

NO. 36677-1-II
IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

CITY OF TACOMA, a municipal corporation,

Appellant,

v.

GARY CONKLIN,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
08 MAR 31 PM 4:13
STATE OF WASHINGTON
BY *[Signature]* DEPUTY

REPLY BRIEF OF APPELLANT CITY OF TACOMA

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I. ARGUMENT

A. Relying on the plain language of the statute, the City correctly performed the “excess payment” calculation using the definitions in only the 1955 Act.

The plain language of the Law Enforcement Officers’ and Fire Fighters’ System (“LEOFF”), RCW 41.26, shows how a city is to perform the excess benefit calculation. The “excess benefit” calculation preserves a firefighter’s rights under the pension act in effect when he was hired. If the language is clear and unambiguous, courts give effect to the plain meaning of the statute as an expression of legislative intent. Dep’t of Ecology v. Campbell & Gwinn LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Here, the pension act under RCW 41.26, known as “LEOFF,” and the pension act under RCW 41.18, known as the “1955 Act”, are two separate pension statutes. Accordingly, under the plain and unambiguous language of the statutes, the City is required to calculate benefit payments under each benefit plan using the provisions contained only within each respective statute.

1. The 1955 Act and LEOFF are two separate pension plans.

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 not to “exceed the salary of a battalion chief.” RCW 41.18.010(4). In turn, because of this definition of “basic salary,” 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).

Effective March 1, 1970, the Legislature enacted LEOFF. Under LEOFF, as with the 1955 Act, a fire fighter contributed 6 percent of his basic salary. RCW 41.26.080(2). But “basic salary” under LEOFF is not capped at the battalion chief’s salary. See RCW 41.26.030(13). 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.¹ LEOFF did not “increase the 1955 Act contribution rates” as

¹ As the Court is aware, Conklin 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.

Conklin claims. Response Br. pp. 21, 23. Instead, LEOFF left the 1955 Act untouched. The new LEOFF contribution rate applied only to those who were members of LEOFF.

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.

Under LEOFF, RCW 41.26.040(1), all employees, like Conklin, who contributed under the 1955 Act, were automatically transferred to LEOFF in 1970. 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). 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.

2. The former version of LEOFF enacted in 1969 never went into effect and thus Conklin has no right to rely on it.

Conklin continues to argue that an earlier version of LEOFF—one that never went into effect—applies to him.

Response Br. p. 20. 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 that law went in effect and before any pension plans transferred on March 1, 1970, the Legislature deleted that language entirely. Laws of 1970, ex. sess., ch. 6, § 2.

Even so, Conklin claims that “if a new pension system is enacted while they are employed, those participants would have a right in that enactment.” Response Br. p. 20. Conklin cites no legal authority whatsoever for such a claim. Moreover, the City is aware of no case where a person is entitled to rely on a pension statute that never even went into effect. Division I agrees. Specifically addressing the 1969 version of LEOFF, Division I stated that “Because the legislature amended RCW 41.26.040(2) before the LEOFF retirement system took effect, [fire fighters] do not have a

right to the contribution rate under the 1955 Act.” McAllister v. City of Bellevue Firemen’s Pension Board, 142 Wn. App. 250, 259, -- P.3d -- (2007).

Moreover, Conklin’s reliance on the legislative history related to the former LEOFF statute is misplaced. Response Br. pp. 10-12. Since that statute never went into effect, any related legislative history is irrelevant.²

3. The LEOFF “excess payment” calculation preserves all of Conklin’s rights under the 1955 Act.

In providing for the calculation of benefits under LEOFF, the Legislature made sure that no fire fighter who paid into the 1955 Act would be harmed by LEOFF. As a result, 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) (emphasis added). This provision means that a city must calculate the fire fighter’s benefits under the 1955 Act as if

² In addition, since Conklin agrees LEOFF is unambiguous, (Response Br. pp. 21, 22) the Court need not resort to legislative history. Western Telepage, Inv. v. City of Tacoma, 140 Wn.2d 599, 609, 998 P.2d 884 (2000).

that law were still in effect. The result is that Conklin receives the higher benefit that either statute allows.

As the City explained in its opening brief, the only way to give full effect to the requirement to compute the benefit “as if he had not transferred” is for the City to use the definitions in the 1955 Act when performing the “excess payment” calculation. Conklin makes no argument about how else to interpret this phrase.

Conklin agrees that the two statutes are not ambiguous. Response Br., p. 21, 22. And yet, his answer about how to read the two unambiguous statutes is to combine the two. 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.

To calculate the benefits as Conklin claims violates the plain language of the statutes. There is nothing in either the 1955 Act or LEOFF to support an argument that the City should use definitions from LEOFF when calculating benefits under the 1955 Act. 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 means the City is required to perform the “excess

payment” calculation under the 1955 Act using the definitions from that act alone.

B. The City’s “excess payment” calculation is consistent with case law.

Case law, particularly the recent decision in McAllister v. City of Bellevue Firemen’s Pension Board, 142 Wn. App. 250, -- P.3d -- (2007), supports the City’s position.

1. The recent McAllister decision squarely addresses the question raised here.

Just like Conklin, the McAllisters argued that the Bellevue Firemen’s Pension Board should calculate the benefits under the 1955 Act by using the “basic salary” definition from LEOFF. Division I disagreed and stated that “Neither the LEOFF statutes nor the case law support the McAllister’s argument.” McAllister, 142 Wn. App. at 255. The Court further stated:

Under the plain and unambiguous language of RCW 41.26.040(2), the City must use the definitions of the 1955 Act, including the 1955 Act salary definition, to calculate the amount the McAllisters would have received to determine whether the McAllisters are entitled to an excess payment.... [U]sing the LEOFF salary definition to calculate the benefits for the 1955 Act is contrary to the plain language of the statute.

McAllister, 142 Wn. App. at 258 (emphasis added). Thus, like the City in this case, Bellevue correctly used only the definitions of the 1955 Act when performing the “excess payment” calculation.

2. Case law supports the City’s position.

Essentially, Conklin seeks to take advantage of parts of the 1955 Act, and take advantage of parts of LEOFF. Aside from the “excess payment” calculation, Conklin cannot have it both ways. He cannot take the definition of “basic salary” from LEOFF and use it in the 1955 Act to give himself a higher benefit. In a substantially similar case, the state supreme court agreed.

In Vallet v. City of Seattle, 77 Wn.2d 12, 459 P.2d 407 (1969), a police officer sought to take advantage of parts of the 1915 pension act in effect when he was hired, and the 1961 pension act in effect when he retired. Under the 1915 act, the officer was entitled to 50 percent of his salary attached to the position from which he retired. This was a fixed benefit. Under the 1961 act, the officer would have been entitled to 50 percent of the salary “hereinafter attached” to his position, resulting in a fluctuating and increasing benefit plan. However, the 1961 act also capped the pension benefit at the salary of a captain which was a lesser pay grade than the officer’s inspector salary. The officer sought to

take advantage of part of the 1961 act allowing for increases in the salary attached to his position, but wanted to avoid the cap at the captain salary level. “The end result of such a theory would be to permit him to take the beneficial aspects under *both* the 1915 and 1961 laws without accepting the limiting proviso of the 1961 law....”

Id. at 19 (emphasis in original). The Court held:

The language of our past decisions does not contemplate a situation whereby a pensioner is entitled to select the best parts of several pension plans relating to him. To hold otherwise would have a serious effect on the everyday administration of pension plans in this state.

Vallet, 77 Wn.2d at 21.

Conklin is asking for the same thing as the officer in Vallet, a request that the Court soundly rejected. Conklin wants the beneficial aspects of LEOFF (no battalion chief cap, lifetime medical and survivor benefits) as well as the beneficial aspects of the 1955 act (different pension benefit calculation). Conklin cannot select the most favorable parts of each act as a basis for his pension rights.

3. The legislature may modify an employee’s pension plan.

Additionally, an employee’s pension rights may be modified prior to retirement if the modifications are “reasonable.” Bakenhus

v. Seattle, 48 Wn.2d 695, 701, 296 P.2d 536 (1956). 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.

As required by the Court in Bakenhus, LEOFF ensures that Conklin would receive the pension benefits in effect when he was hired, if that benefit is higher than his benefits calculated under LEOFF. That is the purpose of the “excess payment” calculation in RCW 41.26.040(2). In addition, LEOFF 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.

Our state supreme court in Mulholland v. City of Tacoma, 83 Wn.2d 782, 522 P.2d 1157 (1974) has already held that LEOFF is consistent with Bakenhus. After citing to the holding in Bakenhus, the Mulholland Court stated that “In obvious recognition of this holding, the legislature preserved all the benefits provided by retirement acts existing prior to LEFF (sic)” and quoted RCW 41.26.040(2), the “excess payment” calculation section. See also McAllister, 142 Wn. App. at 257 (stating that the Mulholland court recognized that “RCW 41.26.040(2) was, in effect, a codification of

the decision in Bakenhus.”) Conklin even acknowledges the Mulholland court’s statement. Response Br. p. 11. Thus, the state supreme court has already held that LEOFF is entirely consistent with the requirements of Bakenhus.

Moreover, the facts here are not “identical to the fact pattern in Bakenhus” as Conklin claims. Response Br. p. 10. In Bakenhus, the police officer was hired under a pension plan where the pension was equal to one-half the salary attached to the rank he held in the year prior to retirement. 48 Wn.2d at 696. Under this calculation, the officer’s monthly benefit would have been \$185.00. But, before he retired, the Legislature amended the pension act to limit one’s pension to \$125.00 per month. Id. at 697. The Court held that since there were no corresponding benefits to the officer, the limit imposed by subsequent legislation could not apply to him. Id. at 703. These facts are in stark contrast to the facts here, where the Legislature ensured no one would suffer a reduction in benefits under LEOFF (through the “excess payment” calculation), and where significant new benefits—lifetime medical and survivor benefits—were provided.

None of the other cases Conklin relies upon support his position either. Response Br., pp. 4-8. That is because those

cases have a common holding: when a change in a pension act is deemed unreasonable and inequitable (often because a retiree's pension was reduced by amendment), the public employee is entitled to receive pension benefits under the pension act in effect at the time of hiring. See Eagan v. Spellman, 90 Wn.2d 248, 258, 581 P.2d 1038 (1978) (stating that the lowering of the mandatory retirement age was invalid because it reduced one's pension benefits and was not accompanied by "comparable new advantages"); Dailey v. City of Seattle, 54 Wn. 2d 733, 742, 344 P.2d 718 (1959) (holding that applying a new pension act to Dailey was unreasonable because not only did his contribution rate go up, but his benefits were reduced); Eisenbacher v. City of Tacoma, 53 Wn.2d 280, 284 333 P.2d 642 (1958) (finding that a new pension act did not provide any "corresponding benefit to the employee to counterbalance the loss of pension rights resulting from the imposition of the one hundred twenty-five dollars maximum pension limitation"); Bates v. City of Richmond, 112 Wn. App. 919, 937, 51 P.3d 816 (2002) (holding that the City could not prove that calculating the pension benefits by using the midpoint of a new salary system adequately compensated the officers when they retired at the highest salary level in their position); Allen v. City of

Long Beach, 287 P.2d 765, 767 (Cal. 1955) (holding that the changes in the new pension plan, including an increase in contribution rate from 2 percent to 10 percent and a fixed retirement amount as opposed to one that fluctuated based the current salary attached to the position from which the person retired, were unreasonable, particularly given the fact that the new pension plan offered no new or increased benefits).³

Under this line of cases, and assuming the changes in LEOFF are unreasonable as applied to Conklin, the answer is to apply the 1995 Act, and only the 1955 Act, to him. This is not what Conklin wants. Rather, he wants the Court to find the LEOFF amended the 1955 Act. There is nothing in LEOFF, or in the case law, to suggest that LEOFF amended the 1955 Act.

As stated above, 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

³ Conklin relies on one other case that has no bearing on the issue presented here. Response Br. 8. See Trembruell v. City of Seattle, 64 Wn.2d 503, 510, 392 P.2d 453 (1964) (holding that a negotiated plea to a criminal charge is not a "conviction" under the pension statutes which could terminate one's pension).

significant and new benefits, including medical coverage for life and a 100 percent survivor benefit. RCW 41.26.150 and RCW 41.26.160. The 1955 Act provided neither of these. Thus, the benefits under LEOFF were increased to compensate for any perceived contribution rate increase. Accordingly, as the Court in Mulholland held, LEOFF is consistent with Bakenhus and its progeny.

C. Because the 1955 Act and LEOFF are two separate pension acts, they are not inconsistent.

As already explained, LEOFF and the 1955 Act are two separate statutory schemes and two separate pension plans. Nonetheless, Conklin argues that the “basic salary provision in the two systems were inconsistent and could not be reconciled.” Response Br. p. 15 (emphasis in original). Because of such alleged “inconsistency” between the two definitions of “basic salary,” Conklin points to RCW 41.26.3902 to argue that the definition of “basic salary” in LEOFF should be used in the 1955 Act benefit calculation. Essentially this would mean that LEOFF amends the 1955 Act. RCW 41.26.3902 provides:

To the extent that the provisions of this 1969 amendatory act are inconsistent with the provisions of any other law, the provisions of this 1969 amendatory act shall be controlling.

But there are no inconsistencies between the definitions of “basic salary” in LEOFF, RCW 41.26.030(13), and in the 1955 Act, RCW 41.18.010(4). The definition of “basic salary” in LEOFF is the new definition of basic salary to be applied to all those who were members of LEOFF on or after March 1, 1970. In other words, it replaced any definitions of “basic salary” that existed under prior pension acts.

D. Conklin attempts to raise a constitutional issue even though he failed to raise it below.

Although Conklin tangentially mentions Article 1, §23 of the Washington State Constitution in his response brief, (Response Br. pp. 17-18, 22), Conklin did not argue his constitutional claim to the superior court. Aside from mentioning a state constitutional claim in his Second Amended Complaint, (CP 61), Conklin stated that his “motion [for summary judgment] was very clear that no constitutional challenge is being made.” CP 159; see also CP 126, 132. Therefore, neither party briefed this issue and so the superior court did not consider any constitutional argument.

Conklin claims he is not making a constitutional argument by stating that reading LEOFF and the 1955 Act in his favor renders LEOFF constitutional. Response Br. pp. 17-18. He claims that

interpreting LEOFF as amending the 1955 Act “satisfie[s]” Article I, § 23 of the Washington state constitution. Response Br. p. 18. In essence, he seeks to argue the constitutionality of LEOFF and avoid the constitutional question at the same time. Conklin cannot have it both ways. By arguing that Article I, § 23 applies, Conklin is raising a constitutional question, which was not briefed to the superior court. Accordingly, this Court should not consider any constitutional argument. See RAP 2.5(a).

The City agrees with the statutory maxim that statutes should be interpreted to comport with the constitution. See e.g. State v. Kinnear, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972). Response Br. pp. 17-18. In this case, reading LEOFF and the 1955 Act as two separate pension acts is wholly consistent with Article I, § 23 of the Washington state constitution. Nonetheless, Conklin failed to adequately raise this issue to the superior court and this Court should refuse to address it. If the Court wishes to address this constitutional question, the City requests the opportunity for additional briefing.

II. CONCLUSION

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 31 day of March 2008.

ELIZABETH A. PAULI, City Attorney

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STATE OF WASHINGTON)
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COUNTY OF PIERCE)

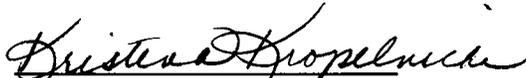
Kristina Kropelnicki, being first duly sworn on oath, deposes and states:

I am a citizen of the United States over the age of 18 and competent to be a witness herein.

On the 31st day of March, 2008, I caused to be delivered via U.S. Postal Service, postage pre-paid, a copy of CITY OF TACOMA'S REPLY BRIEF to:

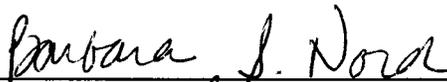
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Kristina Kropelnicki

Subscribed and sworn to before me this 31st day of March, 2008.




Printed name: BARBARA S. NORD
NOTARY PUBLIC in and for the State of
Washington, residing at TACOMA
My commission expires: 2-19-09