

64362-2

64362-2

NO. 64362-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS, and  
KING COUNTY,

Appellants.

v.

WILLIAM SERRES, on behalf of himself and a class of persons similarly  
situated

Respondent

2019 JUN 20 10:10 AM  
COURT OF APPEALS  
DIVISION I

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**KING COUNTY'S APPELLATE BRIEF**

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**ORIGINAL**

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**A. ISSUES PRESENTED**

1. Did the Superior Court err in overturning the Washington State Department of Retirement System's ruling that the *Duncan/Roberts* settlement payments were not compensation earnable pursuant to RCW 41.40.010(8)(a)?
2. Did the Superior Court err in determining that the DRS Presiding Officer committed an error of law pursuant to RCW 34.05.570(3)(d) in determining that the *Duncan/Roberts* settlement payments were not compensation earnable?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The core issue between the parties in this litigation is whether a settlement payment from an earlier class action lawsuit meets the statutory definition of compensation earnable in RCW 41.40.010(8). If the settlement payment had been deemed to be compensation earnable, it would have been included in calculating William Serres<sup>1</sup> average final

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<sup>1</sup> Serres represents a class of individuals defined as:

Members of the plaintiff class in both *Roberts, et. al. v King County ("Roberts")*, King County cause number 97-207412-6SEA, and *Duncan, et. al. v. King County ("Duncan")*, (originally King County cause number 02-1-360921-2SEA), which were consolidated for settlement under King County cause number 97-207412-6SEA ("Roberts/Duncan"), whose retirement allowance under the Washington State Public Employees' Retirement System (PERS) would be increased if distributions they received as a result of the settlement in *Roberts/Duncan* were considered in computing their Average Final Compensation.

In this brief, the class will be referred to as Serres.

compensation (see RCW 41.40.010(17)(a)) to use in determining his retirement benefits.

**A. The Prior Litigation**

*Roberts v. King County*, King County Superior Court Cause No. 97-207412-6SEA, was filed on March 21, 1997. The *Roberts* class alleged that King County violated the King County Code and state law by not paying class members' equal pay for equal work. CP 198. A second class action lawsuit, *Duncan v. King County*, King County Superior Court Cause No. 97-207412-6 was filed on October 10, 2002, alleging that the County had failed to adjust class members' compensation and classifications and that they were not being treated in the same fashion as other County employees. *Id.* The *Roberts* and *Duncan* classes both sought damages including injunctive relief, prejudgment interest, double damages, and attorneys' fees. CP 198-199. The two cases were consolidated in August of 2003<sup>2</sup>. CP 199. The parties settled the *Duncan/Roberts* lawsuits in October of 2003. CP 200. The Honorable Richard Jones of the King County Superior Court approved the parties' settlement agreement on December 4, 2003. CP 202.

In September of 2004 a representative from King County's Office

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<sup>2</sup> The consolidated case will be referred to as *Duncan/Roberts* in this Brief.

of Management and Budget sent a letter to the Washington Department of Retirement Systems (DRS) explaining why the County felt that the *Duncan/Roberts* settlement payments should not be considered compensation earnable. CP 203. On March 15, 2005, Michelle Hardesty, PERS system administrator for DRS, advised King County that:

Based on the fact that the intent of the [settlement] agreement is to settle the lawsuits, not provide retroactive salary payments to make the claimants whole, the monetary awards paid by King County at settlement of the Roberts and Duncan class action lawsuits are not considered compensation earnable under RCW 41.40.010(8).

CP 203.

**B. The Administrative Proceeding**

William Serres was a *Duncan* class member. CP 204. Mr. Serres received a settlement check from King County for \$3,404.64 in September 2004 representing his pro rata share of the settlement proceeds in the *Duncan/Roberts* litigation. CP 204. On November 8, 2005, Mr. Serres wrote a letter to DRS requesting that a portion of his *Duncan/Roberts* settlement check be considered compensation earnable attributable to his average final compensation. CP 204. DRS denied his request. CP 205. Mr. Serres petitioned DRS for an internal review of its decision. CP 205. On June 13, 2007, the DRS Petitions Examiner issued a decision denying Mr. Serres request to include his *Duncan/Roberts* settlement payment in

his average final compensation. CP 205. Mr. Serres filed a notice of appeal of the DRS Petitions Examiner's decision on July 11, 2007.

On March 31, 2008, the DRS Presiding Officer granted DRS and King County's summary judgment motions denying Mr. Serres' appeal of the petition examiner's decision. CP 209. The DRS Presiding Officer ruled that the *Duncan/Roberts* settlement payments were not compensation earnable because they were not retroactive salary increases pursuant to WAC 415-108-445(1). CP 209. Mr. Serres appealed the DRS Presiding Officer's decision to King County Superior Court pursuant to RCW ch. 34.05.

### **C. The Superior Court Litigation**

After a series of motions between the parties regarding class certification, including a determination of which *Duncan/Roberts* class members were appropriately part of the *Serres* class<sup>3</sup>, on September 24, 2009 the Honorable Catherine Shaffer ruled on the substantive issue of whether the DRS Presiding Officer correctly determined that the *Duncan/Roberts* settlement payments were compensation earnable. The Superior Court determined that:

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<sup>3</sup> DRS appealed the Superior Court's May 8, 2009 regarding class certification. See CP 874-875. King County will address DRS arguments regarding the class definition in its response brief.

The Department [of Retirement Systems] incorrectly concluded that the award received by Mr. William Serres in settlement of the *Roberts - Duncan* litigation was not compensation earnable within the meaning of RCW 41.40.011.

CP 1034.

DRS and the County appealed the Court's September 24, 2009 order.

### C. ARGUMENT

#### A. **The Superior Court erred in determining that the *Duncan/Roberts* Settlement Payment was Compensation Earnable**

The *Duncan/Roberts* settlement payments were not compensation earnable because the payments were not a retroactive salary increase pursuant to WAC 415-108-457, which reads as follows:

A retroactive salary payment to any employee who worked during the covered period is payment of additional salary for services already rendered. . .

- (1) To qualify as reportable compensation under this section, the payment must be a bona fide retroactive salary increase. To ensure that is the case, the retroactive salary increase must be made pursuant to:
  - (a) An order or conciliation agreement of a court or administrative agency . .
  - (b) A bona fide settlement of such a claim before a court or administrative agency.

WAC 415-108-445(1)(a) further states that in order for a payment to an employee to be considered compensation earnable, the payment must be

"earned as a salary or wage for personal services provided during a payroll period and be paid by an employer to an employee" or "[q]ualify as compensation earnable under WAC 415-108-464 through 415-108-470".

WAC 415-108-445(b) notes that:

The department determines whether payments to any employee are compensation earnable based on the nature, not the name, of the payment. The department considers the reason for the payment and whether the reason brings the payment within the statutory definition of compensation earnable.

The *Duncan/Roberts* lawsuit was a large, complex class action lawsuit. To deem the Serres' *Duncan/Roberts* settlement payment to be a retroactive salary increase oversimplifies the issues in the *Duncan/Roberts* lawsuit to include solely those issues regarding wage payments in determining whether the settlement payment was compensation earnable. Such a narrow reading of the terms of the *Duncan/Roberts* settlement payments in order to bootstrap the settlement payment into the statutory definition of compensation earnable was improper.

The settlement payments made to *Duncan/Roberts* class members were not, as Serres alleged and the lower court ruled, tied to time work or an individualized calculation of wage loss. The settlement formula used County payroll records as one of the many elements of the distribution formula. CP 164. The settlement distribution formula also excluded

certain types of pay, payments and pay periods as ineligible. *See* CP 165; CP 154-155. The allocation to class members was not based on a calculation of claimed wage loss. As noted in the June 13, 2007 DRS Petition Decision, "the parties made no effort to calculate what percentage of each award reflected back pay, and what percentage was intended to resolve additional claims. The Parties had, after all, wanted to resolve the litigation *without* having to establish every class member's particular circumstances." Certified Appeal Board Record (CABR), 0575, ¶35 (footnote omitted). Further,

it is clear that the Parties intended to settle the case without first spending the time and money necessary to make individualized factual determinations about who worked in what class, whether each person's class assignment was appropriate, how the classes compared to one another, and what damages were sustained by each class member on an individual level.

These factors strongly indicate that the settlement amounts were not intended as wage payments. Wage payments would be individualized to each class members. They would be linked to the provision of specific services.

This conclusion is also supported by the agreement among class counsel that the Settlement Agreement was intended to settle all claims, not just the back pay claims. Wage payments are for wages only; they do not include additional amounts for other items that a plaintiff may wish to litigate.

CABR 0576, ¶38 (footnote omitted).

The sole purpose of the distribution formulas set forth in the *Duncan/Roberts* settlement agreement was to allocate the settlement fund. The formulas did not determine the size of the settlement fund and the settlement fund was not dependent on the number of class members. The Petition Decision summarized the non-individualized nature of the distribution formula as follows.

One of the topics of compromise was the total amount of money that the County would pay in settlement. Like every other aspect of the Settlement Agreement, the \$18.5 million settlement fund was negotiated. Rather than representing the sum of individualized damage calculations, the settlement fund was a firm negotiated maximum settlement amount. The size of the settlement fund did not depend on the number of employees in the class, and ultimately did not even allow for awards to all affected class members.

CABR 0575, ¶36.

The distribution of the class fund was simply a prorated compromise amount of the total claims and was not a specific calculation of claimed wage loss. Since the settlement payments were neither salary nor wages earned during a payroll period for personal services, the DRS Presiding Officer properly determined that they met the statutory definition of "compensation earnable."

Paragraph 15 of the *Duncan/Roberts* Settlement Agreement is a lengthy description of the complicated and numerous issues that were

resolved by the Settlement Agreement. Specifically, Paragraph 15 of the agreement reads as follows.

This Settlement Agreement completely resolves and settles the Plaintiffs' claims for all claims in *Roberts and Duncan*, including but not limited to claims under RCW 49.52.050, all claims under RCW 49.52.070, RCW 49.48.030, and RCW 19.52.010, all claims based upon promissory estoppels or alleged violations of the county's personnel practices and guidelines, all claims by class members under King County Code §3.12.170 and all amendments thereto, all claims by class members concerning disparate hourly pay rates between employees working more than 35 hours per week and other employees in the same job classifications with a higher pay rate based on a 35-hour week, based on K.C.C. §3.12.170 all claims by class members arising out of implementation of the Class Comp Study, whether based on K.C.C. §3.12.170, K.C.C. §3.12.070, or other code provisions and Metropolitan King County Council motions or council action cited in the *Roberts* or *Duncan* complaints, and all claims based upon any other theories for relief sought in *Roberts* or *Duncan*, including equal protection and arbitrary and capricious action, and any other theories to support the claims in *Roberts* or *Duncan*.

CP 143.<sup>4</sup> The Superior Court disregarded the breadth of the issues

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<sup>4</sup> The *Duncan/Roberts* settlement agreement also acknowledged that:

It is understood and agreed by the parties that this settlement is a compromise and nothing contained herein, including the payments are to be construed or interpreted as an admission of liability on the part of King County, by whom liability is expressly denied, or an admission as to any issue in dispute or which could have been in dispute between the Parties. The settlement amount is a compromised figure which considers attorneys fees and other factors. The disbursement formulas are prorated compromise amounts of the total claims.

CP 144.

articulated in Paragraph 15 of the settlement agreement and summarily determined that the *Duncan/Roberts* class members' claims were limited to back wages. While class claims for pay were resolved as part of the lawsuit, the pay claims were only one of many claims as noted in

Paragraph 15. As the DRS Presiding Officer noted:

But WAC 415-108-445(1) influences the application of WAC 415-108-457(1), because the nature of a disputed payment as retroactive salary payment must first be resolved. In addition to making the determination expressly subject to the statutory definition, WAC 415-108-445(1)(b) addresses the nature of the payment. In doing so, it makes paramount the reason for the payment in determining its nature. In the *Roberts/Duncan* Settlement Agreement, it is clear that the County made these payments to its employees and former employees to settle their claims short of full litigation without admission of liability. Thus despite the many aspects of these payments in which they resembled retroactive salary, the **reason for** the payments will control and they will not be found to be retroactive salary payments.

CP 209.

RCW 41.40.010(8) provides that "compensation earnable" for plan 1 members, "means salaries or wages earned during a payroll period for personal services ...." However, not all payments made to a PERS employee may be considered earnable compensation. As the DRS Hearing Examiner and the Presiding Officer correctly pointed out, WAC 415-109-445(b) requires DRS to determine whether a payment to an employee is compensation earnable "based on the nature, not the name, of

the payment. The department considers the reason for the payment and whether the reason brings the payment within the statutory definition of "compensation earnable". CP 208. The objective reason for the *Duncan/Roberts* settlement payments was to settle all of the class members' claims as articulated in paragraph 15 of the settlement agreement, not just those claims highlighted by Serres. DRS appropriately considered the reason for the payment and determined that the reason for the payment should not be included within the definition of "compensation earnable." WAC 415-108-445(1)(b). The Presiding Officer's decision was not an error of law and should not have been overturned by the Superior Court.

Further, the Presiding Officer correctly determined that the settlement awards were not retroactive salary increases:

The settlement awards were not treated as, or intended as, retroactive salary increases. Counsel for both the County and the class members were experienced in class action litigation and settlement. They were certainly familiar with the *Bowles* litigation, which dealt directly with characterizing settlement amounts as "earnable compensation." They could have agreed that *Duncan/Roberts* settlement awards were *bona fide* settlements of back pay claims, thus earmarking them as reportable compensation under WAC 415-108-457. (footnote omitted). They did not do so. There is no reason to think they simply overlooked this point.

CAPB 0576, ¶37.

Since the *Roberts/Duncan* settlement payments do not meet the statutory definition of "compensation earnable", the Superior Court's September 11, 2009 order should be overturned.

**B. Serres Failed to Prove the Invalidity of the DRS Hearing Examiner's Ruling**

RCW 34.05.570(1)(a) provides that the burden of demonstrating the invalidity of agency action is on the party asserting invalidity. Serres failed to carry his burden of proof of proving that the Presiding Officer's decision was invalid, and the Superior Court should not have granted Serres' petition for relief.

In a review of agency orders in adjudicative proceedings, the court shall grant relief from an agency order 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.

RCW 34.05.570(3).

Serres argued that the DRS Presiding Officer's March 31, 2008 order erroneously interpreted or applied the law (RCW 34.05.570(3)(d)) or was not supported by substantial evidence (RCW 34.05.570(3)(e)). As discussed in more detail below, Serres failed to meet his burden of proof regarding either of these criteria. The agency order correctly applied the law and was supported by substantial evidence. The Superior Court erred in not upholding the Presiding Officer's Order.

While the DRS Presiding Officer's legal conclusions are reviewed de novo, the reviewing court is required to give substantial weight to the agency's interpretation where the agency has specialized expertise in dealing with such issues. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). As noted by the Washington Supreme Court:

Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review.

*Overton v. Washington State Economic Assistance Authority*, 96 Wash.2d 552, 555, 637 P.2d 652 (1981) citing *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wash.2d 267, 552 P.2d 674 (1976); *Short v. Clallam County*, 22 Wash.App. 825, 593 P.2d 821 (1979).

DRS regularly interprets the regulations governing the definition of "compensation earnable" and its decision should have been accorded substantial weight. Because the Superior Court failed to do so, its September 11, 2009 order should be overturned.

#### **D. CONCLUSION**

The Superior Court erred in determining that the *Duncan/Roberts* settlement payments were compensation earnable. King County respectfully requests this court to issue an order determining that the DRS Presiding Officer's order was not afforded the weight it was due pursuant to RCW ch. 34.05 and overturn the Court's September 11, 2009 order.

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DATED this 26<sup>th</sup> day of July, 2010.

RESPECTFULLY submitted,

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