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COURT OF APPEALS

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STATE OF WASHINGTON No. 34340-1-II

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COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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MICHAEL P. PRICE,

Appellant,

v.

CITY OF TACOMA,

Respondent.

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REPLY BRIEF OF APPELLANT

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Joan K. Mell, WSBA #21319  
Attorney for Appellant  
Miller, Quinlan & Auter P.S., Inc.  
1019 Regents Blvd., Suite 204  
Fircrest, WA 98466  
Telephone: (253) 565-5019

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## I. SUMMARY OF REPLY

Appellant Price seeks the longevity pay and vacation leave promised to him in his employment contract with Respondent City. Respondent City admits it did not pay him consistent with the contract as he understands it. Respondent City objects to paying him. Respondent City wants to continue its current practices because it has routinely commenced payment of increases in January without calculating the benefits accrued in the previous calendar year. This method admittedly rewards certain employees as much as twelve months additional benefits from other similarly situated employees. Respondent City thinks it has the discretion to pay as it chooses and that its past practices justify its actions.

Appellant Price respectfully requests this Court compel Respondent City to follow its contract and interpret any ambiguity in his favor. Appellant Price is a civil service employee entitled to deference to balance the inequitable power distribution between him and the city. If a city can interpret contract ambiguity in its favor, then cities have more power than any other employer in the State of Washington. Such an imbalance of power provides ample opportunity for abuse of civil service employees who are entitled to fair and equitable treatment. Appellant Price has not been treated fairly, and Respondent City expects this case will justify its inequitable actions among all employees. Such a result is

unwarranted. Appellant Price is entitled to summary judgment and the trial court's summary judgment ruling in favor of Respondent City should be reversed.

## **II. RESTATEMENT OF FACTS**

The Respondent City has not paid Appellant Price his longevity pay for all twelve months of his fifth year of service. CP 11-12. His fifth year of service began in September of 1978 and ended in September of 1979. The City recruited him in September of 1974. CP 713. Appellant Price worked September, October, November and December in 1978 and did not receive 1% of his base rate for each of those months. CP 729. In January of 1979, the year in which he would complete his fifth year of service, he began receiving a 1% increase per pay period for every month in 1979, but the 1% he earned per month for his first four months of his fifth year was not included in the payment. CP 730 & CP 724.

The longevity pay provision states "any" period of aggregate service must be completed to trigger payment of the benefit in January:

Eligibility for longevity pay shall be determined by the length of aggregate City service and will be paid an employee at the first of the calendar year in which any of the above stipulated periods of aggregate service will be completed. CP 13.

The language does not require completion of year five, six, seven, eight or nine to trigger payment. CP 13. The language promises an initial increase beginning from 5 through 9 years. CP 13. An employee's start date to the end of the employee's fourth year is the first period of aggregate service. TMC 1.12.075 CP 910 (aggregate city service defined as the total of all employment). An employee does not receive an increase for the first four years. CP 13. If an employee stays until the fifth year then the employee has reached the designated period of service to receive additional compensation. CP 13. The question to be determined then is whether the accrued benefits are to be paid the employee in January of 1978, 1979, 1980 and so on as the employee continues working.

Respondent City chooses not to pay the benefits in a lump sum. CP 601 at 19. The benefits are paid piecemeal by pay period, which is not specified in the contract. CP 13. Respondent City does not pay for the period of aggregate city service from the start date or date of hire. It ignores the employee's start date and begins payments the year after the employee has completed the first period of aggregate city service of zero through four years. CP 10-11.

Later in Appellant Price's tenth year of service, which began in September of 1983, he did not receive a 2% increase for the months worked in his tenth year for September, October, November and

December 1983. CP 734. In January of 1984, the year in which he would complete his tenth year of service, he began receiving a 2% increase in longevity pay. CP 735. Thus, Respondent City did not pay the promised increase for all twelve months of his tenth year of service.

The process repeated itself for each increase in longevity pay during his more than thirty years of public service. The Respondent City used the same method to shortchange his vacation accruals.

The charts set forth at CP 147-154 help to visualize the discrepancy, as summarized below:

Calendar Years – January through December							
1974	1975	1976	1977	1978	1979	1980	1981
Employee Years of Service – September through August							
Vacation/Longevity Accrual							
Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	...
V = 12	V = 12	V = 12	V = 12	<b>V = 15</b>	V = 15	V = 15	...
L = 0%	L = 0%	L = 0%	L = 0%	<b>L = 1%</b>	L = 1%	L = 1%	...

The longevity and vacation provisions at issue in this matter do not authorize the City to limit the compensation to the months worked in the calendar year in which the designated year is completed. CP 13. Instead, the language specifically provides for a monthly benefit that starts to accrue when the employee begins working for the Respondent City. CP 13. A portion of the benefit is paid beginning at the first of the calendar

year. But, the Respondent City has failed to properly calculate the benefit to reward each employee for every month of the full year of aggregate service linked to the benefit. The shortage in benefits should be paid to Appellant Price.

Respondent City did, at one time, remedy its shortages through a process referred to as “front-loading” CP 715-716, but later reverted to its past practices of paying less than the full year of benefits. CP 716. This resulted in variations in compensation among employees based upon date of hire, which is entirely arbitrary.

### **III. ARGUMENT**

A. Mr. Price Seeks the Compensation Promised by Contract, Not Retroactive Pay in Violation of Wash. St. Const. Article II § 25.

For the first time, Respondent City contends on appeal that Appellant Price’s claims amount to retroactive pay in violation of Washington State Constitution Article II § 25. Article II § 25 concerns legislative appropriation of extra compensation to public officers.

The constitutional provision is inapplicable to this case, which is apparent from the language of the constitutional provision. The provision prohibits legislative appropriation of extra compensation after the services are rendered or the contract entered into. It does not apply when the rate of compensation is fixed by contract before the services are performed.

Mr. Price is not seeking retroactive pay. He seeks payment of his longevity and vacation that began to accrue on his anniversary date under the contract and should have been paid the first of the year. The compensation was granted when the contract was entered and the ordinance passed, not after. Further, Mr. Price earned the compensation under the contract beginning the first day of the first month of the applicable year of service. Case law provides that once a benefit vests in an employee, payment in lump sum of accrued leave does not violate the constitution. *Johnson v. City of Aberdeen*, 14 Wn.App. 545, 544 P.2d 93 (1975).

In addition to the constitutional provision being inapplicable on its face, another constitutional provision provides an exception to the rule: Wash. Const. Article XXX authorizes midterm salary increases for officers who do not set their own salaries. Mr. Price has never set his own salary. Any increase in his pay beginning in January that accrued in September would be permissible to him under Article XXX § 1.

The City Council has no authority to interfere with the Respondent City's contractual compensation to Mr. Price. *Baukenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956) (legislation reducing a police officer's pension was void because it impaired the obligation of the policeman's contract with the city.) *Christie v. Port of Olympia*, 27

Wn.2d 534, 179 P.2d 294 (1947) (Court upheld retroactive wages paid to longshoreman pursuant to an agreement negotiated by the Port's manager and ratified by the port).

Respondent City fails to acknowledge the inconsistency in its argument regarding retroactive pay. It claims it is prohibited from making payments in January for benefits that accrued in the prior year; yet it argues that it is making payments in January for benefits that do not accrue until later in the year. The Respondent City has no authority to support prospective payment of longevity benefits. If it claims retroactive payments are unconstitutional, certainly prospective payments for work not yet performed cannot be within the Respondent City's discretion. The Respondent City cannot pay in January benefits that accrue in September after the period of aggregate service is completed, which is what it is doing if it is correct in claiming no benefits accrued until after the year is completed. If it cannot compensate for work performed in the past it certainly cannot compensate for work not yet performed.

The Respondent City's retroactive theory bolsters Appellant Price's claim that the only equitable method to compensate employees under the contract provisions is to begin payment in January of the year in which the employee completes the first period of aggregate service, which is years zero to four. In his case that would mean his increases would

have commenced in January of 1978. That would be the first of the calendar year that he completed his first four years of aggregate City service, which began in September of 1974 and ended in September of 1978. Instead he was paid an increase in January of 1979 without accounting for the four months worked in 1978 of his fifth year.

An alternative approach would be to pay the entire accrual for the fifth year at the beginning of the year rather than spreading the increase over the calendar year. Nothing in the ordinance mandates a per pay check payment.

A reasonable compromise is to simply continue to pay the benefits in January by pay period, but make sure the amount paid includes the increase for the months completed in the previous calendar year.

Appellant Price should be paid the full value of his benefits.

B. Respondent City Admits its Ordinance is Ambiguous and Cites No Authority to Counter Case Law that Interprets Ambiguity in Employment Contracts Against the Employer/Drafter.

Respondent City cannot contend its ordinance is not ambiguous; particularly when the City Counsel amended it several times after Appellant Price raised his concerns about the language. CP 950-968. Staff's presentation to the City Council acknowledged the changes were needed to clarify the City's practices. CP 296. Recognizing the ambiguity, Respondent City cites to *Neighbors v. King County*, 88

Wn.App. 773, 778, 946 P.2d 1188 (1997) and *Ball v. Smith*, 87 Wn.2d 717, 556 P.2d 936 (1976) to support its claim that the City is entitled to deference relative to the ambiguity it has created in its own ordinance.

Neither *Neighbors* nor *Ball* support the Respondent City because neither case concerns an employment contract.

*Neighbors* is a case involving county road standards where there is an enforcing agency, the King County Roads Division, charged with significant deference in the application of its provisions. Here, as set forth in Respondent City's brief, there is no agency with any discretion to pay anything other than what is specifically authorized by the City Council to its employees. Respondent City's Brief at 8-9. Further, compensation is negotiated at the bargaining table and cannot be amended outside that process.

*Ball* is a case concerning the application of Seattle's electrical code. The code specifically authorized interpretation by the city's building superintendent. That level of discretion is not available to the City in this matter. The compensation ordinances derived from a collective bargaining agreement must be strictly construed against the city and in favor of the employee.

Respondent City has not acquiesced to the scheme for years. First, it was front loading in the seventies to comply with the contract.

Second, as soon as an official report was submitted by Respondent Price the City filed a lawsuit against him and changed the ordinance.

Respondent City admitted it thought its practices were in violation of the ordinance in response to Appellant Price's report, not before. CP 722.

There is absolutely no evidence in the record that Human Resources ever advised the City Counsel about staff complaints regarding the City's practices before Mr. Price. Instead human resources simply told employees they were wrong. CP 598-599 at 9 & 10, CP 630 at 54-57.

The first time the City Council was made aware of the problem it amended its ordinances and filed a lawsuit against the employee who complained.

Employment case law favors Appellant Price and there is no reason to treat the City as unique in the context of employment.

Ambiguity is construed against the drafter who could have taken more care in drafting the agreement. *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 919, 468 P.2d 666, 671 (1970). Respondent City should be encouraged to take precaution in its contracts. Absent reversal, Respondent City will be bolstered to force employees to accept whatever the current administration deems sufficient. Respondent City should be discouraged from managing its employment contracts as it has done with Appellant Price.

C. Respondent City Cannot Make-Up a “Rationale Basis” After Litigation.

The rational basis standard is measured by consideration of the factual record. There is absolutely no testimony to support Respondent City’s current arguments for ignoring start dates. The Respondent City’s rationale are submitted purely by way of argument and are nowhere in the factual record. There is some speculation about the computers, but the testimony of the employee relations coordinator is that the city can include in the payments starting in January the requisite monetary amount to compensate for each month worked by an employee. CP 768 at 50. There is absolutely no evidence in the pages and pages of historical ordinances explaining why Respondent City pays the way it does. The City Council has never directed payroll to pay as it does. Case law indicates that a historical practice is not a sufficient rationale for continuing an inequitable practice. *Washington Public Employees Assoc. v. State*, 127 Wn. App. 254 (2005).

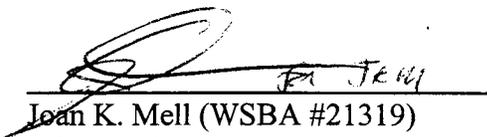
Appellant Price is not in a class of one. Every employee has been shortchanged by the City’s practices, without justification. Appellant City should be instructed to reconcile its erroneous practices.

#### IV. CONCLUSION

Respondent City should correct its erroneous and inequitable practice of paying less than 12 months of its promised benefits. As an employer, the City is bound by the contracts it drafts as would any other employer. Ambiguity works against Respondent City. Summary Judgment should be reversed in favor of Appellant Price.

DATED this ~~25th~~  
23rd day of August, 2006.

Respectfully submitted,

  
Joan K. Mell (WSBA #21319)  
Miller Quinlan & Auter P.S., Inc.  
Attorneys for Appellant

I, Rebecca Dexter, make the following declaration:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On August 23, 2006, I caused to be served a true and correct copy of the below listed document, filed in the Court of Appeals, Division II on all parties or their counsel of record, as follows:

- U.S. Mail Postage Prepaid
- ABC/Legal Messenger Service

TO: Ms. Cheryl F. Carlson, Assistant City Attorney  
Tacoma City Attorney's Office, Civil Division  
747 Market Street, Room 1120  
Tacoma, WA 98402

The documents served are:

1. Reply Brief of Appellant; and
2. This Declaration of Service.

I declare under penalty of perjury under the laws of the State of

Washington that the foregoing is true and correct.

Signed and dated at Fircrest, Washington this 23rd day of August, 2006.

*Rebecca Dexter*

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Rebecca Dexter

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