

FILED
COURT OF APPEALS
DIVISION II

NO. 36677-1-11 DEC 19 PM 2:05

IN THE COURT OF APPEALS
STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION II

CITY OF TACOMA, a municipal corporation,

Appellant,

v.

GARY CONKLIN,

Respondent.

BRIEF OF APPELLANT CITY OF TACOMA

ELIZABETH A. PAULI, City Attorney

DEBRA E. CASPARIAN
Attorney for Appellant City of Tacoma

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
Tel: direct (253) 591-5887
Fax: (253) 591-5755
WSB #26354

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE ISSUES 1

III. STATEMENT OF THE CASE..... 1

 A. Employment and Retirement of Gary Conklin. 1

 B. History of Fire Fighters’ Pension Statutes 2

 1. The 1955 Act 2

 2. Law Enforcement Officers’ and Fire Fighters’ Retirement System 3

 3. The Excess Payment Calculation 5

 4. Additional Benefits under LEOFF 6

 C. Statement of Procedure 7

IV. ARGUMENT 7

 A. Standard of Review 8

 B. Division I has ruled on this issue and found in the city’s favor 8

 C. The 1955 Act and LEOFF are two separate retirement systems..... 9

 D. The plain language of both the 1955 Act and LEOFF show that the Excess Benefit calculation must be performed using only the 1955 Act definitions and provisions..... 10

 E. The City’s Position is Consistent with Case Law..... 14

 1. The cases Conklin relies upon, such as

Bakenhus, are inapposite and do not give
Conklin the relief he seeks..... 14

2. Even if the Court were to review these cases,
they still support the City's position..... 16

V. CONCLUSION 19

TABLE OF AUTHORITIES

Table of Cases

<u>Bakenhus v. Seattle</u> , 48 Wn.2d 695, 296 P.2d 536 (1956)	14, 15, 16, 17, 18, 19
<u>Benjamin v. Washington State Bar Ass'n</u> , 138 Wn.2d 506, 980 Wn.2d 742 (1999).....	8
<u>City of Kent v. Jenkins</u> , 99 Wn. App. 287, 992 P.2d 1045 (2000).....	11
<u>Dailey v. Seattle</u> , 54 Wn. 2d 733, 344 P.2d 718 (1959)	16, 18
<u>Dep't of Ecology v. Campbell & Gwinn LLC</u> , 146 Wn.2d 1, 43 P.3d 4 (2002)	8, 11
<u>Eagan v. Spellman</u> , 90 Wn.2d 248, 581 P.2d 1038 (1978)	18
<u>Eisenbacher v. City of Tacoma</u> , 53 Wn.2d 280, 333 P.2d 642 (1958).....	17
<u>Kruse v. Hemp</u> , 121 Wn.2d 715, 853 P.2d 1373 (1993).....	8
<u>McAllister v. City of Bellevue Firemen's Pension Board</u> , (Div. I, No. 57969-3-I, published by order dated December 17, 2007).....	8
<u>Mulholland v. City of Tacoma</u> , 83 Wn.2d 782, 522 P.2d 1157 (1974).	4, 18
<u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003)	10
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994)	10
<u>Washington Fed'n of State Employees v. State</u> , 98 Wn.2d 677, 658 P.2d 634 (1983)	19

Statutes

Firemen's Relief and Pensions - 1955 Act, RCW 41.18 (2000 & Supp 2008).....	
..... 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19	
RCW 41.18.101(4)	3
RCW 41.18.030.....	3
RCW 41.18.040.....	3
Law Enforcement Officers' and Fire Fighters' Retirement System ("LEOFF"), RCW 41.26 (2000 & Supp 2008).....	
..... 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19	
RCW 41.26.030.....	3
RCW 41.26.030(13)	17
RCW 41.26.040.....	11
RCW 41.26.040(1)	11
RCW 41.26.040(2)	2, 5, 6, 10, 11, 12, 13, 14, 18
RCW 41.26.080(2)	4
RCW 41.26.150.....	6, 17
RCW 41.26.160.....	6, 17
RCW 41.26.420.....	5
RCW 41.28.....	1
Laws of 1969, Ex. Sess., ch. 209.....	4
Laws of 1969, Ex. Sess., ch. 208, § 4	4

Other Authority

CR 56(c).....8

I. ASSIGNMENTS OF ERROR

A. The superior court erred when it granted summary judgment in favor of Gary Conklin and ordered the City of Tacoma to pay a total of \$137,219.55, including interest and attorney fees.

II. STATEMENT OF THE ISSUES

A. Did the superior court err in holding that the City was required to use the definitions of the current firefighter's retirement statute, RCW 41.26, when performing the pension benefit calculation under the former firefighter's retirement statute, RCW 41.18?

B. Did the superior court err in awarding damages to Gary Conklin after erroneously using definitions from RCW 41.26 to perform the pension benefit calculation in RCW 41.28?

III. STATEMENT OF THE CASE

A. Employment and Retirement of Gary Conklin.

Mr. Gary Conklin ("Conklin") became a fire fighter with the City of Tacoma ("City") in 1968. CP 86. He retired from the City in 1993 at the rank of deputy fire chief, a rank that is higher than the rank of battalion chief. CP 86.

At the time of his hire, Conklin's retirement benefits were authorized under RCW 41.18, otherwise known as the "1955 Act." From the date of his original employment through February 28, 1970, Conklin contributed 6 percent of his then basic salary, which was at the rank of fire fighter. CP 86. The monies Conklin

contributed were deposited into the City's pension fund. During this initial period, Conklin never made contributions to the City's pension fund based on any rank or salary other than that of fire fighter.

Effective March 1, 1970, Conklin's pension plan membership was transferred, in accordance with the mandatory statutory language, from the 1955 Act to the Law Enforcement Officers' and Fire Fighters' System ("LEOFF") as codified in RCW 41.26. He began contributing 6 percent of his salary to the state LEOFF plan.

When he retired in 1993 as deputy fire chief, Conklin began receiving LEOFF benefits in an amount calculated according to RCW 41.26.040(2), with the City making a comparative "excess payment" calculation as required. The City compared what Conklin would have received under the 1955 Act, had that law still been in effect, with what he would receive under LEOFF. If in any year Conklin was to receive more under the 1955 Act, the City paid Conklin that amount.

B. History of Fire Fighters' Pension Statutes.

1. The 1955 Act.

Prior to March 1, 1970, fire fighters participated in a retirement system under RCW 41.18 known as the "1955 Act." A

fire fighter was required to contribute 6 percent of his “basic salary” to a city’s pension fund. RCW 41.18.030. The term “basic salary” is defined by the 1955 Act as the

Basic monthly salary, including longevity pay, attached to the rank held at the time of retirement without regard to extra compensation which such fireman may have received for special duty assignments not acquired through civil service examinations PROVIDED, that such basic salary shall not be deemed to exceed the salary of a battalion chief.

RCW 41.18.010(4) (emphasis added). Thus, the contribution rate was capped at the salary of a battalion chief. Id.

In turn, retirement benefits under the 1955 Act were computed at 50 percent of “basic salary.” RCW 41.18.040. Because “basic salary” could “not . . . exceed the salary of a battalion chief,” (RCW 41.18.010(4)) a fire fighter’s retirement benefits were capped at 50 percent of a battalion chief’s salary, even if he retired at a rank higher than that of battalion chief. RCW 41.18.010(4).

2. Law Enforcement Officers’ and Fire Fighters’ Retirement System.

In 1969, the legislature replaced a multitude of prior separate retirement plans with a single statewide pension plan administered

by the State of Washington Department of Retirement Systems.¹

On March 1, 1970, all fire fighters participating in the 1955 Act automatically became members of the Law Enforcement Officers' and Fire Fighters' System ("LEOFF").² RCW 41.26. Active fire fighters who contributed to the 1955 Act had their pension membership "transferred" to LEOFF "to the exclusion of any pension system existing under any prior act." RCW 41.26.040(1) and (2) (Emphasis added). See also Mulholland v. City of Tacoma, 83 Wn.2d 782, 784, 522 P.2d 1157 (1974).

Under LEOFF, as with the 1955 Act, a fire fighter contributed 6 percent of his basic salary. RCW 41.26.080(2). "Basic salary" under LEOFF is defined as:

[T]he basic monthly rate of salary or wages, including longevity pay, but not including overtime earnings or special salary or wages, upon which pension or retirement benefits will be computed, and upon which employer contributions and salary deductions will be based.

¹ Although the Department of Retirement Systems is no longer a party in this case, it did submit a brief to the Superior Court in support of the City's position. CP 140-43.

² The Legislature originally enacted LEOFF during the 1969 legislative session. See Laws of 1969, ex. sess., ch. 209. In that original version, the Legislature made reference to an "employee contribution rate" implying that it would continue as it was under the 1955 Act. Laws of 1969, ex. sess., ch. 208, § 4. But before any pension plans were transferred on March 1, 1970, the Legislature deleted that language entirely. Laws of 1970, ex. sess., ch. 6, § 2.

Unlike the 1955 Act, however, the 6 percent contribution rate under LEOFF is not capped at the battalion chief's salary. In other words, if a fire fighter held a rank higher than a battalion chief (a deputy chief or chief, for example) he would contribute 6 percent of that higher salary to his LEOFF plan.

Correspondingly, LEOFF retirement benefits paid by the state are not capped at a percentage of the battalion chief's salary either. RCW 41.26.420. So a fire fighter retiring as deputy chief or chief would have his benefits calculated according to his final average salary. Id.

3. The Excess Payment Calculation.

To make sure that a fire fighter who made contributions under the 1955 Act would suffer no diminution in benefits, LEOFF provides for an "excess payment" calculation. Under RCW 41.26.040(2), a LEOFF retiree who had contributed to the 1955 Act is entitled to have his former employer calculate what he would have received under the 1955 Act and compare that to the LEOFF retirement benefit. If the LEOFF benefit—calculated without a battalion chief cap for contributions or benefits—is less than what the firefighter would have received under the 1955 Act—with a battalion chief cap for contributions and benefits—the former

employer pays the retiree the difference (i.e., the LEOFF “excess payment”) from the city’s pension fund. RCW 41.26.040(2). Under this provision, the retiree will always receive the highest benefit authorized under either statute.

To determine whether a LEOFF “excess payment” is required, a city calculates the fire fighter’s benefits under the 1955 Act as if that law were still in effect. LEOFF states that “His benefits under the prior retirement act [the 1955 Act] to which he was making contributions at the time of this transfer shall be computed as if he had not transferred.” RCW 41.26.040(2). Thus, a city uses the definitions and conditions of the 1955 Act when determining whether an “excess payment” is appropriate.

4. Additional Benefits under LEOFF.

In addition to removing the cap on benefits at the battalion chief level, LEOFF also provides lifetime medical benefits to participants and a 100 percent survivor benefit. RCW 41.26.150 and 41.26.160. These were not offered under the 1955 Act.

C. Statement of Procedure.

In 2004, Conklin filed a lawsuit against the City claiming that his retirement benefits should be calculated under the 1955 Act without using the battalion chief cap. CP 1-3, 9-12, 58-62. Conklin does not argue that LEOFF is unconstitutional. CP 9.

The superior court granted his motions for summary judgment on both the substantive issue of whether his benefits should be increased as well as his damages claim. CP 167-68, 243-44. The City timely filed this appeal. CP 246-252.

IV. ARGUMENT

Conklin seeks to combine certain provisions of the 1955 Act with certain provisions of LEOFF to come up with a new, and higher, retirement allowance. With no persuasive evidence, Conklin argues that the Legislature intended for the “excess payment” calculation be done in such a way as to import some LEOFF provisions (i.e., no battalion chief benefit cap) into the 1955 Act. Conklin’s novel theory requires the court to reinterpret the statutes in a way that ignores the plain language of the statutes, violates basic rules of statutory construction, and misconstrues cases about pension benefits.

A. Standard of Review.

On appeal from an order granting summary judgment, the court engages in the same inquiry as the superior court. Benjamin v. Washington State Bar Ass'n, 138 Wn.2d 506, 515, 980 Wn.2d 742 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993); CR 56(c).

There is no dispute about the facts in this case. The issue presented is purely a legal one and involves standard principles of statutory construction. Interpretation of a statute is a question of law that is reviewed de novo. Dep't of Ecology v. Campbell & Gwinn LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The City requests this Court to reverse the superior court's decisions in favor of Conklin.

B. Division I has ruled on this issue and found in the city's favor.

On December 17, 2007, the Division I Court of Appeals published a decision on the very same issue and held that the City of Bellevue properly performed the "excess payment" calculation under LEOFF by using the definitions and provisions under the

1955 Act alone. McAllister v. City of Bellevue Firemen's Pension Board, (Div. I, No. 57969-3-I, published by order dated December 17, 2007). As in this case, the McAllister's argued that the City of Bellevue should calculate the "excess payment" benefit under the 1955 Act by using the definitions from LEOFF. Division I disagreed:

For purposes of determining whether the McAllisters were entitled to an excess benefit payment under LEOFF, RCW 41.26.040(2) requires the City to calculate the amount the McAllisters would have received under the 1955 Act as if the transfer to LEOFF had not occurred. . . While the salary definition of LEOFF is used to calculate the amount the McAllisters are entitled to under LEOFF, using the LEOFF salary definition to calculate the benefits for the 1955 Act is contrary to the plain language of the statute.

McAllister, p. 7-8. Thus, Bellevue correctly used only the definitions of the 1955 Act when performing the "excess payment" calculation.

For the reasons stated below, Division I of the Court of Appeals is correct.

C. The 1955 Act and LEOFF are two separate retirement systems.

The 1955 Act and LEOFF are two entirely separate and self-contained retirement systems. In other words, retirement benefits calculated under the 1955 Act must be calculated using the provisions and definitions of the 1955 Act alone. The same is true

for LEOFF. There is no indication whatsoever that the Legislature intended to use some definitions from LEOFF when calculating benefits under the 1955 Act for purposes of the “excess payment” calculation.

In fact, the clear language of LEOFF states otherwise. When making the “excess payment” calculation, a fire fighter’s benefits “shall be computed as if he had not transferred.” RCW 41.26.040(2). Thus, the benefits must be calculated using the 1955 Act provisions alone.

D. The plain language of both the 1955 Act and LEOFF show that the excess benefit calculation must be performed using only the 1955 Act definitions and provisions.

The plain language of LEOFF, RCW 41.26, shows how a city is to perform the excess benefit calculation. When statutory language is unambiguous, a court will look only to that language to determine the legislative intent without considering outside sources. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). In other words, “Plain language does not require construction.” State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Moreover, if the language is clear and unambiguous, courts give effect to the plain meaning of the statute as an expression of legislative intent.

Campbell & Gwinn, 146 Wn.2d at 9-10. “[T]he Court should assume that the legislature means exactly what it says.” City of Kent v. Jenkins, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000).

Under the plain language of LEOFF, all employees, like Conklin, that had been hired and contributed under the 1955 Act were automatically transferred to LEOFF in 1970. RCW 41.26.040(1). RCW 41.26.040 provides:

(1) . . . all firefighters and law enforcement officers employed as such on or after March 1, 1970, on a fulltime fully compensated basis in this state shall be members of the retirement system established by this chapter with respect to all periods of service as such, to the exclusion of any pension system existing under any prior act.

(Emphasis added). Based on this plain language, Conklin could not have been covered under both the 1955 Act and LEOFF as he claims. CP 137. RCW 41.26.040(2) also states that “Any employee serving as a . . . firefighter on March 1, 1970, who is then making retirement contributions under any prior act shall have his membership transferred to” LEOFF. (Emphasis added.) Thus, as of March 1, 1970, Conklin was a member only of LEOFF. He was no longer a member of the 1955 Act pension plan.

In providing for the calculation of benefits under LEOFF, the Legislature ensured that no fire fighter who had paid into the 1955

Act would be harmed or prejudiced by LEOFF. Consequently, the Legislature requires cities to compare the benefits under the 1955 Act with benefits under LEOFF:

In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed **as if he had not been transferred.**

RCW 41.26.040(2). This provision means that a city must calculate the fire fighter's benefits under the 1955 Act as if that law were still in effect. The only way to give full effect to the requirement to compute the benefit "as if the fire fighter had not transferred" is for the city to use the definitions and conditions of the 1955 Act when determining whether an "excess payment" is appropriate. If the payment under the 1955 Act would have been higher than the benefit under LEOFF, then the fire fighter is entitled to this "excess payment". Id. Conklin does not show that there is any ambiguity in either statute regarding how the calculation is to be performed. Therefore, under the plain language of each statute, the calculations under each statute are made independent of each other.

The City's calculation of the pension benefit for a fire fighter who contributed to the pension plan under the 1955 Act did not

change after the enactment of LEOFF as Conklin argues. RCW 41.26.040(2) retained the City's obligation to determine what a LEOFF retiree, who contributed to the plan under the 1955 Act, would have received under the 1955 Act. The only difference is, after LEOFF, the City was obligated to pay the LEOFF retiree the difference between the state paid LEOFF benefit and the greater amount, if any, the fire fighter would have received under the 1955 Act.

Despite the clear language of RCW 41.26, which provides for the greater of the benefits as between the 1955 Act and LEOFF, Conklin incorrectly contends that the proper way to calculate benefits is to combine the two statutes. He argues that he is entitled to benefits under the 1955 Act, but without the 1955 Act's cap on basic salary. In other words, he wants to apply the LEOFF definition of "basic salary"—which does not have a cap of battalion chief—to the 1955 Act in order to give himself a higher benefit.

Calculating benefits in this way violates the plain language of the statutes. There is nothing in the language of the 1955 Act or LEOFF to support a claim that the City should use definitions from LEOFF when calculating benefits under the 1955 Act. Indeed, the "excess payment" statute requires the City to conduct the

calculation “as if he had not been transferred.” RCW 41.26.040(2).

This language shows that the City was required to perform the “excess payment” calculation under the 1955 Act using the definitions from that act alone. Merging the two statutes together, as Conklin wants, and taking definitions from LEOFF and applying them to the 1955 Act is contrary to the plain language of the statutes.

E. The City’s Position is consistent with case law.

This case is a rather simple lesson of how to read a plain and unambiguous statute. With the enactment of LEOFF, the City was required by statute to calculate what Conklin would have received under the 1955 Act as if he had never been transferred out of it, compare that amount with what he would receive under LEOFF, and pay Conklin the higher of the two amounts. Case law supports the City’s position.

1. The cases Conklin relies upon, such as Bakenhus, are inapposite and do not give Conklin the relief he seeks.

Conklin improperly relies on Bakenhus v. Seattle, 48 Wn.2d 695, 296 P.2d 536 (1956) and its progeny to argue that he is entitled to merge the definition of “basic salary” from LEOFF into the 1955 Act. But Bakenhus was a case involving the

constitutionality of a pension plan. In that case, the Legislature reduced a police officer's pension plan many years after he was first employed. The Court held that a systematic reduction in his benefits was unconstitutional. The result in Bakenhus was that Bakenhus was entitled to benefits under the plan in effect when he was hired because the later-enacted provision reduced Bakenhus's benefits. In the instant case, the later-enacted LEOFF statute specifically protects Conklin from having his benefits reduced from what he would have been entitled to under the 1955 Act.

Since the Bakenhus Court found the later-enacted pension plan to be unconstitutional, the previously-enacted plan in that case was effective. In this case, Conklin is not arguing that the later-enacted LEOFF statute is unconstitutional, necessarily triggering a "fall-back" to the 1955 Act. This is significant because, if Conklin were correct that Bakenhus applies here, the logical outcome would be to hold LEOFF unconstitutional, leaving Conklin's disability benefits to be solely those allowed under the 1955 Act: 50 percent of battalion chief with no lifetime medical or survivor benefit. This is not what Conklin wants. Conklin wants to merge the 1955 Act and LEOFF to create a higher pension benefit, giving him the higher retirement rate from the 1995 Act, based on his final salary as a

deputy chief under LEOFF, plus the added medical benefits and survivor benefits provided by LEOFF. Neither Bakenhus nor any other case law mandates such a contortion of the two laws.

2. Even if the Court were to review these cases, they still support the City's position.

The "excess payment" calculation the City performed fully comports with Bakenhus. In that case, the Court stated that pension benefits may be modified prior to retirement if such modification is "for the purpose of keeping the pension system flexible and maintaining its integrity." Bakenhus, 48 Wn.2d at 701. Moreover, pension rights will be constitutionally valid if they are reasonable and equitable. Dailey v. Seattle, 54 Wn. 2d 733, 740, 344 P.2d 718 (1959). In determining whether a change in pension rights is equitable and reasonable, the change must be weighed against the pre-existing rights. Id. at 738. In the instant case, the changes from the 1955 Act to LEOFF were not only equitable, but the Legislature, in enacting LEOFF, took care to weigh the new provisions against the old and to provide protection for the fire fighters.

Conklin's argument, that Bakenhus requires uncapping of benefits under the 1955 Act, is flawed. First, Bakenhus requires

that “changes in a pension plan which result in a disadvantage to employees should be accompanied by comparable new advantages.” Bakenhus, 48 Wn.2d at 702 (emphasis added). Indeed, LEOFF provides greater benefits to Conklin than the 1955 Act. Under LEOFF, a member’s retirement benefits are based on the actual salary paid at the time of retirement; they are not capped at the salary of a battalion chief as they would be under the 1955 Act. RCW 41.26.030(13). LEOFF also added significant and new benefits, including medical coverage for life and a 100 percent survivor benefit. RCW 41.26.150 and .160. The 1955 Act provided neither of these. Thus, the benefits under LEOFF were significantly increased to compensate for any perceived contribution rate increase. This is consistent with Bakenhus.

Moreover, LEOFF does not take away any pension benefits under the 1955 Act. Through the “excess payment” calculation, LEOFF ensures that those who contributed under the 1955 Act do not see any reduction in pension benefits by virtue of LEOFF. The Washington State Supreme Court has already stated that the LEOFF “excess payment” provision ensures fire fighters who contributed to the 1955 Act are protected.

In Mulholland v. City of Tacoma, 83 Wn.2d 782, 522 P.2d 1157 (1974), the Washington Supreme Court noted that RCW 41.26.040(2) was, in effect, a codification of the Bakenhus decision. In Mulholland, the Court held that the purpose of RCW 41.26.040(2) is to ensure that a fire fighter who retires under LEOFF will not suffer any diminution in the benefits he would have received had the 1955 Act still been in effect and LEOFF not enacted.

Conklin fails to acknowledge that the common thread in Bakenhus and related cases is that, in those cases, the actual amount of a *retiree's pension was reduced* by one or another sort of amendment to the plan from which the retiree retired. See Dailey, 54 Wn. 2d at 740-41 (holding that the new limitation of the maximum pension Dailey would receive under the 1955 Act outweighed the additional benefits of the 1955 Act); Eisenbacher v. City of Tacoma, 53 Wn.2d 280, 333 P.2d 642 (1958) (finding that because the retirement benefits were reduced under a new act, the retirees were entitled to benefits under the previous act in effect when they were hired); Eagan v. Spellman, 90 Wn.2d 248, 581 P.2d 1038 (1978) (stating that the lowering of the mandatory retirement age was invalid because it decreased her pension from

28 to 18 percent of her average final compensation); Washington Fed'n of State Employees v. State, 98 Wn.2d 677, 658 P.2d 634 (1983) (holding that a new statute preventing the inclusion of the value of accrued vacation leave was unconstitutional because it led to a reduction of potential benefit amounts and did not provide for counterbalancing benefits).

The common thread in all of these cases is that, one way or another, the actual amount of the retiree's pension was reduced by the new laws and there were insufficient benefits to make up for the loss. No such infirmity exists here. LEOFF does not reduce the amount Conklin receives in his pension. In fact, through the "excess payment" calculation, LEOFF ensures that there is no reduction in the total pension amount received by Conklin as compared to what he would have received under the 1955 Act. Bakenhus and its progeny just do not support Conklin's claim that the City should modify the statutory language of LEOFF and use LEOFF's definitions when performing a calculation under the 1955 Act.

V. CONCLUSION

Because the plain language of both the LEOFF statute and the 1955 Act require the calculations under each statute to be

made using the definitions in each statute, the trial court erred by requiring the City to combine the definitions and pay Conklin a new higher amount. Because Conklin does not suffer any reduction in benefits under LEOFF, but actually receives the highest benefit under either LEOFF or the 1955 Act, and receives medical and survivor benefits under LEOFF not available under the 1955 Act, the trial court erred by providing Conklin with a benefit not contemplated by the Legislature.

The City respectfully requests the Court to reverse the superior court's decision in favor of Conklin and hold that the City properly performed the "excess payment" calculation under the 1955 Act using the definitions and provisions of the 1955 Act.

DATED this 18 day of December 2007.

ELIZABETH PAULI, City Attorney

By: Debra E. Casp
Debra E. Casparian, WSBA # 26354
Assistant City Attorney

FILED
COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE BY MAIL

07 DEC 19 PM 2:06

STATE OF WASHINGTON
BY _____

This certifies that under penalty of perjury under the laws of the state of Washington that on December 18, 2007, at Tacoma, Washington, I, Tracy R. Storwick, placed the original and one true and accurate copy of the attached Brief of Appellant City of Tacoma in the United States mail, first-class stamped, and addressed to the following:

Clerk of the Court
Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

and one true and accurate copy of the attached Brief of Appellant to:

Attorney for Plaintiff
Hans E. Johnsen
10655 NE Fourth Street, Suite 312
Bellevue, WA 98004



Tracy R. Storwick
Sr. Paralegal to Debra E. Casparian