

No. No. 38401-9-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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Gary Fox, *Appellant*

v.

State of Washington, Department of Retirement Systems,  
*Respondent*

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BRIEF OF APPELLANT

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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**A. Introduction**

Gary Fox earned membership in the Public Employees' Retirement System (PERS) for two years of continuous employment with a public employer. While pursuing his degree, he worked as a half-time janitor at the University of Washington (UW). Mr. Fox presented evidence establishing all the elements of PERS eligibility. The Department of Retirement Systems (DRS) found that uncontradicted corroborated testimony credible. We know Mr. Fox told the truth. The issue facing the Court of Appeals is not whether Mr. Fox did what he said he did, but whether he met the legal standard for establishing it.

He could have easily established PERS eligibility if the UW had kept his records. The UW has a sophisticated system in place to maintain employment records for 75 years. For reasons that do not appear in the record, that system failed. The UW's breach does not deprive Mr. Fox of his right to full compensation for public employment.

Instead, that breach shifted the burden to the UW to disprove Mr. Fox's testimony. Its refusal to do so was an error of law. DRS repeated that error when it refused to adopt Mr. Fox's testimony that he had affirmatively elected, and was thus statutorily entitled to, PERS membership. Mr. Fox held a PERS eligible position. His student status

did not exempt him. Mr. Fox's compensation for his UW employment includes PERS membership.

**B. Assignments of Error**

1. DRS erred in placing on Mr. Fox to prove his hours of work, despite the UW's failure to maintain records, rather than requiring him to raise a just and reasonable inference. Conclusions of law nos. 3, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21<sup>1</sup>.
2. DRS erred in failing to find Mr. Fox met his burden to establish his hours of work normally exceeded 70 hours per month. Findings of fact nos. 13, 16. Conclusions of law nos. 3, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.
3. DRS erred in finding Mr. Fox did not work in a Public Employees' Retirement System (PERS) eligible position. Conclusions of law nos. 3, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.
4. DRS erred in finding that Mr. Fox's work as a half-time janitor was incident to and in furtherance of his education or training. Finding of fact no. 14. Conclusions of Law nos. 25, 26, 27, 28.

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<sup>1</sup> Citations for Conclusions of Law (COL) and Findings of Fact (FOF) are to the agency's final order, HR pages 1-18 included in the appendix as exhibit 1.

**C. Issues Pertaining to Assignments of Error.**

1. May the Appellate Court enter findings based on corroborated uncontradicted evidence when DRS failed to do so?  
Assignments of Error 1, 2, 3, 4.
2. Does the UW's failure to maintain employment records shift Mr. Fox's burden such that he must raise a just and reasonable inference of his hours of work? Assignments of Error 1.
3. Did Mr. Fox raise a just and reasonable inference he worked over 70 per month as a janitor for the UW? Assignments of Error 2, 3.
4. Where Mr. Fox submitted the same quantum of evidence on all the facts of his employment, and DRS found that evidence was substantial, proving all the facts of Mr. Fox's employment save hours of work, did the Agency err in failing to find he normally worked over 70 hours per month? Assignments of Error 2, 3.
5. Was it an error of law for DRS to find Mr. Fox had not established he worked in a PERS eligible position? Assignment of Error 3.
6. Was it an error of law for DRS to liberally, rather than narrowly, construe the student exemption from PERS membership, RCW 41.40.120(7)? Assignment of Error 4.

7. Was it an error of law for DRS to rule that a student holding a job in order to pay living expenses was employed “primarily as an incident to and in furtherance of the person’s education or training” and exempt from PERS under RCW 41.40.120(7)?  
Assignment of Error 4.
8. Was it an error of law for DRS to refuse to apply the UW’s long-standing policy, and its own rule administering the student PERS exemption subjectively, giving the student the decision whether to except himself from PERS? Assignment of Error 4.
9. Does the UW’s failure to maintain employment records shift Mr. Fox’s burden such that he must raise a just and reasonable inference he affirmatively elected PERS membership?  
Assignment of Error 1, 4.
10. Did Mr. Fox raise a just and reasonable inference he affirmatively elected PERS membership? Assignment of Error 4.
11. Is Mr. Fox entitled to attorneys’ fees and other expenses as a prevailing party under RCW 4.84.350? Assignments of Error 1, 2, 3, 4.

**D. Statement of the Case.**

**1. Procedural History**

Gary Fox seeks PERS membership for his work as a half-time janitor for the UW from June of 1970 through June of 1972. The UW failed to keep employment records, causing DRS to deny his claim. Mr. Fox appealed and DRS conducted an adjudicative proceeding under Chapter 34.05 RCW.

At the adjudicative proceeding DRS disputed all Mr. Fox's allegations of his employment, including the fact of employment itself, citing the lack of employer records. After considering Mr. Fox's evidence the Hearings Examiner ruled he had established all the facts of his employment necessary to support PERS membership save two: his hours of work and his affirmative election of PERS membership. DRS's final order ruled Mr. Fox had not established he held a PERS eligible position and that, even if he had, he was exempted from PERS as a student employee.

The Thurston County Superior Court upheld DRS's final order. This appeal followed.

**2. Statement of Facts**

DRS's final order found for Mr. Fox on the vast majority of his factual assertions of his UW employment. Those facts are verities on

appeal. *Campbell v. DSHS*, 150 Wn.2d 881, 886, 83 P.3d 999 (2004). A brief recitation of those verities frames the two disputed issues of fact: 1) Mr. Fox's hours of work; and 2) His affirmative election of PERS membership.

**a. Mr. Fox Worked for UW Half-Time for 24 Continuous Months.**

Gary Fox attended the UW from September 1968 through June of 1972, FOF no. 9. Mr. Fox held different part-time jobs while going to school. His first job was as a student gymnastics assistant, which did not require sufficient hours to qualify for PERS. His gymnastics coach, Dr. Eric Hughes, hired him for this job. FOF nos.12, 33.

During the first two years of his education, Mr. Fox also worked at Bethlehem Steel, FOF no. 10. He was laid off from continuous employment there in 1969, testimony of Gary Fox, RP-1<sup>2</sup> p. 693, l. 1-5. Throughout 1970 Mr. Fox continued to work intermittently for Bethlehem Steel. When commencing his half-time janitor job in the summer of 1970, Mr. Fox still picked up what work he could for Bethlehem Steel, FOF no. 10. There is no evidence his summer work for Bethlehem Steel work interfered with his half-time job at the UW.

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<sup>2</sup> The record of proceedings before the hearings examiner is referenced as "RP-1". The record of proceedings before the Superior Court Judge is referenced as "RP-2".

Following his lay-off from regular work with Bethlehem Steel Mr. Fox began looking for another part-time job. Dr. Hughes apprised Mr. Fox of a newspaper advertisement for a half-time job as a UW janitor with full benefits, FOF no. 13, *id.*, RP-1 p. 693, l. 11-13. Mr. Fox applied for the job, interviewed with M.B. Byrd, and was hired. He began employment as a janitor at the Health Sciences complex in June of 1970. FOF no 13. Mr. Fox testified to filling out employment paperwork including a PERS enrollment form, FOF no. 14. "Mr. Fox wanted to participate in PERS," FOF no 14. When presented with the opportunity to waive PERS membership, Mr. Fox testified that he chose to enroll, FOF no. 14, *id.*, RP-1 616 l. 25 - 699 l. 12.

One month after he began he was transferred to upper campus where he remained until May of 1972, FOF no. 15. He was employed continuously as a half-time janitor at the UW from June of 1970 through June of 1972, FOF nos. 13-15. His compensation included health insurance benefits, testimony of Gary Fox, RP-1 p. 723, l. 1-6. Mr. Fox kept paystubs from his janitor employment for many years but threw them away when he remarried and combined households in 1989, *id.*, RP-1 p. 729, l. 18 - p. 780, l. 8.

Mr. Fox's testimony was corroborated by an April 3, 1974, letter of recommendation from his former supervisor, Joseph Caldwell stated:

I am Joseph Caldwell, Gary's former supervisor while employed at the University of Washington. I have know(sic) Gary since he came to work for me as a custodian in July of 1970. He held that position until he graduated in June of 1972. His duties included not only augmenting my regular crew with cleaning and maintaining the classrooms, labs, and bathrooms, but did many special projects for me due to his special hours he was allowed to work as a **half time employee**.

Exhibit A-4, HR p. 224, (emphasis added), appendix, exhibit 2.

Mr. Fox and the janitorial supervisor who hired him, M.B. Byrd, testified half-time meant twenty hours per week for at least 80 hours per month, FOF no 16. DRS's expert from the UW, Katy Dwyer, testified that full-time at the UW was forty hours and that twenty hours was half-time, testimony of Katy Dwyer, RP-1 p. 822, l. 6-18. She further testified that UW classified positions, such as janitor, had to be at least half-time, *id.*, RP-1 p. 757, l. 1-4.

Mr. Fox established he worked for 24 continuous months for a PERS employer in a position that normally required over 70 hours per month. That is, he worked in a PERS eligible position.

**b. Mr. Fox Was Not Working "Incident to and in Furtherance of his Education"**

Students working in PERS eligible positions are exempt from PERS membership if working "incident to and in furtherance of their

education or training” RCW 41.40.120(7), exhibit D-12<sup>3</sup>, HR p. 435 - 437. However, most student employees are not automatically exempted, testimony of Katy Dwyer, RP-1 p. 813, l. 17 – p. 815, l. 5. Rather, a student hired into an eligible position at the UW is given the option. He or she may sign an enrollment form to join PERS, or sign a “student exemption” form, *id*, RP-1 783-787. If the person does not opt to exempt themselves from PERS by virtue of their student status, they are mandated into PERS, *id*, RP-1 p. 785, l. 16 - 786 l. 20. The UW has been administering the student PERS exemption in this fashion since “the 50’s,” *id*. RP-1 p. 786, l. 14,15. DRS codified this procedure into rule in 1991 in WAC 415-108-520.

New employees hired in a half-time position had to fill out paperwork, including making a PERS membership election, *id* RP-1 p. 782, l. 20 - p. 783, l. 14. Mr. Fox remembers participating in this process, FOF no. 14. He was urged to waive PERS membership by a UW human resources employee. After taking the paperwork home and discussing the question with his father, a long-time union employee, Mr. Fox decided to forego the exemption and enroll in PERS, FOF no. 14, testimony of Gary Fox, RP-1 p. 696, l. 25 - p. 699, l. 12. He made this decision in part

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<sup>3</sup> RCW 41.40.120(7) was recodified in 1990 as RCW 41.40.023(7). Provisions of the relevant statutes as they existed in 1970 through 1972 are included in the record. Citations are to the previous provisions of the statute.

because he contemplated continued employment at the UW following graduation, *id.*, RP-1 p. 697, l. 21 - p. 698, l. 14. Mr. Fox had a very clear memory of having made this choice because the human resources officer tried to dissuade him and became confrontational over his decision to enroll in PERS. While Mr. Fox didn't change his mind, the confrontation stuck in his memory, *id.*, RP-1 p. 698, l. 7 - p. 699, l. 12.

Mr. Fox's job was not reserved for students, as all his co-workers were non-students, FOF no. 15. Mr. Fox's job was not part of an award of financial aid nor in any way administered by the financial aid office, testimony of Dr. Eric Hughes, RP-1 p. 825, l. 6-22. Mr. Fox testified it was not subject to the requirements for a financial aid position, FOF no. 15. It served the same function as the Bethlehem Steel job before it: to provide resources to pay bills: "I wanted the job so I could continue going to school. I had bills, needed gas to drive back and forth, keep my car running." RP-1 p. 694, l. 2-4, FOF no. 13. In fact, it paid significantly less than his Bethlehem Steel job. Were it not for the lay-off occasioned by economic conditions, he would have stayed in the Bethlehem Steel job. RP-1 p. 941, l. 5-23.

**c. The UW Did Not Maintain Employee Records.**

Mr. Fox worked for the UW in two different jobs. He worked four years as a student gymnastics assistant and two years as a janitor, FOF

nos. 12, 13, 15. Throughout the gymnastics assistant employment Dr. Hughes personally delivered Mr. Fox's weekly hour records to the payroll office, FOF no. 12, testimony of Dr. Eric Hughes, RP-1 p. 748, l. 8-13, p. 751, l.20 - p. 752, l. 6. Despite four years in this position the UW could only produce records for the first two, exhibits S-A-1, HR p. 218; S-A-2, HR p. 219; testimony of Gary Fox, RP-1 p. 60, l. 19 - p. 61, l. DRS's finding of no records of Mr. Fox's undergraduate employment exist is erroneous, FOF no. 32.

In June of 1970, Mr. Fox was hired as a half-time janitor, FOF no. 14. His payment for both jobs was combined into one check, FOF no. 18, testimony of Katy Dwyer, RP-1 p. 823, l. 17, p. 824, l. 6. When Mr. Fox began his second job all records of UW employment evaporate.

Mr. Fox worked and was paid. Regardless of the type of employment, the UW should have payroll records, FOF no. 35, testimony of Katy Dwyer, RP-1 p. 770, l. 13-25. The UW keeps employment records for 75 years, FOF no. 35, *id.*, RP-1 768, l. 11-12. When hired into an eligible position, Mr. Fox would have had to sign either a PERS enrollment form or a student exemption form, *id.*, RP-1 p. 782, l. 20- p. 784, l. 22. Those forms are also kept by UW for 75 years. *id.*, RP-1 p. 786, l. 11 - p. 787, l. 11. For reasons that do not appear in the record, the UW either failed to create or failed keep those records.

This failure is not uncommon for the UW. Mr. Fox submitted a public disclosure request to the UW asking for copies of their response to all requests for employee records in the last five years. The UW was unable to find records nearly ten percent of the time, testimony of Gary Fox, RP-1 p. 720, l. 2 - p. 721, l.6; exhibits A through I, HR p. 326 - 386.

**d. DRS Inconsistently Evaluated Evidence of Employment.**

DRS's long-standing policy recognized that, although employer records sometimes do not exist, it still has a duty to evaluate PERS eligibility. In the absence of official records, DRS accepted affidavits as evidence of eligibility, testimony of former DRS administrator Jack Bryant, RP-1 p. 665, l. 1 - p. 6, p. 667, l. 13. DRS applied this policy from at least 1996 through 2003, *id.*, RP-1 p. 668, l. 20 - 669, l. 7; p. 672, l. 10 - p. 675, l. 21.

In 2005 DRS tried to change its policy. Current DRS administrator Michelle Hardesty took over Mr. Bryant's position in September of 2004, RP-1 p. 889, l. 7-13. Ms. Hardesty reversed DRS policy and now claims not to allow PERS eligibility to be established without "official" records, testimony of Michelle Hardesty, RP-1 p. 912, l. 7-24, exhibit D-65, HR p. 630-631 "PERS retroactive determination FAQs." Ms. Hardesty applied this policy to deny Mr. Fox's claim. Like the UW, it refused to

acknowledge Mr. Fox's janitorial employment, exhibit S-A-23, HR 253-254.

DRS's final order abandoned the new policy. The Hearings Examiner made multiple findings on Mr. Fox's UW janitorial employment without "official" evidence. DRS retains its new policy only on two issues: Mr. Fox's hours of work and election into PERS.

**e. Post UW Work History**

After graduating and leaving his University employment, Mr. Fox was employed as a police officer and was a member of the Law Enforcement Officers' and Fire Fighters' Retirement System (LEOFF), FOF no. 21, 22. He retired with a disability incurred during an altercation with a suspect in the line of duty, FOF no. 23. Mr. Fox began his employment as an investigator in the sexually violent predator program for the Attorney General's Office in 1991, FOF no. 24, testimony of Gary Fox, RP-1 p. 705, l. 19-22.

**E. Argument**

**1. Standard of Review**

"In reviewing an administrative decision, the appellate court stands in the same position as the superior court. ... Thus, the appellate court applies the appropriate standard of review directly to the administrative

record.” *Galvin v. Employment Sec. Dep’t*, 87 Wn. App. 634, 640, 942 P.2d 1040 (1997) (citations omitted).

**a. The Court May Make a Finding Omitted by the Agency.**

Two main material facts are disputed, neither of which were reduced to findings by DRS's presiding officer: Mr. Fox's hours of work and his affirmative election into PERS. DRS's refusal to make a finding despite the evidence places no restrictions on the Court's review:

A finding which ignores uncontradicted evidence is not binding on an appellate court, which may then proceed to make a finding based on uncontroverted or undisputed evidence before it.

*State v. Reite*, 46 Wn. App. 7, 12, 728 P.2d 625 (1986).

By the same token if there is no finding accepting evidence which it was the hearing officer's duty to accept, an appellate court can itself make such a finding without sending the case back for that purpose. *Lahue v. Keystone Inv. Co.*, 6 Wn. App. 765, 775, 496 P.2d 343 (1972).

*Chmela v. Motor Vehicles*, 88 Wn.2d 385, 391, 561 P.2d 1085 (1977).

**b. The Court Decides Questions of Law De Novo.**

“An agency's conclusions of law, including its interpretations of statutes, are reviewed de novo under an ‘error of law’ standard that permits us to substitute our judgment for that of the agency.” *Skamania County v. Gorge Comm’n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001) (citations omitted). There are three main questions of law facing this Court: 1) Does the UW's failure to maintain records shift the burden of proof? 2)

Did Mr. Fox work in a PERS eligible position? 3) Was Mr. Fox outside the scope of the PERS student employee exemption, RCW 41.40.120(7)? DRS applied the law erroneously. The Court should substitute a correct application.

**c. Mr. Fox Established Grounds for Relief.**

Mr. Fox has substantiated three grounds for relief under RCW 34.05.570(3). First, DRS erroneously interpreted or applied the law, RCW 34.05.570(3)(d). Second, the portions of DRS's order objected to are not supported by substantial evidence, RCW 34.05.570(3)(e). Third, the order is inconsistent with DRS's own PERS student exemption rule, WAC 415-108-520, RCW 34.05.570(3)(h).

**2. Mr. Fox Worked in a PERS Eligible Position.**

DRS accurately recited PERS eligibility law:

To restate these requirements, in 1970 (after July 1, 1965), a person who was otherwise personally eligible could be a member of PERS if he worked for a PERS employer in an eligible position; an eligible position was one that normally required five or more consecutive months of regularly compensated service in a calendar year; and a month of service in turn constituted a minimum of 70 compensated hours of service to an employer in a calendar month. RCW 41.40.120, 41.40.010(26)(a).

COL 11. In 1970 a position qualified for PERS if it required 70 or more hours for five continuous months and continued into a sixth, COL no. 14, Testimony of Michelle Hardesty, RP-1 p. 904, l. 17 - 20.

It is a verity on appeal that Mr. Fox was a regularly compensated half-time employee of a PERS employer for 24 continuous months, FOF no. 13, 15. DRS found Mr. Fox presented substantial evidence establishing each element of an eligible position save one: hours of work.

**a. DRS Erroneously Failed to Shift the Burden.**

Generally, an employee bringing suit for unpaid compensation<sup>4</sup> has the burden of proving he worked the claimed number of hours. That burden shifts when the employer fails to keep records. “An employer who fails to keep time records does so at his peril. (*Caserta v. Home Lines Agency, Inc.* (2<sup>nd</sup> Cir. 1959), 273 F.2d 943; *George Lawley & Son Corp. v. South* (1<sup>st</sup> Cir. 1944), 140 F.2d 439)” *Gilbert v. Old Ben Coal Corp.*, 85 Ill.App.3d 488, 494, 407 N.E.2d 170 (1980).

...where the employer’s records are inaccurate or inadequate and the employee cannot offer convincing substitutes ...[t]he solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on the employer’s failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee’s labors without due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold than an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount

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<sup>4</sup> “Under Washington law, a pension granted to a public employee is not a gratuity but is deferred compensation for services rendered.” *Marysville v. State*, 101 Wn.2d 50, 57, 676 P.2d 989 (1984) (citations omitted).

and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee.

*Reich v. Southern New England Telecommunications*, 121 F.3d 58, 66-67 (2<sup>nd</sup> Cir. 1997) quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688, 66 S.Ct. 1187, 1192-93, 90 L.Ed. 1515 (1946).

The burden-shifting requirement announced by the Supreme Court over sixty years ago is still the law today. The wisdom of the underlying policy is clear: where the employer breaches its duty to maintain employment records, it is unconscionable to penalize the employee by denying him just compensation for his labor. Washington courts follow the *Anderson* rule, see *MacSuga v. Spokane County*, 97 Wn.App. 435, 445, 983 P.2d 1167 (1999) citing *Anderson*.

**b. Mr. Fox Raised a Just and Reasonable Inference He Worked More Than 70 Hours a Month.**

Because of the UW's failure to keep records, Mr. Fox's burden was to raise a just and reasonable inference of hours worked. In the absence of employer records, this does not necessarily require corroboration. Courts accept personal recollection, *Rivera v. Ndola Pharmacy* 497 F.Supp.2d 381, 388, 389 (E.D.N.Y. 2007), see also *Perez*

*v. Palermo Seafood*, 548 F.Supp.2d 1340, 1347 (S.C.Fla 2008) or the employee's personal calendars *Cunningham v. Gibson Elec. Co.* 43 F.Supp.2d 965, 977 (N.D. Ill. 1999). Mr. Fox provided far more than that.

DRS erroneously required Mr. Fox to prove his hours worked by producing the UW's nonexistent records. While refusing to make a finding on hours worked, it did find:

Mr. Fox, Mr. Byrd and Mr. Caldwell all referred to Mr. Fox's position as "half time." According to Mr. Byrd "half time" meant that he was "scheduled to work 80 hours per month." Mr. Fox saw it as 80 hours per month or 20 hours per week, he testified that he typically performed his janitorial duties four hours a day, five days a week.

FOF no. 16. It failed to note Ms. Dwyer's corroborating testimony. The uncontradicted, corroborated evidence raises a just and reasonable inference and the more likely than not standard that Mr. Fox worked at least 80 hours per month, i.e. more than 70.

**c. Mr. Fox Provided Substantial Evidence He Worked More Than 70 Hours Per Month.**

Despite the UW's breach, Mr. Fox produced substantial evidence regarding all the facts of his employment. DRS, after reviewing a consistent quantum of evidence presented for all facts, accepted some and rejected others. Division II recognizes that, while agencies have some discretion in interpretation, they must be consistent:

Rather, we assume, without so holding, that the Department can properly utilize either alternative. We do decide,

however, that regardless of which alternative the Department elects to use, it must act consistently....It may not elect to treat the same employment as non-intermittent and intermittent; being internally inconsistent, the approach is contrary to statute, arbitrary, and hence unlawful.

*School Dist. No. 401 v. Minturn*, 83 Wn.App. 1, 7, 920 P.2d 601 (1996).

DRS violates this standard by treating the same quantum of evidence as substantial and non-substantial, depending upon the fact at issue.

DRS found Mr. Fox credible, COL no. 16. It accepted all of his evidence regarding his student positions, most of which was not found in the UW's records, FOF nos. 11, 12. It accepted Mr. Fox's evidence of how he found out about the job, FOF no. 13; that he was hired and worked in the job, FOF nos. 13, 15; his starting date and length of employment, FOF nos. 14, 15. The same quantum of evidence deemed substantial and thus proving all these facts was deemed inadequate to prove hours of work.

DRS's rejection of this evidence is even less supportable in light of its finding that a lower quantum of evidence proved other aspects of Mr. Fox's employment. DRS found Mr. Fox's individual testimony, standing alone, was substantial evidence of his assignment locations, work history, scheduling, the identity of his co-workers, his rate of pay, and method of payment FOF nos. 15, 17.

DRS cannot have it both ways. Either the evidence presented is sufficient to establish the facts of Mr. Fox's employment or it isn't. DRS found the quantum of evidence substantial and sufficient to prove the facts

of his employment, then turns around and finds it insufficient to establish hours of work. DRS erred.

**d. Higher Education Personnel Board Rules Establish Half time at the UW was 20 Hours per Week.**

The higher education personnel board establishes employment standards for Washington States institutions of higher education, including the UW. *See* WAC 251-04-030 as adopted 9/15/69, appendix, exhibit 3<sup>5</sup>. In 1971 it adopted the following definitions for higher education employees:

(28) "Part-time employment" - Work of less than full time employment in a regular schedule and with an understanding of continuing employment within the foreseeable future. Employees in part-time employment shall attain permanent part-time status after completion of the probationary period, except as specifically exempted in these rules.

...

(30) "Full time employment" - work consisting of forty (40) hours per week except as otherwise identified in the compensation schedule and these rules.

*See* WAC 251-04-020 as adopted 2/19/71, appendix, exhibit 3.

Full-time employment is consistently defined as forty hours per week, *see* RCW 49.28.065; 49.46.130; 50.60.020(6); 72.01.042; *State v. Carter*, 2 Wn.App. 974, 975, 471 P.2d 127 (1970); *Rice v. Garl*, 2 Wn.2d 403, 406, 98 P.2d 301 (1940). Full time at the UW in 1970 to 1972, just

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<sup>5</sup> Prior versions of the Washington Administrative Code and Revised Code of Washington presented below as Petitioner's brief exhibits 1 – 4, cp 75 - 83.

like everywhere else, was forty hours per week. Half-time was twenty hours per week for a minimum of 70 hours per month.

Mr. Fox' receipt of health insurance confirms his half-time job required at least 70 hours per month. The Legislature provided employer health insurance for "all full time and career seasonal employees of the state...; and shall include any or all part time and temporary employees under the terms and conditions established by the board." *See* RCW 41.05.010(2) as adopted in 1970, appendix, exhibit 4. The Higher Education Personnel Board defined covered part-time employees:

"Permanent part-time employees." Those who do not work full-time, but who are under continuous employment by an agency, and who are scheduled to work at least 80 hours per month."

WAC 182-12-115 as adopted 2/9/76, appendix, exhibit 5.

Mr. Fox qualified for benefits. Only persons scheduled to work at least 70 hours per month qualified for benefits. Therefore Mr. Fox was scheduled to work at least 70 hours per month.

**e. Mr. Fox Held a PERS Eligible Position.**

DRS found all the elements of a PERS eligibility except hours worked. Mr. Fox's evidence provided both a just and reasonable inference and substantial evidence that he worked over 70 hours per month. This evidence is supported by the Higher Education Personnel Board rules in

place at the time. The Court should find that Mr. Fox satisfied his burden of establishing hours of work. In so doing, he established he worked in a PERS eligible position.

### **3. Mr. Fox Was Not Exempted From PERS.**

In some cases, persons in PERS eligible positions can still be exempt from membership. 1970, as today, PERS exempted:

(7) Persons employed by an institution of higher learning or community college operated by an employer, primarily as an incident to and in furtherance of their education or training or the education or training of a spouse.

Exhibit D-12, RCW 41.40.120, HR p. 435 - 437.

“The law is well established that pension legislation must be liberally construed most strongly in favor of the beneficiaries.” *Hanson v. Seattle*, 80 Wn.2d 242, 247, 493 P.2d 775 (1972). *See also: Shurtliff v. Retirement Systems*, 103 Wn.App. 815, 825, 15 P.2d 164 (2000). “‘Liberal construction’ is a command that the coverage of an act’s provisions in fact be liberally construed and that its exceptions be narrowly confined.” *Vogt v. Seattle First National Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). By setting the PERS eligibility standard at 70 hours a month, the Legislature included half-time employees like Mr. Fox as intended beneficiaries of PERS entitled to liberally construed statutes and narrowly confined exceptions.

Rather than narrowly construing the student exemption, three previous decision makers have taken pains to stretch it to cover Mr. Fox.

Each decision maker crafted his or her own rationale, recognizing the inadequacy of the prior analysis.

**a. DRS Applied the Student Exemption Erroneously.**

DRS's initial decision did not reach the student exemption. Like the UW before it, it did not acknowledge Mr. Fox's UW employment ever occurred due to the absence of employer records, FOF No. 35, Exhibit S-A-23, HR p. 253 -254. DRS's second decision, the petition under Chapter 415-04 WAC, recognized it could no longer simply ignore Mr. Fox's evidence. The Petitions Examiner found Mr. Fox worked two years as a UW janitor. She then applied DRS's rule, WAC 415-108-520, to conclude Mr. Fox's inability to produce records subjected him to the rule's resulting presumption of that student employees were PERS exempt, exhibit S-A-31, HR p. 275 – 281, COL 20, 21, HR p. 277 - 279 .

DRS's final order disregarded its rule, holding it was not retroactive, COL No. 28. The Hearings Examiner ruled, as a matter of law, that working to pay living expenses while going to school was sufficient to make his employment primarily as an incident to and in furtherance of his education and thus PERS exempt, COL Nos. 25, 26, 27.

The Superior Court Judge reached the same result, but for a different reason:

It appears that this employment was because he was a student, it was because he was an athlete, it was because he knew people, and although some of his coworkers in the janitorial field were not students, he was, and this appears

to be sufficiently within the scope of a student employment that the student exemption applies.

RP-2, p. 45, l. 25 – p. 46, l. 6.

So, either DRS's rule exempts Mr. Fox, or it doesn't apply at all. If it doesn't apply, he is disqualified as a matter of law either because: 1) He worked to pay living expenses; or 2) He was a student. The discomfort of each decision-maker with the previous rationale reveals the weakness of DRS's position.

**b. Mr. Fox's Job Was Not Incident to or in Furtherance of His Education.**

RCW 41.40.120(7) is to be narrowly construed to exempt only those students working "primarily as an incidence to and in furtherance of" their education. This includes some student employees, but not all. DRS and the Superior Court's contrary construction is an error of law.

Mr. Fox credibly testified: "I wanted the job so I could continue going to school. I had bills, needed gas to drive back and forth, keep my car running." RP-1 p. 694, l. 2-4. He also testified that he would have preferred to accomplish that purpose by continuing to work for higher wages at Bethlehem Steel.

People, including college students, work primarily to make money to cover the cost of living. If this is sufficient to invoke the exemption, then what students are eligible? DRS's ruling asks the Court to exempt all student employees from PERS.

If DRS is correct, then most of RCW 41.40.120(7), and all of WAC 415-108-520 is superfluous. But “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The plain language of RCW 41.40.120(7) does not bar all student employees from PERS. It exempts only those employed “primarily as an incident to and in furtherance of their education or training.” It is necessary that both conditions be met. It is not, however, sufficient. The employment must “primarily” exist to meet both conditions.

There are two clear applications of the exemption. These are the same positions exempted from the higher education personnel rules:

Students employed under separately funded student assistance work programs; OR who are employed in a position directly related to a major field of study to provide training opportunity.

*See* WAC 251-04-040(2)(a) as adopted 2/19/71, appendix, exhibit 3.

The first categorical exemption covers those positions described by Ms. Dwyer as “student hourly” exclusively granted as part of a financial aid award:

Q: (by AAG Blocki): So are you saying that, during that time period, no student who was not on financial aid could have held a student hourly position?

A: (by Ms. Dwyer): That would be correct.

RP-1, p. 816, l. 24 - p. 817, l. 2. The second covers graduate students on a fellowship. That is, a student “employed in a position directly related to the major field of study to provide training opportunity.”

It is axiomatic that both these types of employment are incident to and in furtherance of the student’s education. Both are reserved exclusively for students for the purpose of furthering their education, either as part of their degree program or to facilitate financial aid. Students in categorically exempt positions were not given the choice to sign a PERS waiver form. They were automatically excluded. Testimony of Katy Dwyer, RP-1 p. 814, l. 5 – p. 815, l. 5. Mr. Fox’s employment met neither of these categorical exemptions. Consistent with the UW’s long-standing policy, he was given a choice.

**c. Mr. Fox Did Not Exempt Himself From PERS.**

Outside of the two categorical exemptions, both the UW and DRS recognize the exemption depends upon individual circumstances and is subjective:

The basic process has always been that a new employee hired into a PERS eligible position job has been made aware of the existence of the student exemption. In the context of a new employee orientation or benefits enrollment the person identified him/herself as a UW student or spouse of a UW student, and requested on that basis to be exempt from PERS participation.

Exhibit no. A-26, HR p. 259-261.

The subjective administration of the student exemption by the UW, and other higher education institutions, “has been very nearly the same for many, many years” and was in place at the UW “back into the 50s” testimony of Katy Dwyer, RP-1 p. 786, l. 13-15.

DRS’s 1991 rule codified the pre-existing policy of subjective administration. The student employee: “determines her/his employment is primarily an incident to and in furtherance of her/his education or training” He or she “... shall determine her/his membership status as either being excepted from membership in PERS, or being a member of PERS,....Based upon the provisions herein and the written notification of status, the person shall either be excepted from membership in PERS or become a member of PERS.” WAC 415-108-520(1), (2), *see* appendix, exhibit 6.

As an employee in a PERS eligible position Mr. Fox was mandated into PERS unless the student exemption, narrowly construed, barred him. Mr. Fox neutralized the exemption by providing written notification of his affirmative determination of eligibility. Under the UW policy and WAC 415-08-520, he retained PERS eligibility.

**i. The UW’s Failure to Keep Records Does Not Bar Mr. Fox From PERS.**

When Mr. Fox was hired into the PERS eligible position of half-time janitor he was given a choice: either fill out a PERS enrollment form or a student exemption form, testimony of Katy Dwyer, RP-1 p. 770, l. 13-

18. Mr. Fox remembers filling out an enrollment form. DRS acknowledged the form once existed but says no more about it because “the form is lost.” COL no. 27.

Regardless of which form Mr. Fox filled out, the UW had a duty to retain the completed document for 75 years, RP-1 768, l. 11-12. The UW breached that duty. In the face of the employer’s failure to keep records the hearings examiner shrugged her shoulders said, “however that may be....” COL no. 21, and placed the burden of proof on Mr. Fox. This was an error of law.

Mr. Fox provided a just and reasonable inference that he affirmatively elected PERS membership in writing. The UW’s failure to keep records shifts the burden to the employer to disprove Mr. Fox’s evidence, *Anderson* and *MacSuga, supra*. Despite an extensive search of its records, it cannot do that. Therefore, as a matter of law, Mr. Fox met his burden of establishing he affirmatively elected PERS.

**ii. DRS’s Rule is Retroactive.**

DRS claims Mr. Fox cannot rely on its rule. That is, that the subjective application of the student exemption did not exist until it adopted WAC 415-08-520 in 1991. This claim fails for two reasons. First, the UW had already been applying, and DRS had been accepting, the subjective standard for twenty years when it hired Mr. Fox. Second,

DRS did not create the subjective standard in WAC 415-08-520. It adopted the rule to codify existing policy, applying the rule retroactively.

Generally, we presume prospective application of newly amended administrative regulations, particularly where the amendments change substantive rights. In re Pers. Restraint of Shepard, 127 Wn.2d 185, 193, 898 P. 2d. 828 (1995). However, courts may apply an amendment retroactively if either (1) the agency intended the amendment to apply retroactively, (2) the effect of the amendment is remedial or curative, or (3) the amendment serves to clarify the purpose of the existing rule. (citations omitted).

*Champagne v. Thurston County*, 163 Wn.2d 69, 79 (2008).

The effective date of an administrative regulation does not prohibit the regulation from applying retroactively where the purpose of the regulation is curative or remedial in nature and it is “intended to clarify rather than change the law.” A regulation is curative when it is adopted to clarify an inconsistency. An amendment is remedial if “it relates to practice, procedure or remedies and does not affect a substantive or vested right.” (footnotes omitted).

*Letourneau v. State*, 131 Wn.App. 657, 665, 666, 128 P.3d 647 (2006).

WAC 415-108-520 satisfies all the *Champagne* retroactivity factors.

First, DRS intended the rule to be retroactive. DRS adopted WAC 415-108-520 at the Legislature’s urging: “An agency is encouraged to convert long-standing interpretive and policy statements into rules.” RCW 34.05.230 as in effect in 1991, *see* §203, ch. 288, laws of 1988, appendix exhibit 7. By codifying a long-standing procedure into rule DRS intended the rule to be retroactive. DRS manifested that intent by applying the rule retroactively in Mr. Fox’s petition decision.

Second, by codifying an existing practice DRS was clarifying the law, not changing it. Finally, the rule relates to procedure and does not

affect a substantive or vested right, that is, it is remedial. Indeed, if the rule did affect a substantive or vested public pension right, it would be an invalid violation the Washington Constitution's contract clause, art. 1, § 23, *Bakenhus v. Seattle*, 48 Wn.2d 695, 698, 296 P.2d 536 (1956); *Bowles v. Retirement Systems*, 121 Wn.2d 52, 65, 847 P.2d 440 (1993).

WAC 415-108-520 applies retroactively to Mr. Fox. Retroactive application of the rule, as evidenced by DRS's resistance to that application, confirms Mr. Fox's qualification for PERS membership.

**4. The Court Should Enter a Favorable Judgment and Award Attorney Fees.**

Mr. Fox established he worked in a PERS eligible position and is not exempt from PERS membership. The agency action denying him PERS membership should be reversed. As the prevailing party on judicial review, Mr. Fox is entitled to reasonable attorney's fees and costs under RCW 4.84.350. Mr. Fox asks for an award of attorney's fees and other expenses in an amount to be determined at a subsequent proceeding.

**E. Conclusion.**

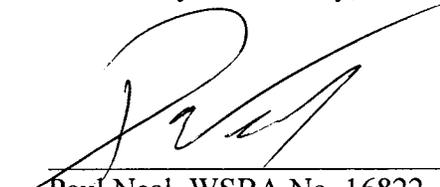
Mr. Fox told the truth. He presented substantial uncontradicted evidence to corroborate it. He established both a just and reasonable inference and substantial evidence he worked over 70 hours per month. In so doing, he established he held a PERS eligible position.

Mr. Fox's status as a student did not exempt him from PERS. He is entitled to the same standard applied to all UW student employees who

are not employed under a fellowship or financial aid: to subjectively determine his PERS status. He did so by providing the UW with an affirmative written declaration of his intent to enroll in PERS. The UW's failure to keep a record of his election shifts the burden to it to disprove Mr. Fox's evidence. Again, it has failed to do this.

Mr. Fox is entitled to a correct application of the law. He has established the elements necessary to support a ruling that: 1) He held a PERS eligible position; 2) He was not exempt from PERS under RCW 41.40.120(7); and therefore 3) He is a prevailing party entitled to attorneys' fees and other expenses under RCW 4.84.350.

Respectfully submitted this 19<sup>th</sup> day of February, 2009



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Paul Neal, WSBA No. 16822  
Attorney for Gary Fox

# Appendix

**CERTIFICATION OF MAILING:**

I hereby certify that I have this day served a copy of this document upon the parties of record in this proceeding by mailing each of them a copy thereof, properly addressed and postage prepaid.

Dated at Olympia, Washington, this 7<sup>th</sup> day of March, 2008.

*Morgan Moreno*

Morgan Moreno, Administrative Assistant  
Department of Retirement Systems  
Olympia, Washington

**WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS  
BEFORE THE PRESIDING OFFICER**

In re the Appeal of )

) Docket No. 07-P-001

**GARY FOX** )

) **FINAL ORDER**

for PERS membership and service credit )

**STATEMENT OF THE CASE**

Gary Fox requested a hearing before the Department of Retirement Systems because the Department has refused to allow him to become a member of PERS (Plan 1).

Paul A. Neal, Attorney at Law, represented Mr. Fox in this appeal. Sarah E. Blocki and Kathryn Wyatt, Assistant Attorneys General, represented the Department of Retirement Systems. Presiding Officer Ellen G. Anderson held a hearing in Olympia and Seattle, Washington, on September 17 and 18, 2007, at which Mr. Fox, Mr. Neal, and Ms. Blocki and Ms. Wyatt appeared. The parties filed post-hearing submissions through January 10, 2008.

The Presiding Officer, having considered the administrative record, including the testimony and evidence presented at hearing, and the arguments of the parties, now enters this Final Order for the Department of Retirement Systems.

**ISSUE**

Whether Mr. Fox established, or is entitled to establish, membership and service credit in PERS (Public Employees' Retirement System), Plan 1?

**RESULT**

Mr. Fox cannot establish membership and service credit in PERS Plan 1.

## FINDINGS OF FACT

### *Background – DRS, LEOFF and PERS*

1. The Public Employees' Retirement System (PERS), is a statewide retirement benefit program for employees of Washington State government and local government entities. Before 1977 a board of trustees administered PERS, then a single system with a single set of requirements.
2. In 1976, the Washington State Legislature (legislature) substantially revised PERS, with different terms governing contributions and benefits for those who became members on or after October 1, 1977. The original plan then became known as PERS Plan 1, and the revised plan as PERS Plan 2.

Plan 1 was closed to new members with the implementation of Plan 2; only persons who first entered PERS, or were eligible to enter PERS, before October 1, 1977, can be members of Plan 1.

3. The legislature created the Washington State Law Enforcement Officers' and Fire Fighters' retirement system (LEOFF) in 1969, to take effect March 1, 1970.<sup>1</sup> As of that date, all full time, fully compensated law enforcement officers and firefighters were to be members of LEOFF.<sup>2</sup>

In 1976, the legislature created a substantially revised plan within LEOFF, LEOFF Plan 2,<sup>3</sup> also effective October 1, 1977. The original 1970 plan then became known as LEOFF Plan 1. Plan 1 was closed to new members with the implementation of Plan 2; only persons who first entered LEOFF, or were eligible to enter LEOFF, before October 1, 1977, continued as members of Plan 1.

4. Also in 1976, the legislature created the Washington State Department of Retirement Systems (DRS or the Department), which by statute became the agency responsible for administering LEOFF and PERS, and other statewide public retirement systems.<sup>4</sup> The legislature directed that all powers, duties and functions of those systems and their boards be transferred to the new agency, and that all records for administration of the systems be made available to DRS.<sup>5</sup>

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<sup>1</sup> Laws of 1969, ch. 209, § 4(1).

<sup>2</sup> RCW of 41.40.010(2), .020, 41.50.030, .050, .055, .060

<sup>3</sup> Originally the two plans in PERS and LEOFF were designated by Roman numerals, "Plan I" and "Plan II." Effective September 1, 2000, the Legislature directed the Code Reviser to use Arabic numerals in place of the Roman. Laws of 1998, ch. 341, §§ 709, 714.

<sup>4</sup> Laws of 1975-76, 2<sup>nd</sup> Ex. Sess., ch. 105, § 4.

<sup>5</sup> RCW 41.50.020-.030(1),(3), .090(1), .802.

5. As part of the same 1976 enactment creating DRS, the legislature broadly prohibited membership participation in more than one DRS-administered retirement system. One subsection, which took effect March 19, 1976,<sup>6</sup> expressly prevents a person retired for disability from one system, such as LEOFF, from becoming a member of another system, such as PERS.
6. In order to administer PERS and other public retirement systems, DRS relies on reports from employers detailing employee information such as employment status, dates of employment, retirement system membership status, compensation paid, hours or days worked, and so forth. DRS also relies on retirement system employers to determine for their reports which of their employee positions are eligible for participation in a retirement system. DRS exercises authority to correct an employer's reporting should it turn out later to be incorrect.

*Mr. Fox's Claim*

7. Gary Fox is an investigator for the Office of the Washington State Attorney General (AGO). A former member of LEOFF, Plan 1, he retired from that system in 1990 with work-related disability benefits. He seeks membership and participation in PERS for his post-retirement state employment with the AGO. He bases this claim that he is eligible for PERS membership on a job he performed in 1970-72 at the University of Washington while he was a student there.

*Mr. Fox's UW enrollment and employment history 1966-1972*

8. The University of Washington (University or UW), a public university, has been an employer participant in PERS since 1954, primarily for its non-faculty staff employees. Its full-time staff participate in PERS. In 1970-72, its classified staff working half-time to full-time were paid on a salaried basis.
9. Mr. Fox enrolled at the University in the fall of 1968, and attained a Bachelor of Arts degree in business administration in June 1972. The University operated on a quarter system then, as it does today. Students register and earn academic credit within any of four academic quarters in a calendar year, designated fall, winter, spring and summer. Mr. Fox entered the University in the fall quarter of 1968 and finished his undergraduate degree work at the end of spring quarter 1972.
10. The summer before he enrolled at the UW, Mr. Fox started work as a shipping clerk with Bethlehem Steel Corporation. He worked there full-time during the summers of 1968, 1969 and 1970, and at times during the school years, into the 4<sup>th</sup> quarter of 1970. He earned \$3.28 per hour.
11. Mr. Fox met Dr. Eric Hughes, Ed.D., when Mr. Fox was a gymnast in high

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<sup>6</sup> Later codified as RCW 41.04.270(1)(c). See Conclusion of Law 5.

school. Dr. Hughes coached the gymnastics program at UW and also made community gymnastics classes available through the University's extension services. Mr. Fox took community gymnastics classes from Dr. Hughes, and as a high school junior and senior progressed to teaching or assisting in these classes once per week in exchange for his own class fees.

12. During his undergraduate years Mr. Fox was a member of the University's gymnastics team under the direction of Dr. (Coach) Hughes. From the fall quarter of 1968 through the spring quarter of 1972 Mr. Fox worked as a physical education student assistant, assisting with the same kinds of extension program gymnastics classes that he had taken before he entered the University. When these classes were in session, he typically worked six to seven hours a week, at the rate of \$1.90 per hour. Dr. Hughes was responsible for recording Mr. Fox's hours worked and submitting reports of student work hours to the extension services administrative office.
13. Over many years of coaching and teaching, Dr. Hughes assisted many gymnastics students in finding campus employment to help pay their education and living expenses. In or about the spring of 1970, Mr. Fox asked Dr. Hughes for help finding additional work to earn money he needed so he "could continue going to school."

In approximately late May 1970, Dr. Hughes became aware of a part-time job with Environmental Services (also referred to in this record variously as "buildings and grounds," "custodial services," and "the janitorial department") on campus. Dr. Hughes contacted M. B. Byrd, a manager with Environmental Services, to arrange an interview for Mr. Fox and to verbally recommend that he be hired. Dr. Hughes brought the opening to Mr. Fox's attention by giving him a copy of an advertisement for the job from an unidentified newspaper, taken from a bulletin board for job postings in the gym. Mr. Byrd interviewed and hired Mr. Fox.

14. Mr. Fox remembers filling out employment-related forms when he began his janitorial work around June 1, 1970. He recalls an "enrollment form" and a "waiver form" for PERS being among them. A "wavier form" would have allowed him to "waive" participation in PERS by declaring his employment to be incidental to his education. Mr. Fox wanted to participate in PERS, and he recalls completing this PERS "enrollment form" to make his wish clear.
15. At the time Mr. Fox was hired for this janitorial work, M. B. Byrd oversaw nine crews of janitorial staff maintaining buildings in different locations on the UW campus, each of which had its own supervisor or "group leader." Mr. Fox began work at the Health Sciences complex June 1, 1970. By the beginning of July 1970 his job duties were transferred to a different complex of buildings (at the electrical and mechanical engineering department) where his immediate supervisor was Joseph Caldwell. He worked in that location that summer and continued through June 1972.

The janitorial crew for the electrical and mechanical engineering department buildings had several full-time staff members. Although the Environmental Services department "often hired student athletes,"<sup>7</sup> Mr. Fox was the only student, and the only part-time staff member, in this group. Mr. Fox performed many of the same cleaning and supply stocking tasks that the full-time staff did, "augmenting [the] regular crew,"<sup>8</sup> and he also performed "special projects," such as inventorying and stocking supplies for the other janitorial staff. He was not aware of any need to re-authorize this position each quarter, nor does he recall being required to complete forms or perform other tasks for any re-authorization.

16. Mr. Fox, Mr. Byrd and Mr. Caldwell all referred to Mr. Fox's position as "half time."<sup>9</sup> According to Mr. Byrd, "half time" meant that he was "scheduled to work 80 hours per month;" Mr. Fox saw it as 80 hours per month or 20 hours per week; he testified that he typically performed his janitorial duties four hours a day, five days a week. Within these minimum requirements, he could perform his assigned tasks at different times, including evening and night hours, to accommodate his class and activity schedule. He and Mr. Caldwell set up a new work schedule each quarter.
17. Mr. Fox was paid for his janitorial work by the hour. \$2.05 was the highest hourly rate he was paid, in June 1972. Mr. Caldwell kept track of the hours he worked, and distributed paper pay checks to him and the other staff in his unit. Coach Hughes continued to supervise and report Mr. Fox's student assistant work, but had no involvement in his performance of janitorial duties or reporting of his hours for that employment.
18. After June 1970, Mr. Fox recalls receiving one monthly pay check for both the Physical Education assistant hours and the janitorial hours. He recalls deductions being taken against his janitorial pay for social security and PERS contributions.
19. Mr. Fox resigned his janitorial position at the end of June 1972, the month he graduated with his bachelor's degree.
20. While Mr. Fox was still an undergraduate at UW, he served as a volunteer reserve officer with the Seattle Police Department as a means to gain experience in the law enforcement field.

*Mr. Fox's LEOFF employment/retirement*

21. In 1974, after a time of intermittent employment during which he continued his reserve service with the Seattle Police Department, Mr. Fox accepted

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<sup>7</sup> Exhibit A-30, Declaration of M. B. Byrd.

<sup>8</sup> Exhibit A-4, letter of J. Caldwell.

<sup>9</sup> M. B. Byrd stated that he hired Mr. Fox "as a half time custodian scheduled to work 80 hours per month." Exhibit A-30. Mr. Caldwell, in a 1974 letter of recommendation, said Mr. Fox "did many special projects for me due to his special hours he was allowed to work as a half time employee." Exhibit A-4.

his first paid employment as a police officer, with the City of Tukwila. The Department records the starting date for this employment as June 1, 1974. He signed his Employee's Permanent Record form for LEOFF on May 28, 1974, became a member of LEOFF, and continued as a member of Plan 1 after the implementation of Plan 2.

22. In February 1987 Mr. Fox began work as a patrol officer for the Kent Police Department. Through December 1989 he remained an active contributing member of LEOFF Plan 1.
23. After he sustained a serious shoulder injury in the course of his police work, Mr. Fox retired for disability under LEOFF Plan 1 effective January 7, 1990. DRS has paid him a monthly retirement allowance through the LEOFF system continuously since then.

*Mr. Fox's post-retirement employment*

24. In 1991,<sup>10</sup> Mr. Fox began his current work as an investigator for the AGO. He has continued to work full time in that PERS-eligible position. However, he has not been allowed to become a member of PERS because he has been receiving a retirement allowance from LEOFF Plan 1.
25. Since November 1993 the AGO has reported Mr. Fox's employment and earnings to DRS as though he were a member of PERS Plan 2. The AGO has done this to comply with legislative requirements that public employers document and report their employment of persons who return to work after retiring from DRS-administered retirement systems.
26. DRS has accepted the AGO's reporting of Mr. Fox's employment and earnings, also to comply with a legislative mandate for reporting retiree employment; PERS Plan 2 is the only system in which DRS could process the required reporting for Mr. Fox. DRS has not used this reporting of his AGO employment to give Mr. Fox membership or service credit in PERS; DRS has not required or collected PERS contributions from Mr. Fox or from the AGO.

*Claim for PERS Plan 1-eligible employment*

27. In August of 1995, the Department adopted an administrative rule, WAC 415-108-725, implementing the exclusion statute RCW 41.04.270 (Finding of Fact 5) for PERS. The 1995 rule expressly authorized PERS membership for persons who had "established membership" in PERS before March 1, 1976, even after retirement from another DRS-administered system. The rule stated:

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<sup>10</sup> Mr. Fox testified that he began his employment with the AGO in July of 1991. TR 74-76. AGO and Department records show his starting date as November 1, 1993, after new reporting requirements took effect for retirees in public employment. Exhibits A-12, D-39. This decision does not require that the inconsistency be resolved; Mr. Fox's testimony has been adopted.

If I have retired from another retirement plan or am eligible to retire, am I excluded from participating in PERS?

(1) If you have retired or are eligible to retire from another retirement system authorized by the laws of this state you cannot participate in PERS membership unless:

- (a) You established membership in PERS prior to March 1, 1976; or
- (b) You accrued less than fifteen years of service credit in the other retirement plan.

(2) If you are receiving a disability allowance from any retirement system administered by the department you can not [sic] participate in PERS unless you established membership in PERS prior to March 1, 1976. . .

28. In August 1998 the AGO requested that DRS re-evaluate Mr. Fox's eligibility for membership in PERS, and submitted a PERS enrollment form and beneficiary designation form to DRS on his behalf. The Department responded by letter dated September 10, 1998, advising that under WAC 415-108-725 Mr. Fox was not eligible for PERS membership because he was a LEOFF retiree who had not established membership in PERS prior to March 1, 1976.
29. In or about 2005 Mr. Fox repeatedly contacted the Department requesting that his 1970-72 janitorial employment at the UW be considered as a basis for pre-1976 membership in PERS. Eventually his requests were referred for decision to Michelle Hardesty, then the plan administrator for PERS. On October 27, 2005, Ms. Hardest notified Mr. Fox by letter that his request for membership and service credit in PERS for "July 1970 through June 1972" was denied for lack of "valid proof of employment in an eligible position."
30. On January 29, 2007, after further investigation and review, the DRS petitions examiner also denied Mr. Fox's request. The petitions examiner accepted that Mr. Fox was employed in a janitorial position as he claims, but did not find sufficient reliable evidence that his work was in a PERS-eligible position, or that he was personally eligible, to support his claim for PERS membership in 1970.
31. Mr. Fox has not asked that DRS consider his Physical Education student assistant employment at UW a basis for his claim for PERS membership in 1970-72.

*Records and Efforts to obtain records*

32. Mr. Fox has no records of his employment or pay from his undergraduate years.
33. Beginning in about 1996, Mr. Fox made persistent, comprehensive, but ultimately unsuccessful, attempts to document the janitorial employment he remembers.

34. He made numerous requests to the University of Washington for records relating to his work there in 1970-72. The University's public records, benefits office and payroll staff have searched its employee and payroll records extensively but have found no record of his janitorial employment in locations where such records would be expected to be. The University has no record of paying hourly wages to Mr. Fox except for a small portion of his student assistant pay in 1969 and 1970. The University has no record of a PERS enrollment form, or a PERS "waiver form," for Mr. Fox.
35. Between 1970 and 1972, the University paid its employees, including student employees, through one computerized payroll system. The system created a record of each payroll "run" in the form of a comprehensive alphabetical check register. The university maintains copies of the register in two locations, and the records center copies are retained for 75 years. In January 2005 the University represented to Mr. Fox in a "Verification of W-2" notice that it had records of his earning \$120.00 in 1970, not attributed to any dates or department. No other record of payroll disbursement to Mr. Fox between 1970 and 1972 has appeared in the University's payroll register despite an extensive search.

The University has consistently refused to acknowledge Mr. Fox's janitorial employment in the absence of any official payroll or other personnel records regarding it.

36. Mr. Fox was unable to obtain records of any federal income tax returns from the Internal Revenue Service for 1968 through 1972, though he believes that he would have filed returns for the years he worked at Bethlehem Steel.
37. In or about 2002 Mr. Fox's request for records of earnings reported to the Social Security Administration, for the period January 1968 through December 1970, also produced nothing related to his employment at the UW. The SSA report did show his earnings from Bethlehem Steel, and small amounts of earnings through the YMCA of Greater Seattle and the City of Seattle. The detail report stated, "There are no other earnings recorded under this social security number for the period(s) requested."
38. In response to Mr. Fox's requests, the Department has also searched its records for any employer reporting of PERS employment and any PERS contributions paid for Mr. Fox. The records searched included his member file in the electronic document imaging management system (EDIMS), the computerized Member Information System, and physical ledgers of employees reported to the Public Employees' Retirement System in 1970 to 1972, before the PERS Board's functions were transferred to DRS (in or about 1976). DRS personnel have found no PERS enrollment form for Mr. Fox, no record of any PERS contributions by him or by the University on his behalf, and no record of his employment with any PERS employer for any time prior to 1993.

The earliest record the Department has of Mr. Fox's participation in any state retirement system is his 1974 LEOFF enrollment form (Employee Permanent Record) from his employment with the City of Tukwila.

39. Mr. Fox has been able to produce only two documents concerning his janitorial employment in 1970-72. One, a copy of a 1974 letter of recommendation from his former janitorial supervisor to the chief of the Police Department of the City of Tukwila, stated, in part,

I am Joseph Caldwell, Gary's former supervisor while employed at the University of Washington. I have know[n] Gary since he came to work for me as a custodian in July of 1970. He held that position until he graduated in June of 1972. His duties not only included augmenting my regular crew with cleaning and maintaining the classrooms, labs and bathrooms, but did many special projects for me due to his special hours he was allowed to work as a half time employee.

Exhibit A-4.

The second, a 2005 declaration of M.B. Byrd stated, in part,

3. In June of 1970 Gary Fox was referred to me for possible employment by Coach Eric Hughes. Our Department often hired student athletes. I remember interviewing and hiring Gary in June of 1970 as a half-time custodian scheduled to work 80 hours per month. I assigned Gary to group leaders Spencer Porter and Joseph Caldwell. Gary was assigned to work with them in the Electrical and Mechanical Engineering buildings.
4. Gary held his half-time custodial position from June of 1970 until he left in June of 1972.

Exhibit A-30.

## CONCLUSIONS OF LAW

### *Jurisdiction and Burden of Proof*

1. The undersigned Presiding Officer enters this Final Order for the Department. RCW 41.50.060, RCW 34.05.425(1)(b), RCW 34.05.461(1)(b).
2. The Department has jurisdiction over the parties and the subject matter of this appeal. RCW 41.40.068; chapters 41.40 and 41.50 RCW; WAC 415-08-020(1).
3. Mr. Fox has the burden of proof in this appeal. WAC 415-08-420(2).

### *Analysis*

A. Governing Law for PERS Membership

4. The Department of Retirement Systems is a legislatively-created agency of the State of Washington, charged with the administration and management of the Public Employees' Retirement System and with the responsibility for implementing the provisions of chapter 41.40 RCW (the PERS authorizing statutes).
5. Persons who receive disability retirement allowances from any DRS-administered retirement system generally may not become members of any other of the DRS-administered retirement systems. RCW 41.04.270 states:

(1) Except as provided in [sections omitted], on and after March 19, 1976, **any member or former member who** (a) receives a retirement allowance earned by the former member as deferred compensation from any public retirement system authorized by the general laws of this state, or (b) is eligible to receive a retirement allowance from any public retirement system listed in RCW 41.50.030, but chooses not to apply, or (c) **is the beneficiary of a disability allowance from any public retirement system listed in RCW 41.50.030 shall be estopped from becoming a member of or accruing any contractual rights whatsoever in any other public retirement system listed in RCW 41.50.030:** PROVIDED, That (a) and (b) of this subsection shall not apply to persons who have accumulated less than fifteen years service credit in any such system.

(Bold emphasis added.)

6. However, under certain circumstances, Department rules expressly permit former PERS members to re-enter PERS membership, even if they have retired from another DRS-administered retirement system. WAC 415-108-725 states, in pertinent part,

**If I have retired from another retirement plan or am eligible to retire, am I excluded from participating in PERS?**

(1) If you have retired or are eligible to retire from another retirement system authorized by the laws of this state you cannot participate in PERS membership unless:

(a) You established membership in PERS prior to March 1, 1976; or

(b) You accrued less than fifteen years of service credit in the other retirement plan.

(2) If you are receiving a disability allowance from any retirement system administered by the department you can not [sic] participate in PERS unless you established membership in PERS prior to March 1, 1976. . .

7. RCW 41.04.270(1)(c) would bar Mr. Fox's participation in PERS as a LEOFF disability retiree, but the exception articulated in WAC 415-108-725 allows him to show that he was entitled to PERS membership before that

bar took effect. For his case the focal point in the rule is that the retiree have "established membership in PERS before March 1, 1976." The Department considers that an individual has "established membership" for the application of this rule where he can demonstrate that he met all statutory requirements for membership, even if he was not earlier enrolled as a member, under *City of Pasco v. Department of Retirement Systems*, 110 Wn. App. 582 (2002).

8. Thus Mr. Fox, who has been working in a PERS-eligible position since the early 1990's, seeks to show that he met all statutory requirements for membership in PERS before March 1976. To do so he must show that the job he claims to have had for two years between 1970 and 1972 was a PERS-eligible position, and that he was at that time personally eligible to be a member of that system. The Department applies the law in effect in 1970 to determine whether he was eligible for PERS membership when this employment began.
9. In 1970, the PERS Board had not adopted regulations addressed to PERS membership. Membership in PERS was governed by RCW 41.40.120,<sup>11</sup> which read as follows (in pertinent part):

Membership in the retirement system shall consist of all regularly compensated employees and appointive and elective officials of employers as defined in this chapter who have served at least six months without interruption or who are employed, appointed or elected on or after July 1, 1965, with the following exceptions:

- (1) Persons in ineligible positions; . . .
- (7) Persons employed by an institution of higher learning or community college operated by an employer, primarily as an incident to and in furtherance of their education or training, or the education or training of a spouse; . . .
- (12) Persons hired in eligible positions on a temporary basis for a period not to exceed six months: PROVIDED, That if such employees are employed for more than six months in an eligible position they shall become members of the system.

10. In June 1970, the following related terms were defined in RCW 41.40.010:

- (4) "Employer" means every branch, department, agency, commission, board and office of the state and any political subdivision of the state admitted into the retirement system; . . .
- (5) "Member" means any employee included in the membership of the retirement system, as provided for in 41.40.120.

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<sup>11</sup> The original PERS membership statute, RCW 41.40.120, and its recodified version, RCW 41.40.023, have been amended numerous times since 1970. (Recodification: Laws of 1991, ch. 35, § 10.)

(8) "Service" means periods of employment rendered to any employer for which compensation is paid, . . . Full time work for ten days or more or an equivalent period of work in any given calendar month shall constitute one month of service. Only months of service shall be counted in the computation of any retirement allowance or other benefit provided for in this chapter. Years of service shall be determined by dividing the total number of months of service by twelve. . . .

(22) "Employee" means any person who may become eligible for membership under this chapter, as set forth in RCW 41.40.120.

(26) "Eligible position" means:

(a) Any position which normally requires five or more uninterrupted months of service a year for which regular compensation is paid to the occupant thereof;

(b) Any position occupied by an elected official or person appointed directly by the governor for which compensation is paid.

(27) "Ineligible position" means any position which does not conform with the requirements set forth in subdivision (26)[all sic]. . . .<sup>12</sup>

11. To restate these requirements, in 1970 (after July 1, 1965), a person who was otherwise personally eligible could be a member of PERS if he worked for a PERS employer in an eligible position; an eligible position was one that normally required five or more consecutive months of regularly compensated service in a calendar year; and a month of service in turn constituted a minimum of 70 compensated hours of service to an employer in a calendar month.<sup>13</sup> RCW 41.40.120, 41.40.010(26)(a).

### *B. Eligible Position*

12. The evidence in this record is sufficient to accept that Mr. Fox worked as a janitor on a regular basis at the University, in a particular area of the UW campus, between June 1970 and June 1972. It is not sufficient to prove that the position in which Mr. Fox worked was an eligible position for PERS. This record does not contain enough reliable evidence to establish particularly crucial elements of a PERS-eligible position in 1970, that Mr. Fox actually worked the requisite number of regularly compensated hours for the University in the minimum number of uninterrupted months as

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<sup>12</sup> For simplicity this decision uses the 1970 version of RCW 41.40.010, disregarding amendments made in the 1971 and 1972 sessions. Of the subsections listed above, only the language of (4) was affected, and that change, expanding the definition of "Employer," would have no bearing on the issues in this case. Laws of 1971, 1<sup>st</sup> Ex. Sess., ch. 271, § 2; Laws of 1972, Ex. Sess., ch. 151, § 1.

<sup>13</sup> In 1970, the statutory requirement for a month of service credit was "ten days or more or an equivalent period of work" per month (RCW 41.40.010(9)); by then the PERS Board and DRS had long accepted 70 hours of work per month as meeting the ten-day requirement. Exhibits D-42-44, D-47. In 1979, the legislature expressly adopted the 70-hour minimum as the standard for a month of service credit in PERS Plan 1. Laws of 1979, 1<sup>st</sup> Ex. Sess., ch. 249, § 7, now RCW 41.40.010(25)(a).

specified in RCW 41.40.120 including subsection (1).

13. In RCW 41.40.010(26)(a), a PERS 'eligible position' is defined first in terms of what a position "normally" requires. Mr. Fox could offer no evidence on this point. He did not know, nor did any other witnesses, how this position was funded, filled, or scheduled, or even whether it existed, before or after he had it. The "normal" requirements of his position, if indeed there were any, are unknown now.
14. The position would still be considered eligible for PERS, regardless of its "normal" requirements or history, if while in it Mr. Fox was paid for at least 70 hours of work in each of five consecutive months and into a sixth month without a break. There is no official or disinterested corroborating record that Mr. Fox fulfilled these requirements, and particularly no record of any compensation paid for this position on comprehensive UW payroll check registers. Mr. Fox asks the Department to accept his testimony and his former supervisors' statements as adequate proof of these elements.
15. The statements by former supervisors are less than needed for this purpose. Mr. Caldwell's 1974 recommendation letter stating that Mr. Fox had worked "as a half-time employee" was written not to document his work hours in 1970 but to communicate in general terms the extent of the writer's familiarity with Mr. Fox's work and performance. Mr. Byrd's 2005 statement that he was "scheduled to work 80 hours per month," is no more than a statement of what Mr. Byrd remembers Mr. Fox's schedule generally was. Neither provides meaningful or specific corroboration that he actually worked the requisite number of hours in his janitorial position each month from June into November of 1970.
16. The undersigned does not question the credibility of Mr. Fox's testimony, in terms of his honesty or truthful recounting of his recollection. His testimony about his janitorial employment was essentially uncontradicted, except by evidence of the general lack of records. Nonetheless, where the claimed qualifying employment occurred during college terms, more three decades ago, his testimony does not provide a sufficiently reliable basis for a conclusion that his work was in a PERS-eligible position or one that became eligible.
17. Mr. Fox testified without qualification or challenge that he worked for Bethlehem Steel during the summers of 1968 and 1969, and that his employment there ended in 1969, prompting him to seek a campus job with Dr. Hughes' assistance in 1970. TR 62, 112. The earnings report from the Social Security Administration from January 1969 through December 1970 (Exhibit A-3) shows that his Bethlehem Steel employment extended well into 1970. It displays earnings from Bethlehem Steel in the 1<sup>st</sup> quarter of 1970 representing approximately 110 hours of work at \$3.28 per hour; in the 3<sup>rd</sup> quarter of 1970 (summer) representing approximately 442 hours of work at \$3.28 per hour, an amount slightly greater than his earnings there in the summer of 1968; and in the 4<sup>th</sup> quarter earnings representing

approximately 30 hours of work at \$3.28 per hour. Where Mr. Fox's testimony from his memory is not congruent with the SSA records of his earnings, the business records held by SSA would be the more reliable indicator of his employment and compensation in 1970, over 35 years ago. Those records support the inference that Mr. Fox's employment with Bethlehem Steel continued into the fall of 1970 in a pattern similar to his employment there in 1968 and 1969, in contrast to his testimony that the job ended in 1969. See Finding of Fact 10.

18. This is set out not to question Mr. Fox's credibility, but to illustrate why memory of particular employment circumstances some decades in the past does not form a sufficiently reliable basis for proof that particular statutory elements are met. The concern about reliability is generally greater where the memory in question is that of a person interested in the outcome.
19. In this case, the summer and fall of 1970 is the time that must be examined carefully for the elements of a statutory PERS-eligible position at the University. Mr. Fox's memory of his 1970 employment situation during this time could reasonably be questioned on his other employment even where his earnings are independently documented. Around his janitorial employment, he testified only that he worked his janitorial job 20 hours per week (or 80 hours per month) year-round, without detail concerning his daily schedules in that time period that would place his paid work in the context of his class schedules, competitive gymnastics activities, reserve officer activities, and school breaks. The SSA records taken together with Mr. Fox's testimony mean that he was working two jobs in the summer of 1970 (one full-time at Bethlehem Steel and one part-time at the University), and, since he was also teaching community gymnastics classes, three part-time jobs in the fall quarter of 1970.
20. In the end Mr. Fox's testimony from his memory and his former supervisors' statements are not enough to demonstrate that he was regularly compensated in his janitorial job for a minimum of 70 hours per month during each of the consecutive months June 1970 into November 1970, in a position that would normally require particularly those hours over that time. He has not proved that he held a PERS-eligible position as defined by RCW 41.40.120 including subsection (1).
21. Mr. Fox protests the Department's failure to give his testimony greater weight, where he has exhausted every avenue a person could be expected to use to find corroborative records, and he argues that it was the University's responsibility, not his, to properly report and maintain records of his work and earnings. However that may be, in an appeal before this agency, an individual seeking PERS system membership bears the burden to prove that his particular employment met all the elements necessary for that membership. In this case, the claim is also presented against a background legislative policy that disapproves multiple-system participation in Washington state retirement systems. The undersigned remains unpersuaded that the Department should place Mr. Fox in PERS Plan 1.

where he has been unable to supply elemental details from his own knowledge, and has been unable to corroborate his own memory by reference to any disinterested source with respect to the details of dates and compensation in the position at issue.

C. "Student Exception"

22. Even were Mr. Fox's evidence sufficient to prove that the position at issue was PERS-eligible, however, in 1970 he would have been barred from PERS membership by the "student exception" in RCW 41.40.120(7), a statutory provision of long standing in PERS.
23. The system now known as PERS was organized as the State Employees' Retirement System in 1947. Then its membership included "all monthly salaried employees . . . of the various departments, commissions, institutions and other agencies of the state, . . ." so long as the potential member worked at least 1,000 hours per year.<sup>14</sup> In the next legislative session, in 1949, students working at state-supported schools were expressly excluded from membership.

Membership in the retirement system shall consist of all regularly compensated employees and appointive and elective officials of Employers as defined in this [act] who have served at least six months without interruption, **with the following exceptions: . . .**

**7. Persons employed by an employer or serving in an institution operated by an employer, primarily as an incident to and in furtherance of their education or training; . . .**<sup>15</sup>

RCW 41.40.120 (1949) (bold emphasis added).

24. In 1965 and 1967 the legislature refined and expanded the exception, to expressly include students and spouses of students at institutions of higher learning and community colleges.

Membership in the retirement system shall consist of all regularly compensated employees and appointive and elective officials of employers as defined in this chapter who have served at least six months without interruption or who are employed, appointed or elected on or after July 1, 1965, with the following exceptions: . . .

(7) Persons employed by an employer or serving in an institution of higher learning or community college operated by an employer, primarily as an incident to and in furtherance of their education or training, or the education or training of a spouse; . . .<sup>16</sup>

RCW 41.40.120 (1967). (Underlined emphasis indicates (7) language

<sup>14</sup> Laws of 1947, ch. 274, §§ 1, 13.

<sup>15</sup> Laws of 1949, ch. 240 § 13.

<sup>16</sup> Laws of 1965, ch. 155 § 2; Laws of 1967 ch. 127, § 3.

added with these amendments.) This version of the statute was in effect in 1970.

25. With regard to the janitorial employment on which Mr. Fox bases his claim for PERS membership, the evidence of record shows the following.

At the time that the janitorial job became available, Mr. Fox was a full-time undergraduate student at the University. He was not a PERS member. Up to the time he began the janitorial work, his only employment at the University had been as a student assistant teaching extension classes in gymnastics, about 6 hours per week.

Mr. Fox was a member of a team or teams that competed in gymnastics for the University. Dr. Hughes, his gymnastics coach, greatly assisted Mr. Fox in obtaining the janitorial work at issue, as he had helped many other gymnastics students find employment on campus.

Mr. Fox was the only student and only part-time worker on the crew at the electrical and mechanical engineering department buildings. He was able to vary his work schedule around his class schedule, which changed quarterly, and his gymnastics schedule, including the extension classes. He performed "special projects" for his supervisor different from those assigned to the regular crew (though he performed many of the same tasks they did). He was paid by the hour, not on salary as were classified University staff, even half-time staff.

Mr. Fox took the job to pay certain living expenses, so that, in his own words, he "could continue going to school."

Mr. Fox worked as a janitor only as long as he was an undergraduate. He resigned this work when he graduated in June 1972. He obtained a degree in business administration and had worked in a large corporation not affiliated with the University. He entered a career in law enforcement within two years of graduation. There is no evidence he ever worked as a janitor or in any similar type of employment before or after this work at the UW.

26. These facts demonstrate that when Mr. Fox was working as a janitor at the University, he was serving in an institution of higher learning primarily as an incident to and in furtherance of his education there. RCW 41.40.120(7) applied to bar his membership in PERS.
27. This is a straightforward application of the statutory provisions to the evidence of record in this proceeding. There is no basis for any other analysis. Any potential mitigating effect of the enrollment form Mr. Fox recalls filling out is lost here because the form itself is lost. Further, the contributions to PERS he recalls making through payroll deduction have never shown up in either the University's or the Department's business records.

28. Nearly 20 years after Mr. Fox graduated from the University, the Department adopted a rule concerning the student/student spouse exception to PERS membership. WAC 415-108-520 does not play a role in applying the student exception in this case because it was adopted much later and was not made expressly retroactive. It is only noted that the result here appears to be consistent with current law under this rule even had Mr. Fox proven that he worked in a PERS-eligible position in 1970.
  
29. Mr. Fox's claim having been resolved on other grounds, it is not necessary to address in any further detail the question whether the temporary employment exclusion in RCW 41.40.120(12) also would have applied to Mr. Fox's claim.

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ORDER

Mr. Fox's request that the Department grant him membership and service credit in PERS Plan 1 for employment at the University of Washington in 1970-72 is denied.

*Notice of Further Appeal Rights*

**Reconsideration:** Any party to this appeal may ask the DRS Presiding Officer to reconsider this Final Order. Within ten days of the mailing of this Final Order, the party must file a petition for reconsideration, addressed to the Presiding Officer at the Department of Retirement Systems, PO Box 48380, WA 98504-8380. The petition for reconsideration must state specific reasons why the Final Order should be changed. "Filing" means **delivery** to DRS, not mailing; the ten-day time limit is strictly observed. RCW 34.05.010(6), 34.05.470.

**Judicial Review:** A party may request judicial (Superior Court) review of this Final Order. A petition for judicial review must be filed within 30 days of the Final Order mailing date. **Any party seeking Superior Court review should carefully read and comply with the Administrative Procedure Act requirements (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, 34.05.542.

Done this 7<sup>th</sup> day of March, 2008.



ELLEN G. ANDERSON  
Presiding Officer  
Department of Retirement Systems

April 3, 1974

Chief John Sheets  
Tukwila Police Department  
14475 59th Ave S.  
Tukwila, WA 98067

Dear Chief Sheets,

I am writing this letter of recommendation for Gary Fox who has applied for the position of police officer with your department.

I am Joseph Caldwell, Gary's former supervisor while employed at the University of Washington. I have known Gary since he came to work for me as a custodian in July of 1970. He held that position until he graduated in June of 1972. His duties not only included augmenting my regular crew with cleaning and maintaining the classrooms, labs, and bathrooms, but did many special projects for me due to his special hours he was allowed to work as a half time employee.

Gary worked very independently, and when asked to perform a task, completed it in a timely manner. Gary is not afraid to ask questions should directions be vague.

Gary was always on time, dressed and groomed appropriately, and always had a positive attitude about everything. He is very well disciplined, and I contribute this to his years of being a gymnast and a member of the Men's Varsity Gymnastics Team here at the University.

Gary has also been a reserve police officer with Seattle Police Department and had had extensive training through them. Police work is his passion and he will be an asset to you and make an outstanding officer.

Sincerely,

Joseph Caldwell

jc/tc  
cc: Gary Fox  
copy

Exhibit 2

# Exhibit 3

WAC 251-04-010 GENERAL PROVISIONS--PURPOSE. The interests of state institutions of higher education and the employees of those institutions will be furthered by the enactment of a system of personnel administration designed specifically to meet particular needs in connection with employer-employee relations in the state institutions of higher education. The general purpose of this act is to establish a system of personnel administration for the institutions of higher education in the state which is based on merit principles and scientific methods, and which governs the appointment, promotion, transfer, layoff, recruitment, retention, classification and pay plans, removal, discipline, and salary of employees covered under this act. [Order 1, §251-04-010, filed 9/15/69.]

WAC 251-04-020 DEFINITIONS. Unless the context clearly indicates otherwise, the words used in these rules have the meaning given in this section.

(1) "Allocation" - The assignment of an individual position to an appropriate class on the basis of the kind, difficulty, and responsibility of the work of the position.

(2) "Appointing authority" - A person or group of persons lawfully authorized to make appointments.

(3) "Board" - The higher education personnel board established under the provisions of the higher education personnel law.

(4) "Class" - One or more positions sufficiently similar with respect to duties and responsibilities that the same descriptive title may be used with propriety to designate each position allocated to the class; that the same general qualification requirements are needed for performance of the duties of the class; that the same tests of fitness may be used to select employees; and that the same schedule of pay can be applied with equity to all positions in the class under the same or substantially the same employment conditions.

(5) "Classified service" - All positions in the institutions of higher education and related boards subject to the provisions of the higher education personnel law.

(6) "Competitive service" - All positions in the classified service for which a competitive examination is required as a condition precedent to appointment.

(7) "Demotion" - The change of an employee from a position in one class to a position in another class which has a lower maximum salary.

(8) "Director" - The personnel director of the higher education personnel board.

(9) "Dismissal" - The termination of an individual's employment for cause as specified in these rules.

(10) "Eligible" - An applicant for competitive or non-competitive examinations who has met the minimum qualifications for the class involved, been admitted to, and has passed the examination.

(11) "Eligible list" - A list of eligible names established by the personnel officer for a class in accordance with these rules.

(12) "Exempt position" - A position properly designated as exempt from the application of these rules.

(13) "Institutions of higher education" - The University of Washington, Washington State University, Central Washington State College, Eastern Washington State College, Western Washington State College, The Evergreen State College, and the various state community colleges.

(14) "Layoff" - A separation from service because of a lack of funds and/or curtailment of work and without fault on the part of the employee.

(15) "Non-competitive service" - All positions in the classified service for which a competitive examination is not required.

(16) "Permanent employee" - An employee who has successfully completed a probationary period.

(17) "Personnel officer" - The principal employee in each institution or related board responsible for administrative and technical activities of the classified service.

(18) "Position" - A group of current duties and responsibilities requiring the full or part-time employment of one person.

(19) "Probationary period" - The period of employment beginning with the date of reemployment into, or original appointment to, the classified service and continuing for six months. This does not apply to reinstatement following layoff.

(20) "Promotion" - A change in status of a permanent employee from a position in one class to a position in a higher class having a higher maximum salary.

(21) "Related boards" - The state board for community college education and the higher education personnel board; and such other boards, councils and commissions related to higher education as may be established.

(22) "Resignation" - A voluntary termination of employment disciplinary purposes.

(23) "Suspension" - An enforced absence without pay for no break in service, from one classified position to another identical entrance salary.

(24) "Transfer" - The change of a permanent employee, with classified position in the same, or a different class having an identical entrance salary.

(25) "Employee organization" - Any lawful association, labor organization, federation, council, or brotherhood, having as one of its purposes the improvement of working conditions among employees, and which has filed a notice of intent to represent employees with the director in accordance with WAC 251-14-020.

(26) "Collective bargaining" - The performance of the mutual obligation of the appointing authority and the certified exclusive bargaining representative to meet at reasonable times, to confer and bargain in good faith, and to execute a written agreement with respect to those personnel matters over which the appointing authority may lawfully exercise discretion; except that by such obligation neither party shall be compelled to agree to a proposal nor be required to make a concession, except as otherwise provided by chapter 251-14 WAC.

(27) "Supervisor" - Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(28) "Part-time employment" - Work of less than full time employment in a regular schedule and with an understanding of continuing employment within the foreseeable future. Employees in part-time employment shall attain permanent part-time status after completion of the probationary period, except as specifically exempted in these rules.

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(29) "Temporary employment"

(a) Work performed in the absence of an employee on leave; projects, or cyclic work loads not to exceed one-hundred twenty (120) calendar days. For example: extra clerical employees hired during registration periods, extra agricultural employees hired during harvest periods.

(b) Extra work required at a work load peak or special (120) calendar days. For example: extra clerical employees hired during registration periods, extra agricultural employees hired during harvest periods.

(30) "Full time employment" - Work consisting of forty (40) hours per week except as otherwise identified in the compensation schedule and these rules.

(31) "Employing official" - An administrative or supervisory employee designated by the appointing authority to exercise responsibility for requesting certification, interviewing eligibles and employing classified employees.

(32) "Trial service" - The initial period of employment following promotion, demotion or transfer into a class in which the employee has not held permanent status, beginning with the effective date of the change and continuing for six (6) months.

(33) "Layoff seniority" - "Layoff seniority" shall be measured as the last period of unbroken service in the classified service of a higher education institution or related board. Veterans and unmarried widows of veterans will be considered senior to nonveterans in like appointment status. Authorized leave of absence or leave without pay shall not constitute a break in service; however, the time spent on such leave shall not be included in computing seniority except where required by statute and except in the case of positions established on the basis of an instructional year.

(34) "Layoff unit" - A clearly identified organizational structure, or substructure with persons employed to achieve a common goal or function under the direction of a single official. A unit may consist of either an administrative entity or a geographically separated activity. [Order 4, \$251-04-020, filed 2/19/71. Prior: Order 3, \$251-04-020, filed 1/15/71; Order 2, \$251-04-020, filed 3/12/70; Order 1, \$251-04-020, filed 9/15/69.]

WAC 251-04-030 ------SCOPE. The provisions of these rules shall apply to all personnel of the institutions of higher education and related boards except those exempted under the provisions of section -04-040. [Order 1, \$251-04-030, filed 9/15/69.]

WAC 251-04-040 EXEMPTIONS. The following classifications, positions, and employees of institutions of higher education, and related boards are hereby exempted from coverage of this act:

(1) Members of the governing board of each institution and related boards, all presidents, vice presidents and their confidential secretaries, administrative and personal assistants; deans, directors, and chairmen; academic personnel; executive heads of major administrative or academic divisions employed by institutions of higher education.

(2) (a) Students employed under separately funded student assistance work programs; OR who are employed in a position directly related to the major field of study to provide training opportunity.

(b) Parsons employed in a position scheduled for less than twenty (20) hours per week or on an intermittent employment schedule.

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(c) Temporary employees filling positions identified in WAC 251-04-020 (29) (b).

(d) Part-time professional consultants retained on an independent part-time or temporary basis such as physicians, architects, or other professional consultants employed on an independent contractual relationship for advisory purposes and who do not perform administrative or supervisory duties.

(3) The Director, his confidential secretary, assistant directors, and professional education employees of the state board for community college education.

(4) The personnel director of the higher education personnel board and his confidential secretary.

(5) The governing board of each institution, and related boards, may also exempt from this act, subject to the employee's right of appeal to the higher education personnel board, classifications involving research activities, counseling of students, extension or continuing education activities, graphic arts or publications activities requiring prescribed academic preparation or special training, and principal assistants to executive heads of major administrative or academic divisions, as determined by the higher education personnel board: PROVIDED, That no nonacademic employee engaged in office, clerical, maintenance, or food and trades services may be exempted by the higher education personnel board under this provision.

(6) Any employee who feels that any classification should or should not be exempt, or any employee because of academic qualifications which would enable such employee to teach and thus be exempt, may appeal to the board in the same manner as provided in section 12-080, et. seq.

(7) Any employee having a classified service status in a position may take a temporary appointment in an exempt position, with the right to return to his regular position, or to a like position, at the conclusion of such temporary appointment. [Order 4, §251-04-040, filed 2/19/71. Prior: Order 1, §251-04-040, filed 9/15/69.]

#### WAC 251-04-050 -----HIGHER EDUCATION PERSONNEL BOARD.

(1) There is a state higher education personnel board composed of three members appointed by the governor, subject to confirmation by the senate: PROVIDED, That no member appointed when the legislature was not in session shall continue to be a member of the board after the thirtieth day of the next legislative session unless his appointment shall have been approved by the senate. The first such board shall be appointed within thirty days after the effective date of this act for terms of two, four, and six years. Each odd-numbered year thereafter the governor shall appoint a member for a six-year term. Persons so appointed shall have clearly demonstrated an interest and belief in the merit principle, shall not hold any other employment with the state, shall not have been an officer of a political party for a period of one year immediately prior to such appointment, and shall not be or become a candidate for partisan elective public office during the term to which they are appointed.

(2) Each member of the board shall be paid fifty dollars for each day in which he has actually attended a meeting of the board officially held. The members of the board may receive any number of daily payments for official meetings of the board

actually attended. Members of the board shall also be reimbursed for necessary travel and other expenses incurred in the discharge of their official duties on the same basis as is provided for state officers and employees generally.

(3) At its first meeting following the appointment of all its members, and annually thereafter, the board shall elect a chairman and vice chairman from among its members to serve one year. The presence of at least two members of the board shall constitute a quorum to transact business. A written public record shall be kept by the board of all actions of the board.

(4) In the necessary conduct of its work, the board shall meet monthly unless there is no pending business requiring board action. Meetings shall be held on campuses of the various state institutions of higher education. Meetings may be called by the chairman of the board, or a majority of the members of the board. Hearings may be conducted by a hearing officer duly appointed by the board. An official notice of the calling of a hearing shall be filed with the director and all members of the board shall be notified.

(5) No release of material, or statement of findings shall be made except with the approval of a majority of the board.

(6) In the conduct of hearings or investigations, a member of the board, or the director, or the hearing officer appointed to conduct the hearing, may administer oaths.

(7) It shall be the duty of the board to promulgate rules and regulations providing for employee participation in the development and administration of personnel policies. To assure this right, personnel policies, rules, classification and pay plans, and amendments thereto, shall be acted on only after the board has given twenty days' notice to, and considered proposals from employee representatives and institutions or related boards affected. In matters involving the various state community colleges, notice shall also be given to the state board for community college education. Complete and current compilations of all rules and regulations of the board in printed, mimeographed, or multigraphed form shall be available from the board without charge.

(8) The higher education personnel board shall adopt and promulgate rules and regulations, consistent with the purposes and provisions of this chapter and with the best standards of personnel administration, regarding the basis for, and procedures to be followed for, the dismissal, suspension, or demotion of an employee, and appeals therefrom; certification of names for vacancies, including promotions, with the number of names equal to two more names than there are vacancies to be filled, such names representing applicants rated highest on eligibility lists; examination for all positions in the competitive and non-competitive services; appointments; probationary periods of six months and rejections therein; transfers; sick leaves and vacations; hours of work; layoffs when necessary and subsequent reemployment, both according to seniority; determination of appropriate bargaining units within any institution or related boards: PROVIDED, That in making such determination the board shall consider the duties, skills, and working conditions of the employees, the history of collective bargaining by

## Chapter 41.05

## STATE EMPLOYEES' INSURANCE AND HEALTH CARE

Hospitalization and health care for subdivision employees: RCW 41.04-county, municipal and other political .180.

**41.05.010 Definitions.** Unless the context clearly indicates otherwise, words used in this chapter have the following meaning:

(1) "Board" means the state employees' insurance board established under the provisions of RCW 41.05.020.

(2) "Employee" shall include all full time and career seasonal employees of the state, whether or not covered by civil service; elected and appointed officials of the executive branch of government, including full time members of boards, commissions or committees; and shall include any or all part time and temporary employees under the terms and conditions established by the board; and members of the legislature who are elected to office after February 20, 1970.

(3) "Panel medicine plan" means a health care plan which can be offered by a health care service contractor which itself furnishes the health care service contracted for by means of a group practice prepaid medical care plan.

(4) "Trustee" shall mean the director of personnel. [1970 1st ex.s. c 39 § 1.]

**Severability—1970 1st ex.s. c 39:** "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1970 1st ex.s. c 39 § 14.] This applies to this chapter and to the 1970 amendments to RCW 41.04.180, 41.04.230, to 41.06.370, and to the repeal of RCW 41.04.200 and 41.04.210.

**41.05.020 State employees' insurance board—Created—Membership—Meetings—Compensation—Powers and duties.** (1) There is hereby created a state employees' insurance board to be composed as follows: The governor or his designee; the state directors of the department of general administration and the department of personnel; one member representing an association of state employees and one member representing a state employees' union, who shall be appointed by the governor; one member of the senate who shall be appointed by the president of the senate; and one member of the house of representatives who shall be appointed by the speaker of the house. The senate and house members of the board shall serve in ex officio capacity only. All appointments shall be made effective immediately. The first meeting of the board shall be held as soon as possible thereafter at the call of the director of personnel. The board shall prescribe rules for the conduct of its business and shall elect a chairman and vice chairman at its first meeting and annually thereafter. Members of the board shall receive no compensation for their services, but shall be paid for their necessary and actual expenses while on official business and legislative members shall receive allowances provided for in RCW 44.04.120.

(2) The board shall study all matters connected with the providing of adequate health care coverage for state employees on the best basis possible with relation both to the welfare of the employees and to the state. The board shall design benefits, devise specifications, analyze carrier responses to advertisements for bids, determine the terms and conditions of employee participation and coverage, and decide on the award of contracts which shall be signed by the trustee on behalf of the board. The board shall from time to time review and amend such plans. Contracts for health benefit plans shall be rebid and awarded at least every five years.

(3) The board shall develop and provide three employee health care benefit plans; one plan will provide major medical benefits as its primary feature, another plan will provide basic first-dollar benefits as its primary feature plus major medical, either or both of which may be provided through a contract or contracts with regularly constituted insurance carriers or health care service contractors as defined in chapter 48.44 RCW, and another plan to be provided by a panel medicine plan in its service area only when approved by the board. Except for panel medicine plans, no more than one insurance carrier or health care service contractor shall be contracted with to provide the same plan of benefits: *Provided*, That employees may choose participation in only one of the three plans sponsored by the board. [1970 1st ex.s. c 39 § 2.]

**41.05.030 Duties of director of personnel—Cooperation of state departments and agencies enjoined.** (1) The director of the department of personnel shall be trustee and administrator of health benefit contracts awarded by the board and shall have power to employ a benefits supervisor and such other assistants and employees as may be necessary subject to the jurisdiction of the state civil service law, chapter 41.06 RCW. The director of personnel shall provide any other personnel and facilities necessary for assistance to the board. He may delegate his duties hereunder to the benefits supervisor.

(2) The director of personnel, as trustee, shall transmit contributions for health care benefits in payment of premiums and receive and deposit contributions and dividends or refunds into the state employees insurance revolving fund, which shall be used for payment of premiums, administrative expenses other than staffing as provided in RCW 41.05.030(1), to reduce employee contributions or to increase benefits in accordance with instructions of the board.

(3) Every division, department or separate agency of state government shall fully cooperate in administration of the plans, education of employees, claims administration and other duties as required by the trustee or the board. [1970 1st ex.s. c 39 § 3.]

**41.05.040 State employees insurance fund.** There is hereby created a fund within the state treasury, designated as the "state employees insurance fund", to be used by the trustee as a revolving

fund for the deposit of contributions, dividends and refunds, and for payment of premiums for health care benefit contracts entered into in accordance with instructions of the board and payments authorized by RCW 41.05.030(2). Moneys from the state employees insurance fund shall be disbursed by the state treasurer by warrants on vouchers duly authorized by the trustee. [1970 1st ex.s. c 39 § 4.]

**41.05.050 Contributions for employees and dependents.** (1) Every department, division or separate agency of state government shall provide contributions to hospitalization and medical aid plans for its employees and their dependents, the content of such plans to be determined by the state employees insurance board. All such contributions will be paid into the state employees insurance fund to be expended by the trustee for the payment of required health insurance premiums.

(2) The contributions of any department, division or separate agency of the state government shall be limited to ten dollars per month per employee covered, from July 1, 1970 through June, 1971. Thereafter such contribution shall be established by the state personnel board in accordance with the procedure required for the adoption and amendment of salary schedules for employees under its jurisdiction as provided in RCW 41.06.150 and 41.06.160. The contributions for employees not covered by state civil service shall be set by the state employees insurance board, subject to the approval of the governor for availability of funds: *Provided*, That nothing herein shall be a limitation on employees employed under chapter 47.64 RCW: *Provided further*, That provision for school district and higher education personnel shall not be made under this chapter. [1970 1st ex.s. c 39 § 5.]

Contributions for state employees,  
amount: RCW 41.06.370.

**41.05.060 Department of general administration to make services available.** The department of general administration shall make its services available to the board in advertising for and procuring bids for health care benefit programs authorized by the board in accordance with RCW 43.19.1935. [1970 1st ex.s. c 39 § 6.]

**41.05.070 Cost deemed additional compensation.** The cost of any health care insurance contracts or plans to any department, division or separate agency of state government shall be deemed additional compensation to the employees or officials covered thereby for services rendered, and any officer authorized to disburse such funds shall pay to the trustee for payment of the contributions due pursuant to any such contract authorized by the board. [1970 1st ex.s. c 39 § 7.]

**41.05.080 Participation by retired employees.** Retired state employees may continue their participation in insurance plans and

contracts after retirement, under the qualifications, terms, conditions and benefits set by the board: *Except*, That such retired employees shall bear the full cost of premiums required to provide such coverage. [1970 1st ex.s. c 39 § 8.]

Chapter 41.06

STATE CIVIL SERVICE LAW

Qualifications for persons assessing real property—Examination: RCW 36.21.015.

**41.06.020 Definitions.** Unless the context clearly indicates otherwise, the words used in this chapter have the meaning given in this section.

(1) "Agency" means an office, department, board, commission or other separate unit or division, however designated, of the state government and all personnel thereof; it includes any unit of state government established by law, the executive officer or members of which are either elected or appointed, upon which the statutes confer powers and impose duties in connection with operations of either a governmental or proprietary nature;

(2) "Board" means the state personnel board established under the provisions of RCW 41.06.110, except that this definition does not apply to the words "board" or "boards" when used in RCW 41.06-.070;

(3) "Classified service" means all positions in the state service subject to the provisions of this chapter;

(4) "Competitive service" means all positions in the classified service for which a competitive examination is required as a condition precedent to appointment;

(5) "Noncompetitive service" means all positions in the classified service for which a competitive examination is not required;

(6) "Department" means an agency of government that has as its governing officer a person, or combination of persons such as a commission, board or council, by law empowered to operate the agency responsible either to (1) no other public officer or (2) the governor. [1970 1st ex.s. c 12 § 1. Prior: 1969 ex.s. c 36 § 21; 1969 c 45 § 6; 1967 ex.s. c 8 § 48; 1961 c 1 § 2.]

**41.06.070 Exemptions.** The provisions of this chapter do not apply to:

(1) The members of the legislature or to any employee of, or position in, the legislative branch of the state government including members, officers and employees of the legislative council, legislative budget committee, statute law committee, and any interim committee of the legislature;

(2) The justices of the supreme court, judges of the court of appeals, judges of the superior courts or of the inferior courts or to

# Exhibit 5

## Chapter 182-12

### ELIGIBLE AND NON-ELIGIBLE EMPLOYEES

RAC	PURPOSE.
182-12-110	Eligible employees.
182-12-115	Non-eligible employees.
182-12-120	Employee or dependents become ineligible for state group coverage.
182-12-125	Employees and retirees declining medicare.
182-12-130	Eligibility for employees on leave without pay.
182-12-135	New eligible employees.
182-12-140	Insurance eligibility for higher education.
182-12-145	Husband and wife are eligible employees.
182-12-150	Classified employee eligible for employer contribution.
182-12-155	State legislators.
182-12-160	

MAC 182-12-110 PURPOSE. The purpose of this chapter is to establish criteria of employee eligibility for all State Employee Insurance Board Approved plans. [Order 5646, § 182-12-110, filed 2/9/76.]

MAC 182-12-115 ELIGIBLE EMPLOYEES. The following definitions of eligible employees shall apply for all State Employee Insurance Board Approved plans except as otherwise stated elsewhere in this section:

(1) "Full-time Employees." Those who work a full-time work week for their agency and are expected to be employed for more than six months.

(2) "Permanent Part-time Employees." Those who do not work full-time, but who are under continuous employment by an agency, and who are scheduled to work at least 80 hours per month.

(3) "Career Seasonal Employees." Those who work at least 80 hours per month during a designated season for a minimum of three months per year and who have an understanding of continued employment with their agency season after season. These employees become eligible to enroll when they return to State employment for their second "season" of employment. Employees who work on a seasonal basis and do not elect to self-pay during the break between seasons shall be treated as "new" employees on return to work in a following season.

(4) "Appointed and Elected Officials." Legislators are eligible on the date their term begins. All other elected and full-time appointed officials of the legislative and executive branches of State government are eligible on the date their term begins or they take the oath of office, whichever occurs first.

(5) "Judges." Justices of the supreme court and judges of the court of appeals and the superior courts become eligible on the date they take the oath of office.

(6) "Retired State Employees." Retired employees are eligible for the medical plans if they are receiving a benefit from the Public Employees Retirement System, the State Teachers Retirement System, the State Judge's Retirement System, Washington State Patrol Retirement System, or the Teachers Insurance Annuity Association.

The surviving spouse of a deceased retiree may continue coverage in the medical program by premium withholding or direct payment or premiums. The State makes no premium contribution for retirees or their surviving spouse. [Order 5646, § 182-12-115, filed 2/9/76.]

MAC 182-12-120 NON-ELIGIBLE EMPLOYEES. The following definitions of non-eligible employees shall apply:

- (1) "Intermittent Employees." Employees who are hired pursuant to the provisions of the Merit System Rules, specifically under the definition of "Intermittent Employees."
- (2) "Temporary Employees." Employees who are hired pursuant to the provisions of the Merit System Rules, specifically under the definition of "Temporary Employment". [Order 5646, § 182-12-120, filed 2/9/76.]

MAC 182-12-125 EMPLOYEE OR DEPENDENTS BECOME INELIGIBLE FOR STATE GROUP COVERAGE. All of the State plans have a conversion privilege. However, under the individual conversion plans, coverage and/or premiums will be different than the State plan with the same carrier. Persons wishing to convert must enroll in the appropriate conversion plan within 31 days after State group coverage ends. If a person converts within 31 days, conversion coverage will be effective the day after State coverage ends. [Order 5646, § 182-12-125, filed 2/9/76.]

MAC 182-12-130 EMPLOYEES AND RETIREES DECLINING MEDICAL CARE. Employees and retirees who are eligible for Medicare but through their own choice decline to enroll in Medicare may enroll in the SRB Medicare supplement with the clear understanding that the coverage supplied by the SRB program is limited coverage based on Medicare enrollment. [Order 5646, § 182-12-130, filed 2/9/76.]

MAC 182-12-135 ELIGIBILITY FOR EMPLOYEES ON LEAVE WITHOUT PAY. Employees who go on approved leave without pay must exercise their right to self pay premiums, rather than go on their spouse's insurance, the spouse being an eligible employee at another State institution or agency. However, if an eligible employee terminates employment, they may be added to their eligible spouse's insurance without proof of insurability or other penalty. [Order 5646, § 182-12-135, filed 2/9/76.]

MAC 182-12-140 NEW ELIGIBLE EMPLOYEES. Employees shall be allowed 31 days from the first day of employment to enroll in any of the insurance plans without a certificate of insurability. Coverage shall begin on the first day of the month following the first payroll deduction for premiums (60 days in the Higher Education System). [Order 5646, § 182-12-140, filed 2/9/76.]

MAC 182-12-145 INSURANCE ELIGIBILITY FOR HIGHER EDUCATION. For the purpose of insurance eligibility and experience reporting, the SRB considers the Higher Education Personnel Board, the Council for Post Secondary Education, and the State Board for Community Colleges to be Higher Education agencies. [Order 5646, § 182-12-145, filed 2/9/76.]

MAC 182-12-150 HUSBAND AND WIFE ARE ELIGIBLE EMPLOYEES. For purpose of the medical insurance program each must enroll

separately as an employee; all dependent children must be enrolled under one parent. This method of enrolling allows both employees to receive the State premium contribution. [Order 5646, § 182-12-150, filed 2/9/76.]

MAC 182-12-155 CLASSIFIED EMPLOYEE ELIGIBLE FOR EMPLOYER CONTRIBUTION. Any employee who is eligible for insurance and eligible for any part of the employer contribution shall be eligible to receive the full employer contribution not to exceed the premium amount enrolled for. [Order 5646, § 182-12-155, filed 2/9/76.]

MAC 182-12-160 STATE LEGISLATORS. State legislators who voluntarily or involuntarily leave State office shall be considered as retired employees, whether or not they receive benefit from a State retirement system. [Order 5646, § 160, filed 2/9/76.]

## EXHIBIT 6:

### **WAC 415-108-520**

#### **Membership exceptions — Student and spouse of student.**

(1) A person employed by a Washington state institution of higher education or community college (employer), who is employed at such institution or college primarily for the purpose of furthering her/his education or the education of the person's spouse, is excepted from membership in PERS when:

- (a) The person is a full-time student or the spouse of a full-time student; and
- (b) The person is employed at the same institution where she/he is a full-time student or where the person's spouse is a full-time student; and
- (c) The person determines her/his employment is primarily an incident to and in furtherance of her/his education or training, or the education or training of the person's spouse.

(2) For purposes of this section, RCW 41.40.023(7) shall be administered as follows:

(a) When a person begins employment in a PERS eligible position, a determination shall be made by the person as to whether the provisions of this section apply. If this section applies to the person, she/he shall determine her/his membership status as either being excepted from membership in PERS, or being a member of PERS, based upon whether employment at the institution of higher education or community college is primarily as an incident to and in furtherance of her/his education or training, or the education or training of the person's spouse. The person shall notify the employer in writing of her/his determination of membership status no later than two months after commencing employment in a PERS eligible position. Based upon the provisions herein and the written notification of status, the person shall either be excepted from membership in PERS or become a member of PERS. In the event that no written notification of status is provided to the employer, based upon the provisions of this section, the employer shall make the presumption:

- (i) That the person shall remain a member of PERS where the person is employed in a PERS eligible position and is a member of PERS at the time the person, or his or her spouse, becomes a full-time student;
- (ii) That the person shall be excepted from PERS membership where the person or the person's spouse is a full-time student at the time of becoming employed in a PERS eligible position.

(b) A person employed in a PERS eligible position at the time of becoming a full-time student or becoming the spouse of a full-time student, shall remain a member of PERS; except, at the time of becoming a full-time student or becoming the spouse of a full-time student, the person may elect to waive her/his membership in PERS, based upon the provisions of this section excepting membership. The person must provide written notification of the waiver to the

employer. If the person elects to waive membership in PERS, she/he cannot later elect membership in PERS unless there is a change of status of the person or of the person's spouse, as set forth below, and the employer has received written notification from the person of the change of status.

(c) A person who is a full-time student or who is the spouse of a full-time student at the time of becoming employed in a PERS eligible position, shall not be eligible for membership in PERS; except, at the time of becoming employed in a PERS eligible position, the person may elect to become a member of PERS, based upon the person's determination that the provisions of this section excepting membership do not apply. The person must provide written notification of the election to be a member of PERS to the employer. If the person elects to become a member of PERS, she/he cannot later waive PERS membership unless there is a change of status of the person or of the person's spouse, as set forth below, and the employer has received written notification from the person of the change of status.

(d) For purposes of this section, status is defined as:

(i) Student status - is full-time student, part-time student or nonstudent. Part-time student and nonstudent status do not meet the threshold for exception from PERS; only full-time student status meets the threshold:

(ii) Employment status - is employment in a PERS eligible position, employment in a PERS ineligible position, or unemployment. Unemployment refers to termination of employment from a Washington state institution of higher education or community college employer;

(iii) Marital status - is single, married, widowed or divorced.

(3) The department shall rely upon the institutions of higher education and community college employers to:

(a) Notify each person, at the time of hire, of the provisions of this section;

(b) Request all written notifications from persons electing membership or waiving membership under this section;

(c) Retain and make available to the department upon request, all written notifications electing membership or waiving membership on a sixty-four year record retention schedule.

(4) It is recommended, but not required, that no less than annually employers provide notice that employees are required to notify the employer of any change in status as set forth in this section.

and any digest or index to those orders, decisions, or opinions prepared by the agency for its own use. No agency order, decision, or opinion is valid or effective against any person, nor may it be invoked by the agency for any purpose, unless it is available for public inspection as herein required. This provision is not applicable in favor of any person who has actual knowledge thereof."

Laws 1989, ch. 175, § 4, rewrote subd. (1)(a), which had read:

"Each agency shall adopt rules governing the formal and informal procedures

prescribed or authorized by this chapter and rules of practice before the agency, together with forms and instructions. Rules for the conduct of adjudicative proceedings shall be those which are adopted by the chief administrative law judge under RCW 34.05.250."

**Effective date—Laws 1989, ch. 175:**  
See Historical and Statutory Notes following § 34.05.010.

**Effective dates—Severability—Laws 1981, ch. 67:** See Historical and Statutory Notes following § 34.12.010.

### Library References

Administrative Law and Procedure  
 §§382, 386, 394, 395.  
 WESTLAW Topic No. 15A.

### Notes of Decisions

**In general 1**  
**Powers of agencies 2**  
 v. Snohomish County Council (1984) 38 Wash.App. 630, 689 P.2d 1084.

Agency does not have the power to promulgate rules that amend or change legislative enactments. *Green River Community College, Dist. No. 10 v. Higher Ed. Personnel Bd.* (1980) 95 Wash.2d 108, 622 P.2d 826, adhered to and modified in another case in another respect 95 Wash.2d 962, 633 P.2d 1324.

Woodhouse (1981) 28 Wash.App. 262, 623 P.2d 1164.

### 2. Powers of agencies

Administrative agencies are creatures of legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication. *Chaussee*

Agency rules may fill in the gaps in legislation if such rules are necessary to the effectuation of a general statutory scheme. *Green River Community College, Dist. No. 10 v. Higher Ed. Personnel Bd.* (1980) 95 Wash.2d 108, 622 P.2d 826, adhered to and modified in another respect 95 Wash.2d 962, 633 P.2d 1324.

### 34.05.230. Interpretive and policy statements

(1) If the adoption of rules is not feasible and practicable, an agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. An agency is encouraged to convert long-standing interpretive and policy statements into rules.

(2) Each agency shall maintain a roster of interested persons, consisting of persons who have requested in writing to be notified of all interpretive and policy statements issued by that agency. Each agency shall update the roster once each year and eliminate

persons who do not indicate a desire to continue on the roster. Whenever an agency issues an interpretive or policy statement, it shall send a copy of the statement to each person listed on the roster. The agency may charge a nominal fee to the interested person for this service.  
 Enacted by Laws 1988, ch. 288, § 203, eff. July 1, 1989.

### 34.05.240. Declaratory order by agency—Petition view

(1) Any person may petition an agency for a declaratory order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner requests the declaratory order.

(a) That uncertainty necessitating resolution exists;

(b) That there is actual controversy arising from the petition such that a declaratory order will not be merely advisory;

(c) That the uncertainty adversely affects the petitioner's interests;

(d) That the adverse effect of uncertainty on the petitioner's interests outweighs any adverse effects on others or on the general public; and

(e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

(2) Each agency may adopt rules that provide for: (a) The form, content, and filing of petitions for a declaratory order; (b) the procedural rights of persons in relation thereto; and (c) the disposition of those petitions. These rules may include a description of the classes of circumstances in which the agency will not enter a declaratory order and shall be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agencies to provide reliable advice.

(3) Within fifteen days after receipt of a petition for a declaratory order, the agency shall give notice of the petition to all persons to whom notice is required by law, and may give notice to any other person it deems desirable.

(4) RCW 34.05.410 through 34.05.494 apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

(5) Within thirty days after receipt of a petition for a declaratory order an agency, in writing, shall do one of the following:

(a) Enter an order declaring the applicability of the statute, rule, or order in question to the specified circumstances;

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON**

**GARY FOX**

**No. 38401-9-II**

v.

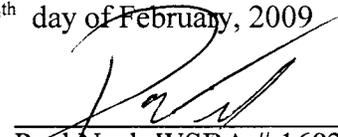
**CERTIFICATE OF SERVICE**

**STATE OF WASHINGTON,  
DEPARTMENT OF RETIREMENT  
SYSTEMS**

I certify that on the 19<sup>th</sup> day of February, 2009, I served a true and correct copy of opening brief of Appellant to be served on the following by personally delivering the same to:

Kathryn Wyatt, Counsel for Department of Retirement Systems  
Office of the Attorney General  
7141 Cleanwater Drive SW  
PO Box 40124  
Olympia, WA 98504-0124

Signed at Olympia, Washington on this 19<sup>th</sup> day of February, 2009

  
\_\_\_\_\_  
Paul Neal, WSBA # 16822  
Counsel for Appellant

DECLARATION OF SERVICE  
Page 1 of 1

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