement, the member's benefit shall be calculated using only the compensation earnable credited prior to the effective date of the member's election. Calculation of the member's average final compensation shall include eligible cash outs of sick and annual leave based on the member's salary and leave accumulations at the time of retirement, except that the amount of a member's average final compensation cannot be higher than if the member had not taken advantage of the election offered under this section.

(3) Members who have already earned thirty years of service credit prior to July 25, 1999, may participate in the election by notifying the department in writing of their intention by December 31, 1999.

The department shall continue to collect employer contributions as required in RCW 41.45.060.[5]

(Emphasis supplied).

RCW 41.40.191 was enacted by Chapter 362, 1999 Washington Laws 1999 Reg. Sess. The portion relating to PERS is Section 2.[6]

We read RCW 41.40.191 as governing retirement for the first time, after one has made the RCW 41.40.191 election. Once you make the election, it is irrevocable until you retire. There is no mention or suggestion of any effect beyond retirement. RCW 41.40.191 says nothing about what happens if you retire and then rejoin membership and subsequently re-retire. That situation is governed by other PERS statutes and a DRS rule.

RCW 41.40.023 provides, in relevant part, as follows:

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[5] If DRS' position is correct, it will, apparently receive a windfall of three and one-half years of employer contributions.

[6] Section 3 provided that certain members who received state-funded long-term care services would not be eligible for a cost of living increase, if that cost of living increase would make them ineligible for state-funded long-term care services. This section has no application to Mr. Sloma.

> . . . reemployment in an eligible position, a retiree may elect to prospectively become a member of the retirement system if otherwise eligible;

When a retiree returns to PERS membership, RCW 41.40.037(3) provides that:

> Such a member shall have the right to again retire if eligible in accordance with RCW 41.40.180. However, if the right to retire is exercised to become effective before the member has rendered two uninterrupted years of service, the retirement formula and survivor options the member had at the time of the member's previous retirement shall be reinstated.
>
> (Emphasis supplied)[7]

Mr. Sloma became a PERS member and employer and employee contributions were made on his behalf, during his employment with Thurston County. (A2, p. 9, Finding 35). The contributions were based upon a percentage of his new salary with Thurston County. Mr. Sloma rendered three and one-half years of service. (A2. p. 8, Finding 30; A2, p. 11, Finding 43). His re-retirement at a higher rate of pay would be consistent with that of every other retiree who elects to return to PERS 1 membership, pursuant to RCW 41.40.023(12). DRS suffers no harm if Mr. Sloma is allowed to rebase his ultimate re-retirement, and Mr. Sloma is greatly harmed if he is not allowed to do so.

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[7] DRS urges you to read this statute as if it began: "Except as provided in RCW 41.40.191."

Ms. Johnson, of PERS, advised Mr. Sloma she had researched and consulted with her team leader and other experienced retirement analysts. (A2, p. 8, Finding 32). She advised his re-retirement, after two years, would be based on his new AFC. She also advised Mr. Sloma of another "irrevocable" decision that can be changed after returning to PERS I for over two years and re-retiring. Her email to Mr. Sloma and to a representative of Thurston County said, in relevant part:

> When a member retires they have to choose one of the four retirement options and this decision is an irrevocable decision. (Option #1 No Survivor, Option #2 Joint and 100% Survivor, Option #3 Joint and 50% Survivor or Option #4 Joint and 66.67% Survivor). The exception to this irrevocable decision is, 'if you go back to work and complete two or more years as a contributing member, you can retire again and select a new benefit option and/or survivor.' (Emphasis supplied). (CAR, Exhibit 7, p. 0153).

Ms. Johnson's statements were not *ultra vires.* Modern case law has given the concept of *ultra vires* a very limited scope. Haslund v. City of Seattle, 86 Wn.2d 607, 547 P.2d 1221 (1976).

2. PERS Administrative Code Provision Supports Mr. Sloma

Mr. Sloma's re-retirement, at the higher rate, is also required by WAC 415-108-710(6)(b), which provides, in relevant part, as follows:

> (b) If you reenter PERS membership and later choose to retire again, DRS will recalculate your retirement allowance under the applicable statutes and regulations.

3. No DRS Rules Or Publications Are Inconsistent With Mr. Sloma's Position

If DRS' interpretation of RCW 41.40.191 is correct, one would think that WAC 415-108-710(6)(b) or some other WAC provision would mention either RCW 41.40.191 or the 30-year election. However, a search of the Washington Administrative Code reveals no such mention. (A2, p. 18, Finding 19).

The most reasonable interpretation is that RCW 41.40.191 only affects a member's first retirement. Any ambiguity must be resolved in favor of the member of the system, pursuant to established case law.

4. Pension Statutes Are Liberally Construed In Favor Of System Members

In cases involving pensions, doubt should be resolved in favor of the party for whose benefit the pension statute was enacted. Bowen v. Statewide City Employees Retirement System, 72 Wn.2d 397, 433 P.2d 150 (1967); Hanson v. City of Seattle, 80 Wn.2d 242, 493 P.2d 775 (1972). Clearly, the retirement system was enacted for Mr. Sloma and others covered by the Act and must be interpreted in their favor.

5. Denying Mr. Sloma A Recalculated AFC Is Unconstitutional

Article 1, Section 3 of the Washington Constitution prohibits enacting any law impairing the obligations of contracts. The United States Constitution Article 1, Section 10, contains a similar prohibition. The courts defer to the legislature when a private contract is impaired, but are more stringent in their review when a state action impairs a public contract. Washington Education Association v. Department of Retirement Systems, 181 Wn.2d 233, 242, 332 P.3d 439 (2014). Retired Public Employees Council of Washington v. Charles, 148 Wn.2d 602, 623-624, 62 P.3d 470 (2003). The statutory interpretation urged by DRS is unconstitutional, as applied to Mr. Sloma.

Bakenhus v. Seattle, 48 Wn.2d 695, 296 P.2d (1956), adopted a contract doctrine applicable to pensions. In Vallet v. City of Seattle, supra, the Supreme Court held that if a pension system member elects to receive a pension benefit, less than that provided by law when the member was employed, the election is contrary to public policy and void. Vallet, supra, pp. 16-17.

The test to be applied to a pension statute is not its effect on all or most employees, but on the individual employee who has challenged the statute. Dailey v. Seattle, 54 Wn.2d 733, 738-739, 344 P.2d 718 (1959).

In Eagan v. Spellman, 90 Wn.2d 248, 581 P.2d 1038 (1978), the Supreme Court held that King County's attempt to change the mandatory retirement age from 70 to 65 was unconstitutional, as it affected Ms. Eagan, by reducing her average final compensation and providing no comparable new advantages to her. As support for its opinion, the Court cited with approval Donner v. New York City Employee's Retirement Sys., 33 N.Y. 2d 413, 353 N.Y.S. 2d 428, 308 N.E. 896 (1974). [8]

DRS contends Mr. Sloma's RCW 41.40.191

[8] 90 Wn.2d 255. That case held that the right to rejoin a retirement system, if rehired, is a retirement benefit.

election waived his right to re-retire using a higher AFC. DRS argues that, since the 30-year program involves a choice or election, it is constitutionally valid. This is incorrect. In Vallet, supra, the Supreme Court noted:

> We have previously held that a civil servant must be paid for his services the amount prescribed by law and that any agreement to accept a lesser sum is contrary to public policy and hence is void. Malcolm v. Yakima, Cy. Consol. School Dist. No. 90, 23 Wn.2d 80, 159 P.2d 394 (1945); Watkins v. Seattle, 2 Wn.2d 695, 99 P.2d 427(1940); Chatfield v. Seattle, 198 Wn.2d 179, 88 P.2d 582, 121 A.L.R. 1279 (1939), and cases cited therein at 186.
>
> Vallet, supra, p.15.

The Supreme Court made that law equally applicable to pension payments due pensioners, under the laws of this state. Vallet, supra, pp. 15-16. Mr. Sloma could not constitutionally agree to abandon his right to return to PERS employment and rebase, unless what he received in exchange was "reasonable and equitable." Vallet, supra, pp. 20-21.

If RCW 41.40.191 were limited to freezing the AFC, of a first retirement, with the ability to receive a refund of contributions plus seven and one-half percent interest, the refund might be a compensating advantage. However, if the disadvantage is that one can never re-retire from PERS membership, based on returning to

service with a higher AFC, in the face of specific statutes that state that the member can do exactly that, then the disadvantage clearly outweighs the advantage. This is especially true as applied to Mr. Sloma, whose re-retirement benefits would be reduced by $2,214.00 each month, for life. All in exchange for the $920.60 that he received, in 2004, as a refund of his contributions and interest.[9] There was no reasonable and equitable exchange.

Courts should avoid reaching a constitutional issue where they are able to decide a case on non-constitutional grounds. State v. Smith, 104 Wn.2d 497, 505, 707 P.2d 1306 (1985); Brunson v. Pierce County, 149 Wn.App. 855, 205 P.3d 963 (2009). We have offered a perfectly reasonable statutory interpretation which avoids unconstitutionality.

Mr. Sloma's Pension Rights Were Not Waived

If Mr. Sloma could elect to waive his constitutional right to re-retire with a higher AFC, what test should be used to determine the validity of the election? In other contexts, the Supreme Court has held that waiver of constitutional rights will not be presumed, but must be made voluntarily, knowingly and

[9] DRS kept the employer contributions. If equity requires, Mr. Sloma is quite willing to repay DRS the $920.60, plus interest, over the intervening years.

intelligently. In re Matter of James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). That was certainly not the case for Mr. Sloma.

If we look at Mr. Sloma's signing of the 30-year election, from the contract point of view, then for a contract modification to be valid, there must be a meeting of the minds. Sea-Van Inv. Assoc. v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). The parties have to agree to the essential terms of the contract. Westcoast Airlines, Inc. v. Miner's Aircraft and Engine Serv., Inc., 66 Wn.2d 513, 403 P.2d 833 (1965). Where DRS is arguing the existence of a modification to Mr. Sloma's pension contract, the burden is upon DRS to prove each essential fact, including mutual intention. Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957).

We know precisely what Mr. Sloma thought at the time he signed the election, and there was no intention to affect re-retirement rights.

> He saw the election as simply a way to obtain a refund of a few months' PERS employee contributions. He does not recall discussing any other effect of the post-30-year election with anyone, or receiving any advice that his choice could affect his benefit after future re-employment. He noticed the 'irrevocable election' language, but since he was planning to retire in the immediate future, he thought

> it only might bar him from buying back service credit or salary for the months between his 30-year-service anniversary and his retirement (in the past he had withdrawn PERS contributions, then later restored (bought back) the lost service credit by restoring the withdrawn contributions). (A2, p.5, Finding 15).

6. Estoppel Prevents Denying Mr. Sloma A Recalculated AFC

The Supreme Court has held that the State must not expect more favorable treatment than is fair between men and women, and that "the state, in its dealings with individuals, should be held to 'resolute good faith.' " State *ex rel.* Washington Pav. Co. v. Clausen, 90 Wash. 450, 452, 156 Pac. 554 (1916).

Estoppel has been applied against DRS. For example, in Hitchcock v. Washington State Department of Retirement Systems, 39 Wn.App. 67, 692 P.2d 834 (1984) Mr. Hitchcock challenged DRS' determination that transportation and local expenses would not be included in his average final compensation.

The court overturned DRS, explaining:

> The Department's authority to determine earnable compensation, however, could not impinge upon a contractual relationship with the employee which creates the expectation of deferred benefits. See Washington Fed'n of State Employees, Coun. 28 v. State, 101 Wn.2d 536, 541, 682 P.2d 869 (1984) (reviewing cases). Such a relationship may arise by estoppel. That

> doctrine is employed to prevent a manifest injustice where there has been an admission, statement, or act which has been relied upon to the employee's injury because of an inconsistent claim thereafter asserted. Beggs v. Pasco, 93 Wn.2d 682, 689, 611 P.2d 1252 (1980).

In West v. Social & Health Services, 21 Wn.App. 577, 579, 586 P.2d 516 (1978), the court described the three elements of estoppel as:

> (1) an admission, statement, or act inconsistent with the claim afterwards asserted, [Ms. Johnson's statements and email]
>
> (2) action by the other party on the faith of such admission, statement, or act, and [Mr. Sloma rejoining PERS]
>
> (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. [The loss of $2,214.00 per month, for life] West v. Social & Health Services, Supra, at 579.

Promissory estoppel can be used affirmatively. Chemical Bank v. WPPSS, 102 Wn.2d 874, 691 P.2d 524 (1984), said. The Court said:

> Unlike its British equivalent, however, the Restatement does not limit promissory estoppel to use as defense. Nor has Washington's case law done so. See Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 616 P.2d 644 (1980).
>
> Chemical Bank, supra, p. 901.

The Supreme Court also noted that Washington cases have intermingled promissory estoppel with equitable estoppel. Chemical Bank, supra, at 902 citing to State v. Northwest Magnesite Co., 28 Wn.2d 1, 182 P.2d 643 (1947).

In this case, DRS made direct representations to Mr. Sloma and Mr. Sloma took actions based upon those representations. Mr. Sloma's reliance was reasonable, since he spoke to the person at DRS who was trained and assigned to answer the type of question he asked, and he requested and received written confirmation of the information he had been given so that he would have a "leg to stand on"[10] if there was a challenge in the future.

In State Ex Rel Shannon v. Sponburgh, 66 Wn.2d 135, 144-145, 401 P.2d 635 (1965), the court said that:

> The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, had made a commitment and the party to whom it was made has acted to his detriment on reliance in that commitment, the official should not be permitted to revoke that commitment.

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[10] Exhibit 7, CR 0148

7. Attorney's Fees And Costs

We ask this Court to award attorney's fees and costs, pursuant to RCW 4.84.010 and RAP 18.1.

F. CONCLUSION

The only constitutional interpretation of RCW 41.40.191 is that the election, once made, is irrevocable until retirement. After retirement, a member's return to service is governed by RCW 41.40.023, RCW 41.40.037(3) and WAC 415-108-710(6). Mr. Sloma's retirement benefits must be based on his new AFC. DRS should be estopped to deny Mr. Sloma the right to rebase his AFC. The DRS Order must be reversed. Attorney's fees and costs should be awarded, pursuant to RCW 4.84.010

DATED this 19th day of March, 2020.

WILLIAMS, WYCKOFF & OSTRANDER, PLLC

Wayne L. Williams, WSBA# 4145
Attorney for Appellant

CERTIFICATE OF MAILING

I, Julie Hatcher, hereby certify, under penalty of perjury, that on this date, a true and correct copy of the foregoing Petition For Review was emailed, per our electronic service agreement, to the following:

Nam Nguyen
Assistant Attorney General
P.O. Box 40123
Olympia, Washington 98504-0123

DATED this 30th day of March, 2020.

Julie Hatcher

Appendix A

Court of Appeals Decision

March 3, 2020

Filed
Washington State
Court of Appeals
Division Two

March 3, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DONALD SLOMA, Appellant, v. WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS, Respondent.	No. 53054-6-II PUBLISHED OPINION

WORSWICK, J. — Donald Sloma worked in a Public Employees Retirement System (PERS)-eligible employment for over 30 years. In 2004, he elected into a program for PERS 1 members with over 30 years of service credit wherein, upon retirement, he would receive a refund of all employee contributions he made to the Department of Retirement Systems (DRS) after his election date, and his retirement benefit would be calculated based on only his compensation earned prior to the election. A few months later, Sloma retired.

In 2012, Sloma began work for Thurston County, a PERS eligible employer. Sloma rejoined PERS membership and believed that when he re-retired his retirement benefit would be recalculated based on his higher Thurston County salary. But when Sloma retired, DRS limited his retirement benefit to his compensation earned prior to his 2004 election.

Sloma petitioned DRS to reverse its decision. A presiding officer granted DRS's motion for summary judgment, and Sloma sought review by the superior court. The superior court affirmed. Sloma now appeals the superior court's order affirming the Department's final order.

Sloma argues that (1) the Department erroneously interpreted RCW 41.40.191 to apply beyond a member's first retirement, (2) RCW 41.40.191 unconstitutionally impairs his public pension contract rights, and (3) equitable and promissory estoppel apply to compel DRS to calculate his retirement benefits using his higher Thurston County salary. We disagree and affirm the Department's final order.

FACTS

Sloma agrees to the findings of fact contained in the Department's final order. Therefore, the findings of fact contained in the final order are verities on appeal.[1] *Tucker v. Dep't of Ret. Sys.*, 127 Wn. App. 700, 705, 113 P.3d 4 (2005). Accordingly, the following facts are primarily from the Department's final order.

I. DRS, PERS, PLAN 1, POST 30-YEAR ELECTION

DRS administers the statewide retirement systems for public employees, including PERS. PERS comprises three plans—PERS 1, PERS 2, and PERS 3. A PERS member who meets the statutory conditions for retirement receives a defined retirement benefit that is paid monthly for life. A PERS 1 member who completes 30 years of creditable service can retire for service with a full benefit, without regard to his or her age.

PERS defined retirement benefits are funded in part by contributions to the system from both the employee-member and the member's employer. A PERS 1 member must contribute six percent of his compensation to the system while in PERS-covered employment. An individual PERS member's retirement benefit is determined by a statutory formula that takes account of the

[1] Except for finding of fact 10, which we consider a conclusion of law.

compensation and service credit the member earned while working for retirement system employers. One component of the formula is average final compensation (AFC). In PERS 1, AFC is the annual average of the member's highest salary during any consecutive two-year period of PERS service. A PERS 1 retirement benefit is said to be "capped" at 30 years of service because service beyond 30 years may not be used to increase the member's benefit above 60 percent of AFC.

In 1999, the legislature created a new option for members of PERS 1. Those members who continue working in PERS-covered employment after they attain 30 years of creditable service can choose to obtain a refund of the PERS contributions they make after that point. DRS refers to this option as the "post-30-year program." PERS 1 members wishing to choose this optional refund of contributions at retirement must notify DRS within six months after they have earned 30 years of service credit. Beginning the month after a member chooses this option, DRS must separately account for the member's employee contributions to PERS and, at retirement, refund to the member the amount of those contributions, plus interest at the rate of seven and one-half percent. Upon retirement, the retirement benefit of a member who chooses to enroll in the post-30-year program "shall be calculated using only the compensation earnable credited prior to the effective date of the member's election." RCW 41.40.191(2). Stated another way, the statute provides that the member's AFC calculation does not change after the effective date of the member's election into the post-30-year program.

Following reemployment in an eligible position, a retiree may elect to prospectively become a member of the retirement system if otherwise eligible. RCW 41.40.023(12). Such a member may retire again if eligible. RCW 41.40.037(3).

II. SLOMA'S FIRST RETIREMENT

Sloma became a PERS 1 member in 1973. By the end of September 2003, Sloma had earned 30 years of service credit in PERS. In January 2004, Sloma began to plan for his retirement from public service. He reviewed the January 2002 version of the PERS Plan 1 Member Handbook published by DRS, which stated, in response to the question, "Can I obtain a refund of contributions paid after 30 years of service?"

> If you participate in the [post-30-year] program, your monthly retirement benefits will be based on earnings made prior to the date DRS received notice of your election to participate. Election to participate is irrevocable and must be made within six months after earning 30 service credit years.

Administrative Record (AR) at 4 (alteration in original).

Sloma submitted his notice of election into the post-30-year program on January 15, 2004. The form stated, "This is an IRREVOCABLE ELECTION. Once you have submitted this election to DRS, you cannot reverse your decision." AR at 208. By Sloma's signature, the form stated:

> I hereby elect to have my retirement contributions after 30 years of service posted to a separate account that is refundable at my retirement. I understand that contributions will be posted to the refundable account beginning the month after I submit this election form and I have accumulated at least 30 years of service credit. Furthermore, I understand that my Average Final Compensation (AFC) will be based on earnings prior to DRS receiving this election. (The AFC is used in the retirement benefit calculation to determine the amount of your monthly retirement benefit.)

AR at 208.

Sloma retired from the Department of Health effective March 1, 2004, at 54 years of age. DRS calculated his PERS AFC at $6,492.80 monthly, yielding a gross monthly retirement benefit of $3,895.68, and began paying his retirement benefit in that amount. DRS refunded to

him the PERS employee contributions he made after his election into the post-30-year program became effective, in a lump sum totaling $920.60.

In 2011, Sloma learned from his personal contacts that Thurston County's Public Health and Social Services Department director planned to retire. Sloma considered applying for the position and how it might affect his PERS retirement benefit. He thought that the director position might offer him the opportunity to "re-base" his retirement benefit based on the increased salary of the director position. Sloma applied for the position on January 30, 2012.

Thurston County offered Sloma the position sometime before April 12, 2012, but Sloma did not immediately accept. He asked Thurston County personnel staff how his PERS retirement benefit would be affected if he were to accept the position, and they referred him to DRS for specific questions.

Believing that if he accepted employment with Thurston County he could reenter active PERS membership and retire again from PERS in the future, Sloma accepted the director position. Thurston County confirmed Sloma's appointment in a letter to him on April 12, 2012, and a press release on April 13. Sloma started working for Thurston County on May 1, 2012.

III. SLOMA'S SECOND RETIREMENT

One day after beginning work with Thurston County, Sloma spoke with Katie Sparkles, a DRS retirement analyst, on the telephone. On May 3, 2012, Sparkles e-mailed Sloma with the information he wanted "in writing." Sparkles wrote that her research and consultation with her team leader and other experienced retirement analysts, had produced answers to two of his concerns. First, he would have to work a minimum of 24 months in a new PERS-covered

position in order to change the payment (survivor) option for a future retirement benefit.[2] Second, "any compensation you earn after returning to membership will be reviewed when determining your 24-month AFC at time of retirement." AR at 8.

Sloma responded with an attempt to further clarify that there was no minimum amount of time he needed to work in his new job to have his new earnings included in any new AFC. Sparkles responded,

> [A]fter returning to active membership it doesn't matter how long you work and then re-retire to have the new compensation and service credits counted towards re-calculating your new AFC for re-retirement. But if you decide that you want a different retirement option when you re-retire you have to work at least 24 months before you re-retire.

AR at 9. Within an hour of acknowledging Sparkles's last e-mail, Sloma e-mailed DRS, advising that he was employed with a PERS employer in a PERS-eligible position and that he wanted to start contributing to his PERS 1 retirement again.

During their 2012 interactions, neither Sloma nor Sparkles considered or discussed the post-30-year election Sloma made in 2004. Sparkles was not aware that Sloma had made the election.

While working for Thurston County, Sloma and his wife were actively looking to purchase a waterfront home. Around June 2015, they found a property that they could purchase on favorable terms. After reviewing their finances, including Sloma's anticipated post-retirement income, the couple applied for a mortgage to purchase the property. With the

[2] Sparkles explained, "When a member retires they have to choose one of the four retirement options and this decision is an [i]rrevocable decision. . . . The exception to this [i]rrevocable decision is, 'If you go back to work and complete two or more years as a contributing member, you can retire again and select a new benefit option and/or survivor.'" AR at 153.

potential major purchase, Sloma sought assurance from DRS that his re-retirement benefit would be re-based using his County salary. From telephone conversations between Sloma and DRS during late June or early July 2015, Sloma understood that his Thurston County salary would be included in the calculation of his new retirement benefit, estimated at $6,110 per month.

On or about July 9, 2015, Sloma requested a written estimate of his PERS benefit if he retired from Thurston County in October 2015. DRS staff preparing Sloma's requested estimate became aware of his 2004 election into the post-30-year program. The resulting estimate of his new retirement benefit did not include his Thurston County salary in the AFC factor. Instead, that factor reverted to the AFC that had been used for his 2004 retirement benefit.

A DRS Plan Administrator called Sloma to discuss the benefit estimate. Without the additional monthly benefit, he and his wife felt forced to cancel the purchase of their waterfront home. The Plan Administrator followed up with his conversation with Sloma by sending him a letter explaining that Sloma's enrollment in the post-30-year program limited DRS's authority to recalculate Sloma's AFC to include only earnings prior to Sloma's election.

Sloma retired from his position with Thurston County effective October 31, 2015.

IV. REVIEW & APPEAL

Sloma petitioned for internal review of DRS's refusal to adjust the calculation of his PERS retirement benefit with a higher AFC reflecting his salary during his employment with Thurston County. In a decision issued March 10, 2016, a petitions examiner for DRS concluded that in calculating Sloma's 2015 retirement benefit, DRS correctly excluded his Thurston County salary from his AFC.

Sloma filed a notice of appeal with the Department requesting a hearing to pursue his claim for an adjusted PERS Plan 1 retirement benefit based on an AFC reflecting his higher earnings from Thurston County. DRS filed a motion for summary judgment. The Presiding Officer ultimately granted DRS' motion for summary judgment. The Presiding Officer concluded,

> Having made an irrevocable election to participate in the PERS plan 1 post-30-year program with his first retirement, [Sloma], after re-entering active PERS membership in post-retirement PERS-covered employment, and retired again, is not entitled to a re-retirement benefit calculated with an AFC component reflecting the increased salary earned in his post-retirement employment. In his situation equitable estoppel will not sustain his claim for an increased retirement benefit.

AR at 20.

Sloma filed a petition for judicial review of the final order in superior court. The superior court affirmed the final order. Sloma now appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review a final agency order under RCW 34.05.570(3). In reviewing an administrative action, we sit in the same position as the trial court and apply the Administrative Procedure Act[3] standards directly to the agency's administrative record. *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 112 Wn. App. 291, 296, 49 P.3d 135 (2002). We review summary judgment de novo. *Wash. Educ. Ass'n v. Dep't of Ret. Sys.*, 181 Wn.2d 233, 241, 332 P.3d 439 (2014). Summary judgment is appropriate only if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c).

[3] Ch. 34.05 RCW.

II. STATUTORY INTERPRETATION

Sloma argues that RCW 41.40.191 should be interpreted to apply only to a member's initial retirement and to have no impact on that member's subsequent retirement should he return to PERS membership. We disagree.

When interpreting a statute, our fundamental objective is to ascertain and give effect to the legislature's intent. *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 405, 377 P.3d 199 (2016). Our inquiry begins with the plain meaning of the statute. *Lenander*, 186 Wn.2d at 405. "In doing so, we consider the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Lenander*, 186 Wn.2d at 405. If the meaning of the statute is plain on its face, then we must give effect to that meaning. *Lenander*, 186 Wn.2d at 405.

A. *Plain Language Supports the Department's Final Order*

Sloma contends that we should construe RCW 41.40.191 in his favor. "Courts liberally construe ambiguous pension legislation to favor beneficiaries." *Hahn v. Dep't of Ret. Sys.*, 137 Wn. App. 933, 943-44, 155 P.3d 177 (2007). But if, as here, a statute is unambiguous, its meaning may be derived from the language of the statute alone. *Chancellor v. Dep't of Ret. Sys.*, 103 Wn. App. 336, 342, 12 P.3d 164 (2000).

RCW 41.40.191 governs the post-30-year program and provides:

> A member may make the *irrevocable* election under this section no later than six months after attaining thirty years of service. The election shall become effective at the beginning of the calendar month following department receipt of employee notification.
>
> (1) The sum of member contributions made for periods of service after the effective date of the election plus seven and one-half percent interest shall be paid

> to the member at retirement without a reduction in the member's monthly retirement benefit as determined under RCW 41.40.185.
>
> (2) *Upon retirement, the member's benefit shall be calculated using only the compensation earnable credited prior to the effective date of the member's election*. Calculation of the member's average final compensation shall include eligible cash outs of sick and annual leave based on the member's salary and leave accumulations at the time of retirement, except that the amount of a member's average final compensation cannot be higher than if the member had not taken advantage of the election offered under this section.

(Emphasis added).

Sloma argues that RCW 41.40.191 applies only to a member's first retirement because the statute is silent about any effect on subsequent retirements. We disagree with his interpretation.

The plain language of the statute unambiguously states that an election under RCW 41.40.191 is irrevocable. A PERS 1 member who achieves 30 years of service has one window of opportunity to elect into the post-30-year program, and if they do so, their retirement benefit shall be calculated using only the compensation earned prior to the effective date of their election. RCW 41.40.191. The statute does not limit the effect of the election to a member's first retirement. Indeed, the election is not tied to retirement, but becomes available to members when they achieve a particular service status.

Interpreting the statute to have no bearing on a future re-retirement would render the statute's use of "irrevocable" meaningless as it would allow a member to effectively revoke his irrevocable election by returning to PERS membership. The plain language of the statute is clear that the irrevocable election into the post-30-year program applies to any calculation of the member's retirement benefit, whether it be his first retirement or a subsequent retirement.

Sloma contends that this interpretation of RCW 41.40.191 conflicts with the statutes governing re-entry into PERS membership and subsequent re-retirement, specifically RCW 41.40.023, RCW 41.40.037(3), and RCW 41.40.010(6)(a). But Sloma fails to identify any such conflict. Rather, these statutes are complementary, raising no contradictions that require harmonization.

RCW 41.40.023 governs eligibility for PERS membership. RCW 41.40.023(12) specifically addresses PERS retirees and provides, in relevant part, that "following reemployment in an eligible position, a retiree may elect to prospectively become a member of the retirement system if otherwise eligible." RCW 41.40.037(3) governs how membership benefits are managed in the event a retiree re-establishes membership and provides:

> If the retiree opts to reestablish membership under RCW 41.40.023(12), he or she terminates his or her retirement status and becomes a member. Retirement benefits shall not accrue during the period of membership and the individual shall make contributions and receive membership credit. Such a member shall have the right to again retire if eligible in accordance with RCW 41.40.180. However, if the right to retire is exercised to become effective before the member has rendered two uninterrupted years of service, the retirement formula and survivor options the member had at the time of the member's previous retirement shall be reinstated.

RCW 41.40.010(6)(a) defines AFC for PERS 1 members to be "the annual average of the greatest compensation earnable by a member during any consecutive two year period of service credit months for which service credit is allowed."

These statutes govern distinct aspects of PERS 1 retirement, benefit calculation, reemployment, and re-retirement and do not conflict with RCW 41.40.191, which pertains only to a member's opportunity to elect into the post-30-year program and the effects of any such election. These four statutes apply in harmony to govern the retirement benefits and PERS

membership of a member who achieves 30 years of service, retires, reestablishes membership, and re-retires.

For example, because Sloma elected into the post-30-year program, his retirement benefit was calculated, in part, by using the definition of AFC in RCW 41.40.010(6)(a) and using the compensation he earned prior to the effective date of the election, as required by RCW 41.40.191. Then, when Sloma returned to a PERS eligible position, RCW 41.40.023 governed his eligibility for PERS membership. Finally, having chosen to reestablish PERS membership, Sloma's subsequent participation in PERS was governed by RCW 41.40.037. Contrary to Sloma's contention, these statutes do not conflict.

B. *The Administrative Code Does Not Support Sloma's Interpretation*

Sloma also contends that the administrative code supports his interpretation of RCW 41.40.191. He contends that WAC 415-108-710(6) requires that his AFC be recalculated at a higher rate upon re-retirement. But WAC 415-108-710(6)(b) provides simply that "[i]f you reenter PERS membership and later choose to retire again, DRS will recalculate your retirement allowance *under the applicable statutes and regulations*." (Emphasis added). For a PERS 1 member who elects into the post-30-year program, one of the applicable statutes is RCW 41.40.191.

Sloma also argues that because no administrative rules or DRS publications address RCW 41.40.191's application to re-retirement, the most reasonable interpretation is that the statute is limited to a first retirement. But we determine the intent of the legislature primarily from the statutory language. *In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011). And if statutory language is plain on its face, as it is here, we will not reach or consider

agency interpretation of the statute. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715-16, 153 P.3d 846 (2007). If anything, the silence of agency rules on RCW 41.40.191's application suggests that the legislature's intent in RCW 41.40.191 is clear on its face.

C. *DRS Advice Is Irrelevant to Our Statutory Interpretation*

Sloma also seems to suggest that Sparkles's communications with him support his interpretation of RCW 41.40.191. But, again, we determine the intent of the legislature primarily from the statutory language. *Schneider*, 173 Wn.2d at 363. We have "the ultimate authority to determine the meaning and purpose of a statute." *Lindeman v. Kelso School Dist. No. 458*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007). Sparkles's comments have no bearing on our determination of the legislative intent behind RCW 41.40.191.[4]

Accordingly, we hold that the Department properly interpreted RCW 41.40.191 to apply to Sloma's re-retirement.

III. CONSTITUTIONAL CONTRACT RIGHTS

Sloma also argues that applying RCW 41.40.191 to deny him a recalculated AFC is unconstitutional because it substantially impairs his public pension contract rights. We disagree.

We review constitutional issues de novo. *Lenander*, 186 Wn.2d at 403. We presume that a statute is constitutional and place the burden of showing unconstitutionality on the challenger. *Lenander*, 186 Wn.2d at 403.

[4] Sloma also implies that because his re-enrollment form when he rejoined PERS membership had no area to alert DRS that he had previously elected into the post-30-year program, the election must be limited to a first retirement. Sloma points to no authority for the premise that an agency form would govern or even inform our statutory interpretation. Moreover, because the statutory language of RCW 41.40.191 is plain on its face, our inquiry ends there.

Article I, section 23 of the Washington Constitution provides that "[n]o . . . law impairing the obligations of contracts shall ever be passed." *See also* U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . law impairing the obligation of contracts."). We give these provisions of the federal and state constitutions the same effect in Washington. *Wash. Educ. Ass'n*, 181 Wn.2d at 242.

PERS is a comprehensive system of pension benefits for qualifying state employees. *Wash. Educ. Ass'n v. Dep't of Ret. Sys.*, 181 Wn.2d 212, 217, 332 P.3d 428 (2014). "A public employee's right to a pension is 'a vested, contractual right based on a promise made by the State at the time an employee commences service.'" *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 65, 847 P.2d 440 (1993) (quoting *Wash. Fed'n of State Emps. v. State*, 98 Wn.2d 677, 683, 658 P.2d 634 (1983)). Although we give some deference to the legislature when a private contract is impaired, we apply a more stringent review of state action that impairs a public contract. *Wash. Educ. Ass'n*, 181 Wn.2d at 242.

In evaluating the impairment of public contracts, we apply a three-part test. *Lenander*, 186 Wn.2d at 414. Under this test, we ask: (1) does a contractual relationship exist, (2) does the legislation substantially impair the contractual relationship, and (3) if there is substantial impairment, is the impairment reasonable and necessary to serve a legitimate public purpose? *Lenander*, 186 Wn.2d at 414. In public pension contract impairment cases, our application of the three-prong test is guided by the principles set forth in *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). There, our Supreme Court held that any modifications to an employee's public pension contract terms must be for the sole purpose of ensuring the continued flexibility and integrity of the pension system, and any modifications that have the effect of

reducing a pension benefit or have an adverse effect on members must be counterbalanced by a corresponding increase or additional benefit. *Bakenhus*, 48 Wn.2d at 701-02.

Here, Sloma contends that RCW 41.40.191 is unconstitutional because it negatively modifies his pension rights without offering a corresponding benefit. He claims a vested right to have his AFC recalculated to include his salary from Thurston County. But RCW 41.40.191 does not remove or impair any benefits from members like Sloma. Rather, it establishes an option for PERS 1 members to be refunded their employee contributions after 30 years of service. RCW 41.40.191 does not require members to elect into the program; nor does it prevent members from reentering PERS membership after retirement. To the extent that RCW 41.40.191(2)'s provision that a member who elects into the post-30-year program shall have his AFC calculated using only his compensation prior to the election has the effect of reducing what he otherwise could have received in pension benefits, the refund of the member's contributions with interest constitutes a corresponding benefit.

For some members, electing into the post-30-year program and receiving a refund would be beneficial, although for others, forgoing a refund of their employee contributions in order to have their post-30-year salary factor into their AFC at retirement would be more financially lucrative. During the election period, members must make a rational calculation as to which path would be best for them.

Here, it was Sloma's decision, not RCW 41.40.191 or DRS that deprived Sloma of the ability to rebase his AFC upon re-retirement. That Sloma's decision to elect into the post-30-

year program ultimately resulted in a lower retirement benefit than if he had not elected does not render RCW 41.40.191 unconstitutional.[5]

IV. ESTOPPEL

Sloma also argues that "[e]stoppel prevents denying [him] a recalculated AFC." Br. of Appellant 41. He intermingles arguments based on equitable estoppel and promissory estoppel, but the two are different doctrines with different elements and applications. *See Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 258-59, 616 P.2d 644 (1980) ("Equitable estoppel is based upon a representation of existing or past facts, while promissory estoppel requires the existence of a promise."). Accordingly, we address the two doctrines separately. We hold that neither equitable estoppel nor promissory estoppel entitles Sloma to relief.

A. *Equitable Estoppel*

"Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who has justifiably and in good faith relied thereon." *Byrd v. Pierce County*, 5 Wn. App. 2d 249, 258, 425 P.3d 948 (2018).

Equitable estoppel against the government is disfavored. *Byrd*, 5 Wn. App. 2d at 258.

> When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is 'necessary to prevent a manifest injustice'; and (5) estoppel will not impair governmental functions.

[5] Sloma dedicates a portion of his brief to arguing that his "pension rights were not waived." See Br. of Appellant 38. However, DRS does not contend that Sloma's pension rights were waived.

Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wn.2d 868, 887, 154 P.3d 891 (2007) (plurality opinion) (quoting *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993)).

More importantly, equitable estoppel is not available for use as a "sword," or cause of action by plaintiffs. *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 73, 110 P.3d 812 (2005). Equitable estoppel is properly used as a "shield," or a defense. *Klinke*, 94 Wn.2d at 259. Here, Sloma misplaces his reliance on the equitable estoppel doctrine by attempting to use it as a sword to compel DRS to recalculate his AFC based on the compensation he earned after he made his irrevocable election under RCW 41.40.191. Because equitable estoppel cannot be the basis for a cause of action, Sloma cannot invoke it here.

B. *Promissory Estoppel*

Promissory estoppel requires (1) a promise (2) where the promisor reasonably expected to cause the promisee to change his position, (3) which in fact did cause the promisee to change his position (4) by justifiably relying on the promise in such a manner (5) that injustice can be avoided only by enforcement of the promise. *Jones v. Best*, 134 Wn.2d 232, 239, 950 P.2d 1 (1998). "Promissory estoppel requires the existence of a promise" that is "clear and definite." *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 172-73, 876 P.2d 435 (1994). Washington courts have adopted the *Restatement's* definition of "promise": "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981); *Wash. Educ. Ass'n*, 181 Wn.2d at 225.

Here, Sloma's promissory estoppel claim fails on the first element because Sparkles's correspondence with Sloma did not make a clear and definite promise. Sparkles told Sloma "any compensation you earn after returning to membership will be reviewed when determining your 24-month AFC at time of re-retirement." AR at 153. Sloma responded to clarify that there was no minimum number of months he would need to work in order for his new salary to be considered in his AFC calculations upon re-retirement. Sparkles responded that "after returning to active membership it doesn't matter how long you work and then re-retire to have the new compensation and service credits counted towards recalculating your new AFC for re-retirement." AR at 152.

Sparkles's statements did not constitute a "manifestation of intention to act . . . in a specified way," as required to form a promise. RESTATEMENT (SECOND) OF CONTRACTS § 2(1). Rather, her comments were general information and guidance as to how later compensation is considered at re-retirement. Sparkles said that Sloma's new compensation would be "reviewed" upon re-retirement but did not promise that the new compensation would necessarily result in a new AFC.

Sloma's claim also fails because he cannot show that he changed his position in reliance on Sparkles's comments. The e-mails Sloma relies on occurred on May 4 and 8. But Sloma's appointment to the Thurston County position was confirmed on April 12, and his first day of work was May 1. Although Sloma may have subjectively believed he would be able to rebase

his AFC upon re-retirement, the record does not support his claim that his decision to accept the Thurston County position turned on DRS's communications with him.[6]

Accordingly, we hold that neither equitable estoppel nor promissory estoppel entitle Sloma to the relief he seeks.

V. ATTORNEY FEES

Sloma seeks an award of statutory attorney fees and costs under RAP 18.1 and RCW 4.84.010. RCW 4.84.010(6) permits statutory attorney fees to the prevailing party upon judgment. Because we affirm, Sloma is not the prevailing party and, therefore, not entitled to statutory attorney fees and costs.

VI. CONCLUSION

In conclusion, we hold that (1) under the plain language of RCW 41.40.191, Sloma's re-retirement benefit was properly calculated using only the compensation he earned prior to the effective date of his irrevocable election; (2) RCW 41.40.191 did not unconstitutionally impair Sloma's pension rights; (3) equitable estoppel is not available to Sloma as a means to compel DRS to re-calculate his retirement benefit based on his Thurston County salary; (4) Sloma fails to prove the existence of a promise or reliance for the purposes of promissory estoppel; and (5)

[6] Although Sloma mentions that he attempted to purchase a house because he relied on the State's representations, he does not specifically argue that this purchase and sale agreement was a change in position for purposes of promissory estoppel.

Sloma is not entitled to attorney fees.[7] Accordingly, we affirm the decision of the superior court affirming the Department's final order.

Worswick, J.

We concur:

Lee, A.C.J.

Cruser, J.

[7] Sloma noted two additional assignments of error—that the DRS order was not supported by substantial evidence and that the DRS order was arbitrary and capricious. But Sloma does not support his assignments of error with argument or authority; thus, they are waived. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Appendix B

DRS Final Order

August 31, 2017

CERTIFICATION OF SERVICE

I hereby certify that I have this day served copies of this document upon the parties to this proceeding, and on their attorneys of record, by electronic distribution (electronic mail service), under RCW 34.05.461(8)(a). Dated at Olympia, Washington, this 31st day of August, 2017.

Rebekah Carter, Appeals Coordinator
Department of Retirement Systems
Olympia, Washington

WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS
BEFORE THE PRESIDING OFFICER

In re the Appeal of	)	Docket No. 16-P-003
	)	
DONALD SLOMA	)	DECISION AND ORDER ON
	)	MOTION FOR SUMMARY
for PERS Plan 1 post-30-year revised AFC	)	JUDGMENT
	)	

STATEMENT OF THE CASE

Appellant Donald Sloma requested a hearing before the Washington State Department of Retirement Systems to pursue his claim that the Department is required to increase his PERS Plan 1 retirement benefit by recalculating it with a higher average final compensation reflecting the higher salary he earned in over three years of post-retirement PERS-covered employment.

Attorney Wayne Williams represented Mr. Sloma in this appeal. Assistant Attorneys General Sarah Blocki and Nam Nguyen represented the Department.

On August 8, 2016, the Department filed a motion for summary judgment. The parties filed responses and replies through September 15, 2016. The parties filed responses to additional questions posed by the Presiding Officer.

ORDER

The Department's motion for summary judgment is granted.

DISCUSSION

I. Facts Considered

As shown by the parties' motions, and the responsive filings and supporting documents, the parties do not dispute the following facts.

DRS, PERS, Plan 1 retirement and post-30-year program

1. The Washington State Department of Retirement Systems (the Department, or DRS), is the agency that administers statewide retirement systems for public employees, including the Washington Public Employees' Retirement System (PERS).

2. PERS, a retirement system for employees of Washington State and its political subdivisions, comprises three plans. Until 1977, PERS was a single system with a single set of requirements. In 1976, the Washington State Legislature (legislature) created a substantially revised plan within PERS, with different terms governing contributions and benefits for those who became members on or after October 1, 1977. The revised plan became known as PERS Plan 2, and the original plan then became known as PERS Plan 1.[1]

3. A PERS member who meets the statutory conditions for retirement receives a defined retirement benefit ("allowance") that is paid monthly for life.[2] A PERS Plan 1 member who completes 30 years of creditable service can retire for service with a full benefit, without regard to his or her age.[3,4]

4. PERS defined retirement benefits are funded in part by contributions to the system from both the employee-member and the member's employer. A Plan 1 employee-member must contribute six percent of his compensation to the system while in PERS-covered employment.[5]

5. At retirement a PERS member can choose to receive the retirement benefit in the full individual amount (standard allowance), or in a reduced amount to provide a beneficiary with a benefit that continues after the retiree's death

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[1] Originally the two plans were designated by Roman numerals, but effective September 1, 2000, the legislature directed the Code Reviser to use Arabic numerals in place of the Roman. Laws 1998, Ch. 341, §§ 709, 714.

[2] In this Order, the term "benefit" will refer only to a continuing monthly retirement benefit, or pension.

[3] RCW 41.40.180(2).

[4] The Appellant is male, and for the remainder of this order, the male pronoun will be used for simplicity. Except when used to designate him individually, the pronoun is not intended to be limited to one gender.

[5] RCW 41.40.330(1).

(survivor option). The retiree's choice of payment option can be changed in only limited circumstances.[6]

6. An individual PERS member's retirement benefit is determined by a statutory formula that takes account of the compensation and service credit the member earned while working for retirement system employers. One component of the formula is average final compensation (AFC). In Plan I, AFC is the annual average of the member's highest salary during any consecutive two-year period of PERS service.[7]

7. A PERS retiree may return to work later for a PERS employer, and is permitted to continue to receive his retirement benefit under certain circumstances. He may work in a PERS-eligible position, up to 867 hours in a calendar year, the equivalent of about five months, after which the retirement allowance must be suspended for the remainder of the year or until the PERS-eligible employment ends.[8]

8. A PERS Plan 1 retirement benefit may not exceed 60 percent of the member's AFC.[9] The Plan 1 retirement benefit is said to be "capped" at 30 years of service because service beyond 30 years may not be used to increase the member's benefit above 60% of AFC.

9. In 1999, the legislature created a new option for members of Plan 1. Those members who continue working in PERS-covered employment after they attain 30 years of creditable service can choose to obtain a refund of the PERS contributions they make after that point. The Department refers to this option as the "post-30-year program". In this Order, it is also referred to as the Plan 1 refundable account option.[10]

   PERS Plan 1 members wishing to choose this optional refund of contributions at retirement must notify the Department within six months after they have earned 30 years of service credit. Beginning the month after a member chooses this option, the Department must separately account for the member's employee contributions to PERS, and, at retirement, refund to the member the amount of those contributions, plus interest at the rate of seven and one-half percent.

10. When a PERS Plan 1 member with 30 years of service credit chooses this refundable account option, the choice "freezes" his AFC for his eventual retirement benefit. The AFC for a member in the post-30-year program can

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[6] RCW 41.40.188(1),(4) (Plan 1); WAC 415-108-326(7).
[7] RCW 41.40.010(6)(a), (8)(a).
[8] RCW 41.40.037(2); WAC 415-108-710.
[9] RCW 41.40.185(3).
[10] See *In re Appeal of Gutter*, DRS Docket No. 05-P-005 (December 30, 2005).

be determined on only the salary the member earned before his choice became effective.

Mr. Sloma's first PERS retirement

11. Mr. Sloma became a member of PERS in 1973. As a member who joined the system before October 1, 1977, his membership continued in Plan 1, the original plan, after Plan 2 took effect. By the end of September 2003 he had earned 30 years of service credit in PERS.

12. During his PERS career Mr. Sloma worked with the legislature for almost twenty years in various capacities. From 1992-1997 he was the staff director for the Health and Long Term Care Committee of the Washington State Senate. He last worked in state government as executive director for the Washington State Board of Health for almost four and one-half years (1999-2004).

13. In January 2004 Mr. Sloma was planning to take his PERS retirement, being dissatisfied with the direction of state government and seeing little chance that continuing to work in PERS-covered employment would have any positive effect on his retirement benefit. He was aware of the post-30-year program. He reviewed the January 2002 version of the *PERS Plan 1 Member Handbook* published by DRS, which stated, in response to the question, "Can I obtain a refund of contributions paid after 30 years of service?",

> . . . If you participate in the [post-30-year] program, your monthly retirement benefits will be based on earnings made prior to the date DRS received notice of your election to participate. Election to participate is irrevocable and must be made within six months after earning 30 service credit years. . . .

14. On January 15, 2004, Mr. Sloma completed and signed a form, *Notice of Election for Post 30-Year Program*, and submitted the form to the Department.

The first line of text in this form stated,

> This is an IRREVOCABLE ELECTION. Once you have submitted this election to DRS, you cannot reverse your decision.

(Emphasis in capitals in original.)

In Section 2, the Election Statement and Signature, just above the member's

signature line, the form text specified,

> I hereby elect to have my retirement contributions after 30 years of service posted to a separate account that is refundable at my retirement. I understand that contributions will be posted to the refundable account beginning the month after I submit this election form and I have accumulated at least 30 years of service credit. *Furthermore, I understand that my Average Final Compensation (AFC) will be based on earnings prior to DRS receiving this election.* (The AFC is used in the retirement benefit calculation to determine the amount of your monthly retirement benefit.)

(Italic emphasis added.)

15. In early 2004 Mr. Sloma was extremely busy managing the transition to a new director at the Department of Health and his own transition to part-time post-retirement employment. He paid only cursory attention to his choice to enroll in the post-30-year program, which was just one piece of paperwork among many. He saw the election as simply a way to obtain a refund of a few months' PERS employee contributions. He does not recall discussing any other effect of the post-30-year election with anyone, or receiving any advice that his choice could affect his benefit after future re-employment. He noticed the "irrevocable election" language, but since he was planning to retire in the immediate future, he thought it only might bar him from buying back service credit or salary for the months between his 30-year-service anniversary and his retirement (in the past he had withdrawn PERS contributions, then later restored (bought back) the lost service credit by restoring the withdrawn contributions).

16. The Department enrolled Mr. Sloma in the PERS post-30-year program effective February 1, 2004. The PERS employee contributions withheld from his pay were then posted to a post-30-year account for later refund.

17. Mr. Sloma retired from the Department of Health effective March 1, 2004, at 54 years of age. The Department calculated his PERS AFC at $6,492.80 monthly, yielding a gross monthly retirement benefit of $3,895.68, and began paying his retirement benefit in that amount. The Department refunded to him the PERS employee contributions he made after his choice of the post-30-year program became effective, in a lump sum totaling $920.60.[11]

18. Beginning in March 2004 Mr. Sloma worked half-time for two foundations, the Washington Health Foundation (2004-2010) and the Comprehensive Health Education Foundation (CHEF) (2011-2012). He maintained many contacts in the public health and health advocacy community.

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[11] The net payment was $736.48 after deduction for federal income tax of $184.12.

Mr. Sloma's County employment 2012-2015

19. Thurston County (the County) is a PERS employer. The County is governed by a three-member board of commissioners. The commissioners also serve as the County's Board of Health (the Board), which oversees the County's Public Health and Social Services Department (PHSS) and appoints its director.

20. Mr. Sloma has lived in Thurston County for over 25 years and had long-standing acquaintance with all three of the commissioners serving the County in 2011. That year he became aware through his personal contacts that the County's then-PHSS director planned to retire.

21. In late summer of 2011, in a meeting with then-Commissioner Wolfe on topics of interest to CHEF, the County and a regional health network, Mr. Sloma and Commissioner Wolfe discussed the PHSS director position in terms of the direction that department should take five to ten years in the future. At the time Mr. Sloma was not interested in working full-time or in taking the position, but expressed his opinion that the County and the incoming director needed to re-assess the role and expectations of that department to align with changes in the area of public health.

22. The County's 2011 recruitment for the PHSS director position was unsuccessful. When the County began efforts for a second recruitment, Mr. Sloma agreed to look over the job description with an eye toward his vision of how the director should be aligning the County's department with the wider public health environment. The wording of the recruitment was changed to reflect his suggestions.

23. Mr. Sloma was encouraged to apply for the position. Although he did not think it likely that he would be selected, he saw that it offered something interesting and challenging that he had not had the chance to do before, and that his knowledge and experience would be useful in the type of re-assessment he had been recommending.

24. In thinking about whether to apply for the PHSS director position with the County in late 2011 and early 2012, Mr. Sloma considered how taking a full-time PERS-covered position might affect his PERS retirement benefit and his Social Security benefits. In his years working for the legislature, he had observed legislators who were PERS members take higher-paid positions late in their careers where the increased salary factor would increase their resulting retirement benefits, a strategy he refers to as "re-basing" their benefits. He thought that the County PHSS director position might also offer an opportunity for him to "re-base" his benefit, which at the end of 2011 was the same as it had been when he retired in 2004.

25. Mr. Sloma sought information from DRS. In response to a request from him, on December 16, 2011 Customer Service Specialist April Zmuda sent him a letter verifying the amount of his monthly PERS retirement benefit. Also in response to a request from him, on January 26, 2012 Retirement Analyst Katie Johnson emailed Mr. Sloma a copy of his "PERS record", his PERS employment history.

26. The County re-published its recruitment announcement for the PHSS director, and Mr. Sloma applied for the position on January 30, 2012, shortly after receiving his PERS-record message from Ms. Johnson. Though not the only consideration, the ability to re-base his PERS retirement benefit was a motivating factor in his decision to apply. He was "fairly sure" at that point that he would be able to re-base his PERS retirement benefit, from his contacts with DRS, his observations of individuals who had re-based their benefits while he was working for or with legislative bodies, and from conversations with his wife, whose opinion he regarded highly because of her lengthy service as a state employee with experience in employee compensation and benefits.

27. In his application and interview(s) with the County Mr. Sloma made clear that if he were selected he would pursue definite goals for the PHSS department. He was offered the position sometime before April 12, 2012, but he did not accept it right away. He investigated and negotiated several aspects of his possible future role, such as reporting relationships, Board support and staff support.

28. Mr. Sloma and the County did not extensively negotiate concerning salary and benefits. The County offered a salary that would "make it worth his while", at a level nearly identical to what he had been earning part-time with CHEF. The benefits offered were mostly those that were standard for County employees, including participation in PERS.

29. In deciding whether to accept the County's offer, Mr. Sloma considered again how taking the PHSS director's position would affect his PERS retirement. He saw this as a significant financial decision. He made County personnel department staff aware of his concerns and inquired how his PERS retirement benefit would be affected if he were to accept the position. County personnel staff responded with general information, but referred him to DRS for specific questions about PERS.

    From conversations with County personnel staff, earlier contacts with DRS, and the 2012 DRS publication *Thinking About Working After Retirement*?, he understood that if he accepted employment with the County he could either continue to receive his retirement benefit for five months of each year, or he could re-enter active PERS membership and retire again from PERS in the future. He viewed the latter as the better choice when he considered that it

would allow him to re-base his pension (have his new PERS retirement benefit increased, using the considerably higher salary he would earn working for the County when he retired again).

30. After meetings with the commissioners and PHSS staff to ascertain that he would have the support he needed for the changes he intended to implement, Mr. Sloma accepted the offered position. The Board appointed him as the County's Director of the Public Health and Social Services Department effective May 1, 2012; the appointment was confirmed in a letter to him of April 12, 2012 from County Manager Donald Krupp.

    The County's April 13 news release announcing the appointment also stated,

    > Commissioners, serving as the Board of Health, will work with Mr. Sloma, everyone in Public Health and Social Services and the community on a visioning process to create a strategic plan and goals for the future of public health in Thurston county. It is hoped that one of the outcomes will be new partnerships on the local and regional levels as well as strengthening of existing collaborative efforts.

    Mr. Sloma began work for the County on May 1, 2012.

31. Mr. Sloma accepted the PHSS director position believing that the higher salary in his new employment with the County would enable him to re-base his PERS retirement benefit when he later retired again. Shortly after he began work with the County he needed to make decisions in order to complete forms required for his new position, and he again contacted the Department.

32. On May 2 Mr. Sloma spoke with Ms. Johnson by telephone, and on May 3 and 4 they exchanged emails. Mr. Sloma sought written confirmation from DRS that he would be able to re-base his pension if he took the PHSS director position with the County and re-entered active PERS membership. Ms. Johnson wrote that her research, and consultation with her team leader and other experienced retirement analysts, had produced answers to two of his concerns. First, he would have to work a minimum of 24 months in a new PERS-covered position in order to change the payment (survivor) option for a future retirement benefit. Second, "any compensation you earn after returning to membership will be reviewed when determining your 24-month AFC at time of retirement". Ms. Johnson included in her message text quoted from two DRS publications, a Department rule, WAC 415-108-710, and a statute, RCW 41.40.037.

    Mr. Sloma responded with a query attempting to clarify further that there was no minimum amount of time he needed to work in his new job to have his

new earnings included in any new AFC. Ms. Johnson reiterated in her response message,

> Summary; after returning to active membership it doesn't matter how long you work and then re-retire to have the new compensation and service credits counted towards re-calculating your new AFC for re-retirement. But if you decide that you want a different retirement option when you re-retire you have to work at least 24 months before you re-retire.

Mr. Sloma appreciated Ms. Johnson's efforts, feeling she had taken an interest in his situation and made an effort to get clear answers for him.

33. In their 2012 interactions, neither Mr. Sloma nor Ms. Johnson considered or discussed the post-30-year election he made in 2004. Mr. Sloma had forgotten about it, and it never occurred to him that it might be relevant to his post-retirement employment. Ms. Johnson was not aware that he had made the election, having never opened a "screen" in his electronic member file where his election was recorded. She did not recall ever having been made aware that a Plan 1 post-30-year election could affect a PERS retiree's return to PERS-covered employment.

34. On May 4, 2012, within an hour of acknowledging Ms. Johnson's last message, Mr. Sloma e-mailed DRS, advising that he was employed with a PERS employer, was in a PERS retirement-eligible position, and wanted to start contributing to his PERS Plan 1 retirement again.

35. DRS instructed the County to begin reporting Mr. Sloma to DRS as an active PERS member, as of May 1, 2012. Mr. Sloma resumed contributing six percent of his pay to PERS.

36. Shortly after he began working for the County Mr. Sloma was able to arrange to stop receipt of his Social Security benefits, repay some already received, and start making employee contributions to Social Security through his County employment to eventually qualify for a higher monthly Social Security benefit.

37. Though it was hard work to manage the process of re-assessing the goals and direction for the County's PHSS department, Mr. Sloma experienced the work as fun, interesting, and a fulfilling professional opportunity. During his employment with the County he did not consider or apply for other jobs.

Mr. Sloma's second PERS retirement

38. While Mr. Sloma was working for the County he and his wife were actively seeking to purchase a waterfront home, working for a lengthy time with a real estate agent in Tacoma. In approximately June of 2015 they located a property that they could purchase on favorable terms. Mr. Sloma and his

wife carefully reviewed their finances, including his anticipated post-retirement income, and applied for a mortgage to purchase this long-sought property. Because of this major pending purchase commitment, Mr. Sloma again sought assurance from DRS that his PERS benefit would be re-based using his County salary. He understood from telephone conversations in late June or early July 2015 with Department representative Mark Muller that the Department would count his County salary in its calculation of his new retirement benefit, estimated at $6,110 per month.

39. On or about July 9, 2015, Mr. Sloma requested a written estimate of his PERS benefit if he retired from his position with Thurston County in October 2015. Department staff preparing Mr. Sloma's requested benefit estimate became aware of his 2004 enrollment in the PERS Plan 1 post-30-year program. The resulting estimate of his new retirement benefit did not include his County salary in the AFC factor. Instead, that factor reverted to the AFC that had been used for his 2004 retirement benefit.

40. On July 10, 2015, DRS Plan Administrator Seth Miller called Mr. Sloma to discuss the July 9 benefit estimate and his retirement options.

    Mr. Sloma was extremely angry that his PERS retirement benefit would not reflect his County salary. Without the expected $2,214 monthly increase to his expected retirement benefit, he and his wife felt forced to cancel the purchase of the house they had planned to buy after years of looking.

41. In a follow-up letter to Mr. Sloma of July 13, 2015, Mr. Miller confirmed that DRS would not include his County salary in its calculation of AFC for his PERS retirement benefit when he retired again. The letter reviewed Mr. Sloma's enrollment in the post-30-year program and 2004 retirement benefit calculation, his "numerous phone conversations" with DRS representatives in early May 2012, and his May 4, 2012 decision to re-enter PERS membership. Mr. Miller pointed out the text from WAC 415-108-710 that had been included in Ms. Johnson's May 3, 2012 e-mail message, and that DRS had never provided Mr. Sloma with an estimate of what his PERS retirement benefit would be based on projected future salary if he returned to membership. Mr. Miller related that when Retirement Specialist Team Leader Mark Muller began to prepare an official benefit estimate on July 9, 2015, Mr. Sloma's 2004 post-30-year program enrollment "was brought to his [Mr. Muller's] attention", so the benefit estimate showed only a small increase over his original PERS Plan 1 benefit, due solely to a projected cashout of unused leave.

    Mr. Miller advised,

    > DRS does not have the authority to provide you with a benefit that is greater than the statutes allow. With your selection to enter the Post 30-year

program in January 2004 DRS is required to calculate your AFC only with earnings prior to this election (excluding cash outs).

In the body of the letter Mr. Miller recounted two options he had offered Mr. Sloma in the July 10 telephone call. The first option would be to proceed with his planned retirement, using the value of cashed out leave in his AFC to increase the retirement benefit from $3,895.68 per month to $4,050.88 per month. The Department would pay him the amount of his 2012-2015 PERS employee contributions plus statutory interest, approximately $26,000, either a cash payment in a lump sum "or rolled over".

The second option would be for Mr. Sloma to undo his return to PERS membership during his employment with the County. The Department would still pay him the amount of his 2012-2015 PERS employee contributions plus interest, approximately $26,000. It would also pay him a lump sum equivalent of five months per year of his original PERS Plan 1 retirement benefit, approximately $77,913.

42. Mr. Sloma retained counsel and requested that DRS review its actions in his case. By letter of October 9, 2015, Mr. Miller advised Mr. Sloma that the Department could not continue to offer the first option outlined in his letter of July 13, 2015, citing advice from tax counsel. Mr. Miller further advised that the department would implement the second option in his earlier letter, that is, refunding Mr. Sloma's PERS employee contributions with interest and paying him the lump sum equivalent of five months per year of his original PERS Plan 1 retirement benefit. Acknowledging Mr. Sloma's concern about potential tax liability if he received a lump sum distribution in 2015, Mr. Miller offered to work with him to have the distribution allocated to 2016.

43. Mr. Sloma retired from his position with the County effective October 31, 2015. He has not chosen either of the options offered in Mr. Miller's letter of July 13, 2015, and has not received any payments from the Department other than his PERS retirement benefit. That benefit does not include any value for the unused leave he was paid by the County when he retired.

    Mr. Sloma and his wife own a home that they built in the early 1990's, and a rental house that provides some income. They both have deferred compensation accounts.

Review and appeal procedure

44. Mr. Sloma petitioned for internal review of the Department's refusal to adjust the calculation of his PERS retirement benefit with a higher AFC reflecting his salary during his 2012-2015 employment with the County. In a decision issued March 10, 2016, a petitions examiner for the Department concluded that in calculating Mr. Sloma's 2015 retirement benefit the Department

correctly excluded from his AFC the salary he earned while working for the County.

45. On April 4, 2016, Mr. Sloma filed a Notice of Appeal requesting a hearing to pursue his claim for an adjusted PERS Plan 1 retirement benefit based on an AFC reflecting his higher earnings from his 2012-2015 employment with the County.

II. Analysis

Department authority

1. The Department of Retirement Systems (DRS, or the Department) is charged with the administration and management of the Public Employees' Retirement System, and with the express responsibility for making effective the provisions of the PERS statute, chapter 41.40 RCW.[12]

Jurisdiction, burden of proof

2. The Department has jurisdiction over the parties and the subject matter of this appeal.[13]

3. The Presiding Officer issues this order as the Department director's designee.[14]

4. Mr. Sloma has the burden of proof in his appeal.[15]

Summary judgment

5. In an administrative appeal, a party may obtain a favorable order on summary judgment if the written record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[16]

   Evidence is considered in the light most favorable to the non-moving party.[17]

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[12] RCW 41.40.020.
[13] RCW 41.40.068, .073; chapters 41.40 and 41.50 RCW; WAC 415-08-020(1).
[14] RCW 41.50.060, RCW 34.05.425(1)(b), RCW 34.05.461(1)(b).
[15] WAC 415-08-420(2).
[16] WAC 10-08-135.
[17] *See, for example, Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186 (2014).

A. Calculation of Sloma AFC for 2015 re-retirement benefit

PERS Plan 1 retirement and re-retirement

6. Among the PERS statute sections fundamental to retirement in Plan 1 are the following.

RCW 41.40.180 sets the age and service requirements for a member to be eligible to retire.

> (1) Any member with five years of creditable service who has attained age sixty and any original member who has attained age sixty may retire on written application to the director, setting forth at what time the member desires to be retired: . . .
>
> (2) Any member who has completed thirty years of service may retire on written application to the director setting forth at what time the member desires to be retired . . .

RW 41.40.185 sets the components and formula for a retirement benefit (standard allowance).

> Upon retirement from service, as provided for in RCW 41.40.180 . . ., a member shall be eligible for a service retirement allowance computed on the basis of the law in effect at the time of retirement . . . The service retirement allowance payable to members retiring on and after February 25, 1972 shall consist of:
>
> (1) An annuity . . .
>
> (2) A membership service pension . . . , which shall be equal to two percent of his or her average final compensation for each service credit year or fraction of a service credit year of membership service.
>
> (3) A prior service pension . . .[18]

RCW 41.40.188 authorizes "survivor options", options for payment of a retirement benefit other than the standard allowance.

> (1) Upon retirement for service as prescribed in RCW 41.40.180 . . . a member shall elect to have the retirement allowance paid pursuant to one of the following options calculated so as to be actuarially equivalent to each other.

[18] The Department states in its motion (fn 1) that only subsection (2) applies in Mr. Sloma's case, and this statement has not been challenged. Subsections (1) and (3) are assumed to be inapplicable and are not set out in full.

(a) Standard allowance. A member electing this option shall receive a retirement allowance payable throughout such member's life. . . .

(b) The department shall adopt rules that allow a member to select a retirement option that pays the member a reduced retirement allowance and upon death, such portion of the member's reduced retirement allowance as the department by rule designates shall be continued throughout the life of and paid to a person nominated by the member by written designation duly executed and filed with the department at the time of retirement. The options adopted by the department shall include, but are not limited to, a joint and one hundred percent survivor option and a joint and fifty percent survivor option. . . .

RCW 41.40.010 defines terms for the PERS Plan 1 retirement benefit formula.

(6) (a) "Average final compensation" for plan 1 members, means the annual average of the greatest compensation earnable by a member during any consecutive two year period of service credit months for which service credit is allowed; or if the member has less than two years of service credit months then the annual average compensation earnable during the total years of service for which service credit is allowed.

. . .

(8) (a) "Compensation earnable" for plan 1 members, means salaries or wages earned during a payroll period for personal services . . .

[(ii) "Compensation earnable" does not include:
(A) Remuneration for unused sick leave . . .]

7. WAC 415-108-710(6) states that when a PERS member retires, and later re-enters membership and retires second time, the Department will "recalculate [sic] his retirement benefit [allowance] under the applicable statutes and regulations". Two sections of the PERS statute, RCW 41.40.023 and RCW 41.40.037, directly address system membership and re-retirement for retirees.

Membership in the retirement system shall consist of all regularly compensated employees and appointive and elective officials of employers, as defined in this chapter, with the following exceptions: . . .

(12) Retirement system retirees: PROVIDED, That following reemployment in an eligible position, a retiree may elect to prospectively become a member of the retirement system if otherwise eligible; . . .

RCW 41.40.023 (last amended by Laws of 1997, ch.254, sec. 11).

(1) (a) If a retiree enters employment with an employer sooner than one calendar month after his or her accrual date, the retiree's monthly retirement allowance will be reduced by five and one-half percent for every eight hours worked during that month. This reduction will be applied each month until the retiree remains absent from employment with an employer for one full calendar month. . .

(2) A retiree from plan 1, plan 2, or plan 3 who enters employment with an employer at least one calendar month after his or her accrual date may continue to receive pension payments while engaged in such service for up to eight hundred sixty-seven hours of service in a calendar year without a reduction of pension. . .

(3) If the retiree opts to reestablish membership under RCW 41.40.023(12), he or she terminates his or her retirement status and becomes a member. Retirement benefits shall not accrue during the period of membership and the individual shall make contributions and receive membership credit. Such a member shall have the right to again retire if eligible in accordance with RCW 41.40.180. However, if the right to retire is exercised to become effective before the member has rendered two uninterrupted years of service, the retirement formula and survivor options the member had at the time of the member's previous retirement shall be reinstated.

. . .

RCW 41.40.037.[19]

These two sections and WAC 415-108-710 apply to all three PERS plans.

8. For a PERS Plan 1 retiree who opted to reestablish PERS membership and retire again under RCW 41.40.037(3), and whose new period of PERS service was less than 24 months, the Department is to calculate the re-retirement benefit using the same retirement formula and payment option it used when he retired before. If the retiree earned new service credit of 24 months or more, the Department would not be bound by the same retirement formula and payment option it used when he retired before. Thus for a PERS Plan 1 member eligible to retire again under RCW 41.40.180, after post-retirement PERS service longer than 24 months, the Department would calculate the re-retirement benefit by applying the benefit formula in RCW 41.40.185, with a reduction for any survivor option chosen by the member under RCW 41.40.188.

Effect of post-30-year program -- RCW 41.40.191

9. Mr. Sloma seeks to have the Department "re-base his pension", that is, calculate his retirement benefit for his 2015 re-retirement under RCW 41.40.037(3)

[19] This is the 2011 version of RCW 41.40.037, which was effective during most of Mr. Sloma's employment with the County. The terms of subsection (3) are the same as when the section was enacted, Laws of 1997, ch. 254, sec. 15. Subsection (2) was amended in 2015, but the changes do not affect the issues or analysis here.

according to the formula in RCW 41.40.185(2), with the AFC component reflecting the higher salary he earned during his PERS service with the County.[20]

The Department has refused to do this. Instead, when Mr. Sloma retired in 2015, the Department looked back to his choice to participate in the post-30-year program in 2004, and it carried forward the effect of his 2004 choice to 2015. By reference to RCW 41.40.191(2), it disregarded the salary he earned with the County between 2012 and 2015. It calculated the AFC component of his re-retirement benefit using the AFC credited to him in 2004 before he chose the refundable account option.

10. In pertinent part, RCW 41.40.191 states,

> A member may make the irrevocable election under this section no later than six months after attaining thirty years of service. The election shall become effective at the beginning of the calendar month following department receipt of employee notification.
>
> (1) The sum of member contributions made for periods of service after the effective date of the election plus seven and one-half percent interest shall be paid to the member at retirement without a reduction in the member's monthly retirement benefit as determined under RCW 41.40.185.
>
> (2) *Upon retirement, the member's benefit shall be calculated using only the compensation earnable credited prior to the effective date of the member's election.* Calculation of the member's average final compensation shall include eligible cash outs of sick and annual leave based on the member's salary and leave accumulations at the time of retirement, except that the amount of a member's average final compensation cannot be higher than if the member had not taken advantage of the election offered under this section.
>
> . . .

(Italic emphasis added.)

11. Under RCW 41.40.191, a PERS Plan 1 member may notify the Department that he will participate in the post-30-year program; if he does, when he retires, the Department will be required to refund, with interest, the PERS contributions he made after notifying the Department of his choice.

The refund itself will not affect the calculation of the member's retirement benefit, but two limits in subsection (2) may affect the calculation. The first is the "freeze" on the member's compensation at the point where the member chose the refundable account option; after this point the Department must calculate the member's AFC using only compensation earned before the election. The second

[20] Mr. Sloma's PERS service with the County extended beyond 24 months, so the calculation of his re-retirement benefit would not be subject to the 24-month restriction in RCW 41.40.037(3) discussed just above.

limits the total amount of the member's AFC. The Department is to add in the value of eligible leave the member has accumulated at the time of retirement, and, after comparing the result against the AFC that it would have used if the member had not chosen the refundable account option, take the smaller of the two as the member's total AFC.

12. Mr. Sloma chose to participate in the post-30-year program just before his 2004 PERS retirement. As far as can be seen from the record, the Department followed the requirements of RCW 41.40.191 at that time, and its actions then are not challenged here. The dispute here arises from the Department's application of these requirements to Mr. Sloma's second PERS retirement in 2015.

13. A Plan 1 member who chooses the refundable account option authorized in RCW 41.40.191 also accepts the subsection (2) freeze on the compensation that can be counted in his AFC when he retires. Subsection (2) applies "upon retirement", without further detail as to time or sequence.

Parties' positions

14. The Appellant points out that RCW 41.40.191, authorizing the post-30-year program for PERS Plan 1 members, does not affect a retiree's ability to later take PERS-covered employment, become an active member of PERS and retire a second time, as authorized by RCW 41.40.023(12), RCW 41.40.037(3), and WAC 415-108-710(6). He reasons that, for a second or subsequent retirement, the Department should calculate the Plan 1 retiree's retirement benefit under RCW 41.40.185(2), using the definition in RCW 41.40.010(6)(a) for the AFC component of his re-retirement benefit. In his case this would produce a new AFC based on his County salary, and a monthly PERS re-retirement benefit some 50% greater than the benefit he now receives.

15. The Department gives much more extensive effect to RCW 41.40.191, particularly the freeze on AFC in RCW 41.40.191(2). In its motion for summary judgment the Department seeks a ruling to the effect that, once a PERS Plan 1 member chooses the refundable account option in RCW 41.40.191, the freeze in subsection (2) is permanent, and will always control the calculation of AFC. Thus the freeze on AFC in RCW 41.40.191(2) effectively supplants or overrides the conventional calculation of "average final compensation", as defined in RCW 41.40.010(6)(a), in the formula for a Plan 1 retirement benefit under RCW 41.40.185(2). The Department's application of the RCW 41.40.191(2) freeze on AFC therefore prevents any significant increase in Mr. Sloma's 2015 retirement benefit.

16. In the Appellant's view RCW 41.40.191(2) need not be read as a permanent freeze on AFC for a retiree who re-enters PERS membership and re-retires. He would read "upon retirement" to refer to only the member's retirement that follows his choice of the refundable account option. A retiree's original choice of the

refundable account option thus need not have any continuing effect on any later re-retirement under RCW 41.40.037(3), and the Department should not apply the RCW 41.40.191(2) freeze on AFC when a retiree retires again after re-entering PERS membership as part of post-retirement employment.

17. The Department emphasizes that the choice of the refundable account option under RCW 41.40.191 is expressly designated an "irrevocable election". Because this section first makes the election irrevocable, "upon retirement" in subsection (2) means every subsequent retirement. The Department characterizes the Appellant's argument as an impermissible attempt to revoke his 2004 election to participate in the post-30-year program.

Discussion

18. The Appellant's memorandum opposing the Department's motion for summary judgment shows that he does not deny that in 2004 he received the required refund of his PERS employee contributions for February; he accepts that for his 2004 retirement he could not revoke his choice to participate in the post-30-year program; and he does not seek to undo his election with respect to that retirement, or the Department's implementation of his choice. Without undoing his decision to enroll in the post-30-year program, he seeks to confine the effects of his 2004 election to his 2004 retirement.

19. The Appellant emphasizes that his legal argument is not inconsistent with any provision in the PERS statute. The PERS statute lacks language expressly connecting or cross-referencing the post-30-year program (RCW 41.40.191) and the sections governing re-entry into to PERS membership and later re-retirement (RCW 41.40.023(12) and RCW 41.40.037). The Department's rules are similarly silent on how the legislative directives regarding the post-30-year program interact with post-retirement employment and re-retirement for PERS Plan 1 retirees.

20. The Department cites appellate court opinions and final orders of the Department, including *In re Appeal of Fowler,*[21] to support its position that RCW 41.40.191(2) permanently fixes a retiree's AFC (except for the potential value of leave cash outs). In *Fowler* the Department considered the effect of the term "irrevocable election" in RCW 41.32.4986, the post-30-year program provision in Plan 1 of the Teachers' Retirement System (TRS), which is nearly identical to RCW 41.40.191 for PERS Plan 1. Mr. Fowler notified the Department of his choice to participate in the post-30-year program, but was permitted to withdraw his notification before it became effective. The order in *Fowler* did not extend to whether a member's choice of the post-30-year program would affect his AFC for any later re-retirement. Like *Fowler*, the other opinions and orders cited by the Department do not involve the interaction between the "irrevocable election" to participate in the post-30-year program and a subsequent re-retirement. They do not assist in answering the question presented here, which is, given an effective election to

[21] DRS Docket No. 03-T-012 (February 10, 2004).

participate in the PERS post-30-year program, whether the Department must continue to apply the freeze on AFC in RCW 41.40.191(2) to any retirement after the member's initial retirement.

21. No other sources of law, such as regulations or decisions with precedential effect, have been identified to resolve this dispute about the application of different sections of the PERS statute. The Department gives the freeze on AFC in RCW 41.40.191(2) overriding effect in light of the direction in the same section that a member's choice of the refundable account option is an "irrevocable election", so that "upon retirement" refers to any retirement after the election is made. It views RCW 41.40.191 as complementing, rather than in conflict with, the sections of the PERS statute authorizing active PERS membership and re-retirement for PERS Plan 1 retirees. However, acknowledging that, to the extent that RCW 41.40.191(2) may be inconsistent with RCW 41.40.185(2) and 41.40.010(6)(a) for the calculation of AFC for a Plan 1 member's re-retirement benefit, the Department views RCW 41.40.191 as controlling because it is the more recent and specific section addressing that calculation.

22. As the agency charged with the administration and management of PERS and with the express responsibility for making effective the provisions of the PERS statute, the Department necessarily exercises authority to resolve inconsistencies or ambiguities to advance the purposes and goals of the statute. The Department has properly exercised its discretion here to produce a rational reading of the PERS statute in which RCW 41.40.191 controls over other sections where they may be inconsistent.[22] The Appellant provides an alternate reading in which RCW 41.40.037, 41.40.185(2) and 41.40.010(6)(a) control over RCW 41.40.191(2). His reading is not compelling, and he has not demonstrated that the Department's application of RCW 41.40.191 is unreasonable or in error. Since the parties' filings demonstrate no genuine issue of material fact between them on these questions, in this forum the Department is entitled to judgment as a matter of law.

B. Equitable Estoppel

23. Mr. Sloma's main argument in this appeal is that the Department should be equitably estopped from applying RCW 41.40.191(2) to exclude his County salary from its calculation of his AFC for his 2015 re-retirement benefit. Although it does not exercise general equitable authority, this agency considers equitable estoppel in appropriate circumstances, within the limits our state courts place on its use by administrative agencies. In an administrative adjudication, equitable estoppel is appropriately considered and applied where it is raised as a defense to a claim. In *Motley-Motley, Inc., v. Pollution Control Hearings Board*, 127 Wn. App. 62 (2005), the court confirmed the PCHB's inherent authority to hear and decide equitable estoppel, but only when raised as a *defense*. "Equitable estoppel is available only

[22] The Department's submissions suggest that its application of RCW 41.40,191 depends in some measure upon federal taxation requirements, an aspect of its position not considered here.

as a shield, or defense; it is not available as a sword, or cause of action." 127 Wn. App. at 73-75 (citing *Chemical Bank v. WPPSS*, 102 Wn.2d 874 (1984)).

24. The Department has not asserted any claim against Mr. Sloma. Rather, he brings this administrative appeal to pursue his claim for a higher retirement benefit. In this procedural posture there is no authority to consider or apply the defense of equitable estoppel. *In re Appeal of Gahan*, DRS Docket No. 05-P-009 (March 16, 2006), Conclusions 31-32.

Conclusion

25. Having made an irrevocable election to participate in the PERS plan 1 post-30-year program with his first retirement, the Appellant, after re-entering active PERS membership in post-retirement PERS-covered employment, and retired again, is not entitled to a re-retirement benefit calculated with an AFC component reflecting the increased salary earned in his post-retirement employment. In his situation equitable estoppel will not sustain his claim for an increased retirement benefit.

Entered this 31st day of August, 2017.

ELLEN G. ANDERSON
Presiding Officer
Department of Retirement Systems

Notice of Further Appeal Rights

Reconsideration: Any party to this appeal may ask the DRS Presiding Officer to reconsider this Order, but must do so promptly. The party must file a petition for reconsideration within ten days of the mailing date in the certification at the top of this Order. The ten-day time limit is strictly observed; DRS must **receive** the petition within that time. RCW 34.05.470, 34.05.010(6).

A petition for reconsideration must state specific reasons why the Order should be changed, and must be addressed to the Presiding Officer at the Department of Retirement Systems, PO Box 48380, Olympia, WA 98504-8380.

Judicial Review: A party may request judicial (Superior Court) review of this Order. A petition for judicial review must be filed within 30 days of the Order mailing or service date. ***Any party seeking Superior Court review should carefully read and comply with the requirements for judicial review in the state Administrative Procedure Act (chapter 34.05 RCW).*** Petitions for judicial review go directly to the Superior Court; it is not necessary to request DRS reconsideration. RCW 34.05.470(5), 34.05.542.

Appendix C

Thurston County Superior Court

Order Affirming DRS' Final Order

December 24, 2018

The Honorable Amber Finlay

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

DONALD SLOMA, Petitioner, vs. DEPARTMENT OF RETIREMENT SYSTEMS OF THE STATE OF WASHINGTON, Respondent.	NO. 17-2-05134-34 ORDER AFFIRMING DEPARTMENT OF RETIREMENT SYSTEMS' FINAL ORDER

THIS MATTER CAME ON FOR HEARING on September 11, 2018, on Petitioner's petition for judicial review pursuant to the Administrative Procedure Act (RCW 34.05). The Petitioner, Donald Sloma, was represented by WILLIAMS, WYCKOFF & OSTRANDER, PLLC, per WAYNE WILLIAMS, Attorney at Law. The Respondent, the Department of Retirement Systems (the Department), was represented by ROBERT W. FERGUSON, Attorney General, per NAM NGUYEN, Assistant Attorney General.

The Petitioner petitioned for review of the Department's Final Order, dated August 31, 2017, through which the Department denied his request to have his Public Employees' Retirement System (PERS) Plan 1 retirement benefits calculated to include the compensation earnable from his position as Director of the Thurston County Department of Public Health.

This Court, having considered the Certified Administrative Record and the briefs and oral argument of the parties, concludes:

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1. Under the error-of-law standard set forth in RCW 34.05.570(3)(d), the Department's Final Order contains no error of law.

2. Under the substantial evidence standard set forth in RCW 34.05.570(e), the Department's findings, conclusions, order, and denial of Mr. Sloma's request to have his PERS Plan 1 retirement benefits calculated to include the compensation earnable from his position as Director of Thurston County Department of Public Health are supported.

Accordingly, the Court now enters the following:

ORDER

The Department of Retirement Systems' Final Order is affirmed.

DONE IN OPEN COURT this 21 day of December, 2018

THE HONORABLE JUDGE FINLAY

Presented by:

Nam D. Nguyen, WSBA No. 47402
Assistant Attorney General

Approved as to form, notice of presentation waived:

Wayne Williams, WSBA No. 4145

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Appendix D
Administrative Procedure Act
RCW 34.05.570

RCW 34.05.570

Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

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

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW **2.06.020**(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW **2.06.020**(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW **34.05.425** or **34.12.050** was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW **34.05.514**, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an

answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW **34.05.562**, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[**2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13.** Formerly RCW **34.04.130**.]

NOTES:

Findings—Short title—Intent—1995 c 403: See note following RCW **34.05.328**.

Effective date—1989 c 175: See note following RCW **34.05.010**.

WILLIAMS, WYCKOFF & OSTRANDER, PLLC

March 30, 2020 - 4:24 PM

Transmittal Information

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