

No. 43865-8-II

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DOUGLAS MERINO and KAY  
MERINO, husband and wife and the  
marital community composed thereof,

Appellants,

v.

THE STATE OF WASHINGTON and  
ITS AGENCIES; THE WASHINGTON  
STATE DEPARTMENT OF  
RETIREMENT SYSTEMS; THE  
WASHINGTON STATE PATROL and  
JOHN R. BATISTE, Chief Thereof, and  
DAVID J. KARNITZ, Deputy Chief  
Thereof,

Respondents

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DIVISION II  
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STATE OF WASHINGTON  
BY  DEPUTY

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE PATROL TROOPERS ASSOCIATION

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## I. Introduction

Mr. Merino's right to a continuing disability retirement allowance<sup>1</sup> is not subject to the condition subsequent of retaining the status of "officer". The disability retirement allowance of State Patrol Troopers, like the statutory disability coverage for all other state employees, is not subject to any condition subsequent except recovery from the disabling condition.

Providing disability coverage for employees injured on the job is an important benefit available to all state employees. It is particularly important for State Patrol Troopers, who were one of the first state employees to earn disability retirement coverage. That compensation is a contractual right that vests from the first day of employment.

When Mr. Merino became disabled in the course of duty, he qualified for a disability retirement from the State Patrol (Patrol). His eligibility continues unless and until he recovers. Mr. Merino has not recovered, yet the Patrol has terminated his disability retirement allowance following his discharge for conviction of a

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<sup>1</sup> RCW 43.43.040(1)(d) defines the State Patrol disability benefits paid after a determination of permanent disability as a "retirement allowance."

felony. The Patrol's action is unlawful. Mr. Merino met, and continues to meet, all the conditions for the disability retirement allowance. If, arguendo, the Patrol is right that eligibility is conditional and that post-retirement defrocking disqualifies Mr. Merino from his disability retirement allowance, then the statute works an unconstitutional forfeiture of estate. In either case, the Court should reverse the Patrol's action and reinstate Mr. Merino's disability retirement.

The Patrol's argument to the contrary rests on three flawed premises. First, that Mr. Merino's disability retirement allowance is not vested. Second, that the disability retirement allowance is identical to wages for services currently rendered. Third, that after qualifying for disability, a continuing retirement allowance depends on a condition subsequent of remaining an officer. The disability statute and the cases construing it prove the inaccuracy of each of these propositions.

Mr. Merino's disability retirement allowance is a retirement benefit vesting from the first day of employment as deferred compensation for services previously rendered. State Patrol disability beneficiaries are not, in fact, officers, thus the benefit is

not conditioned on that status. *State v. Hendrickson*, 98 Wn.App. 238, 989 P.2d 1210 (1999).

## **II. Identity and Interest of Amicus**

The Washington State Patrol Troopers' Association (Troopers' Association) submits this brief as Amicus Curiae. The Troopers Association is the labor union representing a bargaining unit of all commissioned officers of the Patrol through the rank of sergeant. *Washington State Patrol Troopers' Association v. State*, Decision 10314-A (PECB, 2010). The disability retirement rights of all Troopers and Sergeants are governed by RCW 43.43.040. Those rights vest from the first day of employment. The Patrol seeks a contrary ruling, claiming those rights are not vested and are forfeit in the event of a post-retirement conviction. A decision declaring that Trooper disability retirement rights, unlike the disability retirement rights of Washington's other public employees, are not vested and may be alienated or forfeited significantly diminishes those rights. If disability retirement is not vested it is not protected and could be alienated for any reason devised by the Legislature or the Patrol.

The members of the Troopers' Association will be bound by the decision in this case. They submit this Amicus Curiae brief to explain why that decision should recognize disability retirement coverage as a vested right and reverse the Superior Court order.

### **III. Statement of the Case**

Mr. Merino was hired by the Patrol on August 14, 1978. (CP 172-173). He served as a commissioned officer until February 10, 1994, when he was placed on job-related disability status, under RCW 43.43.040. (CP 172-173). Under RCW 43.43.040 Mr. Merino was classified as a retired officer in receipt of a disability retirement allowance, RCW 43.43.040(1)(d). Although he had retired from the Patrol 14 years earlier, Mr. Merino was "fired" from the Patrol following his conviction for theft and conspiracy to commit theft. (CP 172-173). Pursuant to its interpretation that Mr. Merino's felony conviction disqualified him from the disability retirement allowance provided by RCW 43.43.040 the Patrol refused to continue paying Mr. Merino's disability retirement allowance. (CP 228-233, 172-173). This appeal followed.

#### IV. Argument

The statewide retirement systems covering full-time public employees provide both a service retirement benefit and a disability retirement benefit<sup>2</sup>. For State employees other than Troopers, both disability and service retirement allowances are paid from the retirement system trust fund. In an arrangement unique in Washington law, service and disability retirement for Troopers are paid from different pots of money. *See* Respondent's Brief, p. 7, 8. The Patrol elevates form over substance, arguing that because the disability benefit is paid out of the Patrol's operating budget instead of the Washington State Patrol Retirement System (WSPRS), it is just like a wage for current service and, like any other wage, conditioned on continued employment. The Patrol is wrong. The payment mechanism does not define the benefit. The analysis does not depend on the label applied to the payment, but on when the payment was earned.

The disability benefit was enacted in chapter 215 Laws of 1943 while WSPRS was not created until 4 years later in chapter 250 law of

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<sup>2</sup> See RCW 41.26.430 (service retirement) and RCW 41.26.470 (disability retirement), Law Enforcement Officers' and Firefighters' Retirement System (LEOFF) Plan 2; RCW 41.32.765 (service retirement) and RCW 41.32.790 (disability retirement), Teachers' Retirement System (TRS) Plan 2; RCW 41.40.630 (service retirement) and RCW 41.40.670 (disability retirement), Public Employees' Retirement System (PERS) Plan 2.

1947, AGO 51-53 No. 274, *see* exhibit 1. This does not mean, as the Patrol claims, that the disability retirement is an inferior benefit to WSPRS service retirement. The Patrol has it backwards. Legislature's initial enactment of a free standing disability retirement allowance reflected the strong policy of providing for law enforcement officers injured while protecting the public. Rather than waiting for the creation of a trust fund the Legislature required the Patrol to pay disability retirement allowances out of its operating budget. The disability benefit was more important to the Legislature, not less.

The focus on providing disability benefits to law enforcement officers runs throughout pension policy. The very first public retirement benefit enacted in the United States was a free-standing duty disability benefit for New York City police officers enacted in 1857. *State & Local Pensions: What Now?* P. 12, 13 (2012), *see* exhibit 2. The physical demands and dangers of the job, and the higher probability of duty-related disability that goes with it, has led Washington's Legislature to provide significantly better disability coverage for law enforcement officers than for other public employees.<sup>3</sup>

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<sup>3</sup> Compare RCW 41.26.120, LEOFF Plan 1 disability, and RCW 41.26.470, LEOFF Plan2 disability, with RCW 41.40.220, PERS Plan 1 disability, and RCW 41.40.670, PERS Plan 2 disability.

The Patrol believes differently. It argues its troopers have the worst disability retirement of any of Washington's public employees. That is, no retirement allowance at all, but a conditional gratuity that can be taken away at any time leaving aging disabled Troopers with no benefit. *See* Respondent's Brief, p. 16, 17. That is not what the Legislature intended, and that is not what the law provides.

**A. Mr. Merino's Disability Benefit is a Vested Contractual Benefit.**

Under *Bakenhus v. Seattle*, 48 Wash.2d 695, 698, 296 P.2d 536 (1956) retirement benefits are contractual rights vesting from the first day of employment and every day thereafter:

In the seminal *Bakenhus* case, this court held that pension benefits conferred in an employment relationship constitute deferred compensation. *Bakenhus v. City of Seattle*, 48 Wash.2d 695, 698, 296 P.2d 536 (1956). The right to such compensation vests at the moment that the employee accepts an offer to work in exchange for the promise of pension benefits. *Id.* at 700, 296 P.2d 536; see *Crabtree*, 101 Wash.2d at 552, 557, 681 P.2d 245 (1984) (" ' the rights in and to [the pension] commence to vest with the first day of employment or service, and continue to vest with each day's service thereafter.' " (alteration in original) (quoting *Tembruell v. City of Seattle*, 64 Wash.2d 503, 506, 392 P.2d 453 (1964))).

*Navlet v Port of Seattle*, 164 Wn.2d 818, 835, 194 P.3d 221(2008). The *Bakenhus* doctrine flows from the contract clause of the Washington State Constitution: "No bill of attainder, ex post facto law, or law impairing the

obligations of contracts shall ever be passed." Washington State Constitution, Art. I, §23; *cf* United States Constitution Art. I, §10.

In this state, a pension granted to a public employee is not a gratuity but is deferred compensation for services rendered. The contractual nature of the obligation to pay a pension when the employee has fulfilled all of the prescribed conditions was recognized in *Luellen v. City of Aberdeen*, 1944, 20 Wash.2d 594, 148 P.2d 849, in *Benedict v. Board of Police Pension Fund Commissioners of City of Seattle*, 1950, 35 Wash.2d 465, 214 P.2d 171, 27 A.L.R.2d 992, and in *Ayers v. City of Tacoma*, 1940, 6 Wash.2d 545, 108 P.2d 348. Had we held in those cases, or were we to hold now, that the pension statutes provide for the payment of gratuities, we would be bound to hold further that such statutes are contrary to the provisions of Art. II, § 25 and Art. VIII, § 7 of the Washington constitution and are therefore void.

...

"Pension annuities \* \* \* are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of such services. They are in effect pay withheld to induce long-continued and faithful service." *Giannettino v. McGoldrick*, 295 N.Y. 208, 66 N.E.2d 57, 59.

... There are cases which hold that, since the right to receive a pension does not arise until all the conditions are fulfilled, the employee's rights must depend upon the law as it exists at that time. This view is insupportable. Unless the services are rendered in reliance on an offer, they are consideration for nothing, and any pension received thereafter can only be a gratuity.

*Bakenhus*, 698-700, see also *Navlet* at 845. Mr. Merino's disability retirement allowance under RCW 43.43, like his right to a service retirement allowance under the same chapter, springs from an offer made by the State Patrol which he accepted with his commission: to serve as a Trooper for compensation. That compensation includes eligibility for

either a disability retirement allowance under RCW 43.43.040 or a service retirement allowance under RCW 43.43.250. It is not a gratuity.

Central to the *Bakenhus* vested rights doctrine is recognition that the benefit is deferred compensation for services already rendered, *Navlet*, at 836. Mr. Merino upheld his half of the bargain: he provided services and met the conditions for a disability retirement when he incurred disabling injuries in the service of Washington's citizens. The Patrol may not come along 14 years later and pull the rug out from under his vested right.

' ' [c]learly ... an employer cannot offer a retirement system as an inducement to employment and ... withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder.' " 77 Wash.2d at 916, 468 P.2d 666 (emphasis added) (quoting *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 410, 171 N.E.2d 518 (1960)).

*Navlet* at 838, quoting *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wash.2d 911, 915, 468 P.2d 666 (1970); see also *Johnson v. City of Aberdeen*, 14 Wn.App. 545, 547, 544 P.2d 93 (1975).

The Patrol places its disability retirement outside the scope of the *Bakenhus* vested rights doctrine arguing *Bakenhus* only applies to pension benefits. That argument has failed before, as it fails now:

Despite our holding in *Firefighters*, the Port argues that the *Bakenhus* line of cases applies only to pension benefits and

should not extend to retirement welfare benefits. However, our precedent under *Bakenhus* and its progeny offers no distinction between pension and other compensatory retirement benefits.

*Navlet* at 838, referencing *Int'l Ass'n of Firefighters, Local 1789 v.*

*Spokane Airports*, 146 Wn.2d 207, 222, 45 P.3d 186,50 P.3d 618 (2002).

The *Navlet* Court noted prior decisions applying the *Bakenhus* contractual vesting principle to "pensions and retirement benefits." citing *Frank v.*

*Day's, Inc.*, 13 Wash.App. 401, 404, 535 P.2d 479 (1975); *Abels v.*

*Snohomish County Pub. Util. Dist. No. 1*, 69 Wash.App. 542, 552, 849

P.2d 1258 (1993). Following this analysis the Court adopted the

reasoning of the 9th Circuit Court of Appeals in *Vizcaino v. Microsoft*

*Corp.*, 120 F.3d 1006, 1014 (1997):

We think that that same form of reasoning [that pension benefits are deferred compensation] *applies to all employee benefits*. Few of them are mere gratuities or a result of unadulterated altruism. Most are for services rendered or for the purpose of inducing the further rendering of services. They help to guarantee a competent and happy labor force.

*Navlet* at 838, 839, quoting *Vizcaino* at 1014 (emphasis added by *Navlet*

court) and holding post retirement medical benefits were a vested

contractual right that could not be alienated from employees who provided

service under the contract provisions providing those benefits.

*Navlet* was not the first case to apply *Bakenhus* to retirement benefits that were not necessarily public pension plans: *Johnson*, supra, (sick leave cashout ordinance), *Jacoby*, supra, (voluntary private employer financed pension plan) *Dorward v. ILWU-PMA Pension Plan*, 75 Wash.2d 478, 452 P.2d 258 (1969), (union pension plans); *Firefighters*, supra, (*Bakenhus* applied to employer Social Security and Medicare contributions to compel payment of like amount to employees after opting out of social security). The Patrol's argument that Mr. Merino's disability benefit is not vested because it is not paid under the Patrol's retirement system is every bit as invalid as the parallel analysis advanced by the losing employers in those cases.

Whether the patrol calls it a "pension," "wage," "retirement benefit" or some other label is irrelevant. What is relevant is that the payment is consideration for the service Mr. Merino provided as an active duty Trooper. Just like the service retirement benefit it replaces, it is a vested benefit. These two benefits are mutually exclusive: "Under the law, a disabled person does not participate in the retirement system and therefore has no way of building up his reserve in order that he may receive full benefit of the retirement upon reaching retirement age." AGO 51-53 No. 274, exhibit 1. When Mr. Merino became disabled he stopped earning benefits under WSPRS. The permanent disability benefit of

RCW 43.43.040 is a retirement allowance, and the recipient "will continue to receive said compensation as long as the disability exists." *id.*

The Patrol also attempts to distinguish *Bakenhus* by claiming that its application is "specifically prevented by law." See Respondent's Brief, p. 20. It bases this claim on a strained reading of *Callecod v Washington State Patrol*, 84 Wn.App. 663, 668, 669, 929 P.2d 510 (1997). *Callecod* held that, as the statutory language establishing the disability standard for troopers was significantly different than the statutory disability language governing LEOFF, cases construing eligibility under the LEOFF standard did not apply to cases determining eligibility under the Patrol standard. The Patrol reads too much into *Callecod*, claiming it limits the Courts analysis in this case to cases construing RCW 43.43.040. The *Bakenhus* vested rights doctrine is not limited to any one retirement system or benefit<sup>4</sup>. It is not statutory, it is constitutional.

Under *Bakenhus* and *Navlet*, Mr. Merino's right to a disability benefit vested from the first day he reported for duty. As the Patrol acknowledges: "If the benefit vested, no such mechanism could exist, as the benefit would be received regardless of status change." See

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<sup>4</sup>See *Crabtree v. State, Dept. of Retirement Systems*, 101 Wn.2d 552, 681 P.2d 245 (1984), TRS; *Retired Public Employees Council of Washington v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003), PERS and TRS; *McAllister v. City of Bellevue Firemen's Pension Bd.*, 166 Wn.2d 623, 210 P.3d 1002 (2009), LEOFF. See also *Johnson, Jacoby, Navlet and Dorward*, *supra*.

Respondents Brief, p. 17. The Patrol is right about that. Mr. Merino's disability benefit is a vested right. It cannot be divested by a change in status.

**B. The Disability Benefit is a Retirement Benefit.**

The Legislature enacted the disability benefit and the service retirement benefit separately, but both are retirement benefits for troopers who work a full career. The law enforcement career of disability beneficiaries is cut short by injury while a service retiree serves a full career of 25 years or more. In both cases the Legislature provided a lifetime benefit for the qualifying beneficiary. The Legislature recognized the availability of retirement benefits outside of WSPRS when it defined "beneficiary" in WSPRS as: "... any person in receipt of retirement allowance or any other benefit allowed by this chapter<sup>5</sup>." RCW 43.43.120(4).

By enacting the duty disability benefit 4 years before the service retirement benefit, the Legislature recognized the importance of providing disability coverage for law enforcement employees who place life and limb on the line every day as part of their ordinary duties. Just as in the

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<sup>5</sup> "Chapter" refers to 43.43 RCW which includes both the service disability retirement of RCW 43.43.250 and the disability retirement benefit of RCW 43.43.040.

case where the disability and service retirement benefits are both funded from the retirement system trust fund, disability and service retirement benefits available to Troopers are mutually exclusive. If a Trooper qualifies for a disability benefit, they stop participating in WSPRS:

Under the law, a disabled person does not participate in the retirement system and therefore has no way of building up his reserve in order that he may receive full benefit of the retirement upon reaching retirement age. The legislature made no provision to take care of this situation. Perhaps some corrective legislation is needed.

...

It is therefore our opinion that a person who receives compensation under the provision of chapter 215, Laws of 1943 because of permanent or total disability incurred as a direct and proximate result of injury received in the course of employment will continue to receive said compensation as long as the disability exists and the age of retirement has nothing to do with it.

AGO 51-53 No. 274, p. 2, exhibit 1. From the inception of WSPRS the Legislature designated the disability benefit as a retirement benefit by excluding disability beneficiaries from continued participation. By contrast, troopers on temporary disability leave continue to participate in WSPRS:

When a trooper of the Washington State Patrol is injured while on the job, Ch. 43.43 RCW provides that the trooper may receive temporary disability benefits of up to six months of full pay, benefits and insurance if the trooper was injured or incapacitated while performing "line duty." RCW 43.43.040(1)(a). Thereafter, or if the trooper does not qualify for temporary benefits, he or she may receive disability retirement benefits of one-half of regular pay if

disabled while "in the performance of their official duties, or while on standby or available for duty." RCW 43.43.040(1) (2). Whether a disabled trooper receives (full-pay) temporary benefits for six months from the time of the injury and then (half-pay) regular retirement disability benefits thereafter, or merely receives (half-pay) retirement disability from the outset, depends on whether the trooper suffered the injury while on "line duty" or during "active service."

*Callecod v Washington State Patrol*, 84 Wn.App. 663, 668, 669, 929 P.2d 510 (1997) (emphasis added). The *Callecod* Court consistently describes the disability benefit of RCW 43.43.040 as a disability retirement at 665, 668, 669, 672, 673.

The Legislature has the same definition. The Patrol's brief, indeed the crux of its argument, rests on its assertion that the disability benefit is not deferred compensation for services previously rendered, but wages. The Patrol seeks to characterize the disability benefit as a form of paid leave rather than a retirement benefit, claiming:

The State Patrol's system, by contrast, explicitly and by statute retains an employment relationship, both by describing the disability status payments made under RCW 43.43.040 as "wages" and through the terms of RCW 43.43.050, which states that, by statute, a State Patrol officer remains an officer until their death, resignation, suspension, demotion, or discharge.

*See* respondent's brief, p. 18. The Patrol's analysis relies too much on the label without recognizing the key issue: The allowance is a deferred benefit earned for past service.

RCW 43.43.040 does not define the State Patrol disability benefit as wages. What it actually says is: "Officers on disability status shall receive one-half of their compensation at the existing wage." Unlike officers on disability leave, who receive full wages and full benefits including WSPRS service credit, a disability retiree receives no benefits and a partial payment. The fact that the disability benefit is pegged at half the existing wage for an officer does not make it a wage. RCW 43.43.040 defines the disability benefit received after the six-month disability leave period as a "retirement allowance." RCW 4.43.040(1)(d). Whether you call it a wage, a retirement allowance, or simply a disability benefit, the defining feature of the payment is that it was earned under the terms of Mr. Merino's contract for compensation while he provided services as a Trooper. That is what makes it vested. That is what prohibits its alienation.

*Callecod* and RCW 43.43.040 both make it clear that the disability benefit is a retirement benefit. During his 14 years of disability retirement Mr. Merino, has not been earning a wage. He has been receiving deferred compensation for services previously rendered. Like any other deferred

retirement compensation, continued eligibility is not conditioned on continued employment.

**C. Continued Employment is Not a Condition Subsequent For Disability Retirement.**

The Patrol's brief construes RCW 43.43.040 to require continued employment as a "condition precedent" for continued receipt of a disability retirement allowance. *See* Respondents Brief, p. 12. A reading of the complete statute and related statutes disproves that assertion.

The primary goal in construing statutes is to give effect to the Legislature's intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Recognizing the Legislature's intent to provide a benefit, retirement benefit statutes are liberally construed in favor of beneficiaries. "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), see also *Seattle Fire Fighters v. Hollister*, 48 Wn.App.129, 737 P.2d 1302 (1987).

The Patrol argues that the Court should read the statute to include a “condition precedent,” see Respondents’ Brief, p. 12. Whether the Patrol is arguing condition precedent or condition subsequent,<sup>6</sup> conditions are not favored in the law: “Conditions precedent are not favored by the courts and will be excused if enforcement would involve extreme forfeiture or penalty and if the condition does not form an essential part of the bargain.” *Ashburn v. SAFECO Ins. Co. of America*, 42 Wn.App. 692, 698, 713 P.2d 742 (1986). The condition urged by the Patrol does not exist at law and should not be applied by the Court.

The statutes governing State Patrol disability do not condition the retirement allowance on continued employment:

A person receiving benefits under RCW 43.43.040 will be a nonactive member. If any person who is or has been receiving benefits under RCW 43.43.040 returns or has returned to active duty with the Washington state patrol, the

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<sup>6</sup> When the Patrol said “condition precedent” it meant “condition subsequent”. “A condition precedent is an event occurring subsequent to the making of a valid contract which must exist or occur before there is a right to immediate performance.” *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 556, 557 730 P.2d 1340 (Wash. 1987). “On the other hand, if it is agreed that the contract will cease to be binding if some event occurs in the future, then it is delivered upon a condition subsequent.” *Fleming v. August*, 48 Wn.2d 131, 135, 291 P.2d 639 (Wash. 1955). In this case there is no dispute that Mr. Merino was entitled to his disability retirement allowance at least until the Patrol stopped it. Their claim is that continued employment is a condition subsequent to continued receipt. In either case, the Patrol is wrong.

person shall become an active member of the retirement system on the first day of reemployment. The person may acquire service credit for the period of disablement by paying into the retirement fund all contributions required based on the compensation which would have been received had the person not been disabled.

RCW 43.43.290 (emphasis added), the disability beneficiary is not an officer but “a person receiving benefits.”

The original text of RCW 43.43.290 referred to disability beneficiaries as “members” of WSPRS. *See* §18, Ch 250, laws of 1947, exhibit 3. There is some ambiguity whether employees remain WSPRS members after terminating employment, RCW 43.43.130(2); whether they cease to be members upon termination of employment; or whether the person is a nonactive member with limited rights. RCW 43.43.280(2). Recognizing the logical disconnect of describing disability retirees as members, the Legislature amended RCW 43.43.290 in 1982, replacing the term “member” with the term “person receiving benefits” and describing that “person” as a “nonactive member.” *See* §30, ch. 52, Laws of 1982 1st ex. sess., exhibit 4. These amendments clarified that a disability beneficiary, like the Trooper who terminates employment and does not withdraw their contributions, is a nonactive member. For both persons, the right to a statutorily defined benefit survives the employment relationship.

The transition from officer to beneficiary is reflected in the disability statute itself:

1) The chief of the Washington state patrol shall relieve from active duty Washington state patrol officers who, while in the performance of their official duties, or while on standby or available for duty, have been or hereafter may be injured or incapacitated to such an extent as to be mentally or physically incapable of active service:

...

(c) An officer injured while engaged in willfully tortious or criminal conduct shall not be entitled to disability benefits under this section; and

(d) Should a disability beneficiary whose disability was not incurred in line of duty, prior to attaining age fifty, engage in a gainful occupation, the chief shall reduce the amount of his or her retirement allowance to an amount which when added to the compensation earned by him or her in such occupation shall not exceed the basic salary currently being paid for the rank the retired officer held at the time he or she was disabled. All such disability beneficiaries under age fifty shall file with the chief every six months a signed and sworn statement of earnings and any person who shall knowingly swear falsely on such statement shall be subject to prosecution for perjury. Should the earning capacity of such beneficiary be further altered, the chief may further alter his or her disability retirement allowance as indicated above. The failure of any officer to file the required statement of earnings shall be cause for cancellation of retirement benefits.

RCW 43.43.040 (emphasis added).

The statute refers to an "officer" when setting out the standards for determining whether a Trooper is disabled. After completing disability leave and beginning receipt of a disability allowance, the statutes no longer refer to officers, but rather to a "retired officer," "disability

beneficiaries," RCW 43.43.040(1)(d), " a person receiving disability benefits" and "a nonactive member" RCW 43.43.290. Further, RCW 43.43.040(1)(d) provides for a reduction in the disability beneficiary's "retirement allowance" if engaged in "gainful activity" i.e., other employment. The statute does not contemplate a temporary absence, but a full cessation of Patrol duties such that the beneficiary may start another job elsewhere, free from the trooper employment restrictions in RCW 43.43.112; i.e. retirement.

One need look no further than the facts of Mr. Merino's case to see this. As noted in the Patrol's brief, after his disability rendered him unable to continue to work as a Trooper, Mr. Merino started a second career as a full-time investigator for the Department of Labor and Industries until 2008. CP at 318. He was not serving as a State Patrol officer.

The Court of Appeals confirmed disability beneficiaries are not officers in *State v. Hendrickson*, 98 Wn.App. 238, 989 P.2d 1210 (1999)<sup>7</sup>. In *Hendrickson* a Washington State Patrol disability beneficiary drew a pistol on a suspect and detained him. After being charged with second degree assault with a deadly weapon, disability retiree Hendrickson, just like the Patrol in this case, argued that he was still an officer while on

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<sup>7</sup> The Patrol's response brief does not cite *Hendrickson*. In fact, it denies its existence stating that *Callegod* is "the only case to interpret the relevant statute." See Respondent's Brief, p. 19.

disability status based on the language in RCW 43.43.040 and the status provisions of RCW 43.43.050. If true, Mr. Hendrickson would still have "police powers and duties" under RCW 43.43.030. The Court disagreed:

It follows that when the chief relieves a trooper from active duty, the chief is recognizing that the trooper is not capable of performing law enforcement duties, and the chief is removing the trooper's authority to perform such duties pending the trooper's return to active service.

Attempting to refute this conclusion, Hendrickson relies on RCW 43.43.050. It provides that "Washington state patrol officers shall be entitled to retain their ranks and positions until death or resignation, or until suspended, demoted, or discharged in the manner hereinafter provided." It is our view, however, that RCW 43.43.050 merely prevents the State Patrol from demoting or terminating a disabled trooper; it does not mean that a trooper may perform law enforcement duties while incapable of doing so, or, in alternative terms, that a trooper may perform law enforcement duties while disabled.

*Hendrickson*, 243, 244 (emphasis added). That is worth repeating: RCW 43.43.050 does not require that a disabled Trooper remains an officer. It "...merely prevents the State Patrol from demoting or terminating a disabled trooper." That is, it prohibits the State Patrol from doing exactly what it has done to Mr. Merino.

A trooper disabled in the course of duty has met the conditions to receive the compensation deferred during his prior service: a disability retirement allowance. Once he begins receipt of that benefit he is entitled to continue receiving it unless the Chief finds he is no longer disabled and

returns him to duty. He has no other retirement, AGO 51-53 No. 274, exhibit 1. The question before the Court is not whether Mr. Merino met the qualifications for a disability retirement, but whether his post-retirement conviction entitles the Patrol to terminate his retirement.

**D. RCW 43.43.040 is Constitutional; it does not Work a Forfeiture.**

A trooper committing a felony is only disqualified from receipt of a disability benefit if the disability was incurred in the commission of a crime, RCW 43.43.040(1)(c). That is not the case here, *See* Respondent's Brief, p. 14. The Supreme Court's opinion in *Leonard v. Seattle*, 81 Wn.2d 479, 503 P.2d 741 (1972) shows why the Legislature limited the scope of disqualification.

In *Leonard* the court struck down a statute in the former police pension law, chapter 41.20 RCW, expressly requiring forfeiture of a retiree's pension if convicted of a felony following retirement. In that case, as here, the felony conviction had nothing to do with the officer's retirement, coming several years later. The Court relied on *Bakenhus* to find that officer Leonard had a vested right to a retirement benefit as deferred compensation for services previously rendered and that that benefit was, therefore part of his estate exempt from forfeiture under

Art. 1, § 15, of the Washington State Constitution. The Court explained when a deferred compensation benefit is a constitutionally protected part of a person's estate and when it is not:

The property in issue, i.e., the vested right to a pension, was not the fruit of crime nor acquired in the pursuance of criminal activity as a policeman. Instead, the felony conviction occurred some 4 years after retirement; the criminal act of which plaintiff had been convicted contributed in no way to the enlargement or aggrandizement of his pension, nor was it proved to have been done in the course of his duty as a Seattle police officer during his 25 years of active duty. The crime had no connection with a police officer's performance of his duties, nor his contribution into the pension fund either in money or services during his active tenure as a police officer.

*Leonard*, 488-489. Had the crime had some connection with Officer Leonard's performance of his duty, it would have prevented the property from becoming part of his estate, and thus kept it outside the protection of the Constitution's forfeiture clause, *id.*

*Leonard* was decided on November 15, 1972. Eleven months later, in September of 1973, the Legislature enacted RCW 43.43.040(1)(c) prohibiting receipt of a disability benefit if the Trooper became disabled while committing a crime, 1973 2nd ex.s. c 20 § 1, *see* exhibit 5. The Legislature was aware of the Court's action striking down across-the-board forfeiture provision in the police pension statute. "The Legislature is presumed to be familiar with judicial interpretations of statutes, and absent

an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions." *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574, 579 (1999). That is particularly true where those decisions flow from the Court's exclusive authority to interpret the Constitution. The Legislature drafted the limitation to ensure the constitutionality of its enactment: limiting disqualification to cases where the disability was incurred in the commission of a crime so that it never became part of the member's estate. The Legislature drew the line in the same place for Washington's other statewide public pension systems in 1997, *see* ch. 103, laws of 1997, exhibit 6.

Despite this Legislative history, the Patrol argues the disability retirement is forfeited even where the crime occurred years after disability retirement. The Patrol believes that, even without the specific forfeiture provision, RCW 43.43.040 on its face prohibits a disability beneficiary convicted of a felony from continuing to receive a disability retirement allowance. If the Patrol is right, and the commission of a felony and the resulting mandatory discharge from the State Patrol disqualifies a former Trooper from receipt of a disability retirement allowance, then it does not matter when the felony was committed or whether it had any connection to the disability. If that is true then the Legislature's 1973 enactment of a

limited forfeiture provision was superfluous. This contradicts the clear connection between the 1972 Leonard decision and the 1973 limited forfeiture law, common sense, and the rules of statutory construction: "we presume that a legislative body will not use superfluous words in a statute" *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 221, 254 P.3d 778 (2011).

The Patrol's primary defense against forfeiture is its claim that the disability benefit is not a vested benefit. *See* Respondents Brief, p. 21, 22. As established above, that defense is invalid. Mr. Merino's right to a continuing disability benefit is a vested right. If the Patrol is right that RCW 43.43.040 disqualifies a disability retiree from a continuing disability benefit if convicted of a felony after retirement, then, as in Leonard, the statute works an unconstitutional forfeiture. If, on the other hand, the reference to "officer" in RCW 43.43.040 (1), (a),(b), and (c) refers to the persons status at the time of the disability determination, and not to his or her status after retirement, then Mr. Merino continues to be eligible for his benefit, and the statute is constitutional.

The Court faced a similar choice in *Tembruell v. Seattle*, 64 Wn.2d 503, 392 P.2d 453 (1964), which applied the same statute held unconstitutional in *Leonard*. Officer Tembruell was in receipt of a retirement allowance from the pre-LEOFF police pension system, Chapter

41.20 RCW. Following retirement, he pled guilty to grand larceny and served 60 days in jail. After first identifying that, under *Bakenhus*, supra, the pension benefit was a vested right to deferred compensation for services previously rendered, the Court noted the statute was a potentially unconstitutional forfeiture. The Court avoided that issue by finding that, although officer Tembruell had pled guilty and served jail time, he had not technically been "convicted" of a crime. In reaching this result, the Court noted:

In this connection, though, we deem it proper to observe that, where two interpretations of a statute are possible, one valid and the other unconstitutional, the court will give that effect to the questionable language which preserves its constitutionality (*Martin v. Aleinikoff*, 63 Wash.Dec.2d 842, 389 P.2d 422) (1964), it being presumed that the legislature intended to act within its constitutional powers.

*Tembruell*, 506, 507.

Mr. Merino's reading of the statute, that he has a continuing right to his vested disability benefit unless the disability was incurred in the commission of a crime or unless he recovers, yields a constitutional statute. The Patrol's interpretation, resting on the invalid assertion that the disability benefit is not a vested benefit, causes a forfeiture and results in an unconstitutional statute. The presumption that the Legislature intended to act within its constitutional powers is particularly compelling here, where the Legislature had the benefit of the *Leonard* Court's then-recent

guidance. This Court should rule Mr. Merino has a right to a continuing benefit under a constitutional statute.

Finally, the Patrol argues Mr. Merino's benefit was not terminated because of his felony conviction but because of his other actions surrounding the conviction. This is essentially a “proximate cause” argument. Yet the Constitution does not require a chain of causation. “Article I, § 15 only prohibits forfeiture of a convict's estate on the ground that he or she is incapacitated from owning property due to conviction.” *State v. Young*, 63 Wn.App. 324, 328, 329, 818 P.2d 1375 (1991), citing *Leonard*. That is precisely what the Patrol has done here. As a result of the criminal charge and the conviction, the Patrol has sought to incapacitate Mr. Merino from his property, i.e. his vested right in a disability benefit. It has relied upon Mr. Merino’s conviction to work a forfeiture. The fact that it engaged in an intermediary process before terminating the disability benefit does not change the fact that the forfeiture is due to the conviction. The Patrol's own brief confirms that Mr. Merino's discharge was caused by his conviction by complaining that Mr. Merino asks the court to "pay wages to a convicted felon." *See* Respondent's Brief, p. 16.

#### IV. Conclusion

State Patrol officers disabled in the course of their duty have a vested right to a disability retirement benefit. Once a Trooper goes through a period of disability leave and qualifies for disability retirement, he is no longer an officer, he is a beneficiary of a retirement allowance. He has a vested right to receive that retirement allowance unless he recovers and returned to active duty. Though pegged at the current salary for a Trooper, the disability retirement allowance it is not a wage for current services, it is deferred compensation for services previously rendered. The Patrol's termination of Mr. Merino's disability retirement is unlawful and unconstitutional. He respectfully requests this Court to retroactively reinstate his disability allowance.

DATED at Olympia, Washington this 7<sup>th</sup> day  
of May, 2013.

Respectfully submitted,



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Paul A. Neal, WSBA #16822  
Attorney for Washington State Patrol  
Troopers Association

## VI. APPENDIX

<b>Exhibit 1</b> .....	AGO 51-53 No. 274 (1952)
<b>Exhibit 2</b> .....	Munnell, <i>State and Local Pensions, What Now?</i> (2012)
<b>Exhibit 3</b> .....	<i>Laws of 1947</i> , ch. 250 §18
<b>Exhibit 4</b> .....	<i>Laws of 1982</i> 1st Ex. Sess., ch. 52, §30
<b>Exhibit 5</b> .....	<i>Laws of 1973</i> , 2d Ex. Sess., ch. 20 § 1
<b>Exhibit 6</b> .....	<i>Laws of 1997</i> , ch. 103

**EXHIBIT 1**

[back](#)



Smith Troy | 1941-1952 | Attorney General of Washington

## STATUS OF DISABLED STATE PATROLMEN.

Compulsory retirement provisions of chapter 250, Laws of 1947, applies to members in active service and not to non-active [[nonactive]]members. A disabled patrolman continues to receive his compensation under the provisions of chapter 215, Laws of 1943, as long as the disability exists.

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March 27, 1952

Honorable James A. Pryde  
Chief Washington State Patrol  
Olympia, Washington Cite as: AGO 51-53 No. 274

Dear Sir:

Receipt is hereby acknowledged of your letter of March 19, 1952, in which you propose the following two questions:

"1. Should a disabled officer who is receiving disability benefits continue to receive such benefits after he reaches the age of sixty, or should he be retired under the provisions of Section 14, Chapter 250, Laws of 1947?

"2. If your answer is that he should continue to receive disability benefits under Chapter 174, Laws of 1947, would he then be eligible to retire under Section 14, Chapter 250, Laws of 1947, should the disability cease sometime after he reaches the age of sixty years?"

Our conclusion may be stated as follows:

A disabled officer who is receiving disability benefits continues to receive such benefits after he reaches the age of sixty and he is not subject to the retirement provisions of chapter 250, Laws of 1947.

[[Orig. Op. Page 2]]

### ANALYSIS

Chapter 250, Laws of 1947 is the Washington State Patrol Retirement System and all retirement is effectuated by reason of the provisions of this chapter and is applicable to all officers on the force at the time they reach the age set out in section 14. Those officers who become permanently or totally

disabled as a direct and proximate result of injury received in the course of employment receive benefits under the provisions of chapter 215, Laws of 1943 (See section 18, chapter 250, Laws of 1947). There is nothing in this chapter which changes the status of a disabled person for the purpose of pension other than his restoration to full time employment; in other words, whenever the disability is removed, the status changes.

Under the law, a disabled person does not participate in the retirement system and therefore has no way of building up his reserve in order that he may receive full benefit of the retirement upon reaching retirement age. The legislature made no provision to take care of this situation. Perhaps some corrective legislation is needed.

The compulsory retirement provisions of the act (section 14, chapter 250, Laws of 1947; 6362-94 Rem. Supp. 1947) direct that upon attaining the age of sixty years a member "shall automatically be separated from active duty" and thereupon become eligible for participation in the retirement fund. This on its face would seem to indicate that compulsory retirement is applicable only to members inactive service. A non-active member obviously cannot be separated from active service.

It is therefore our opinion that a person who receives compensation under the provisions of chapter 215, Laws of 1943 because of permanent or total disability incurred as a direct and proximate result of injury received in the course of employment will continue to receive said compensation as long as the disability exists and the age of retirement has nothing to do with it. We are satisfied that had the legislature meant for a person once on disability compensation to be placed on retirement compensation as soon as he reached the age of sixty, it would have said so in enacting chapter 250 of the Laws of 1947.

Very truly yours,  
SMITH TROY  
Attorney General

RUDOLPH NACCARATO  
Assistant Attorney General

**EXHIBIT 2**

# STATE AND LOCAL PENSIONS

## WHAT NOW?

ALICIA H. MUNNELL

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### *State and Local Pensions: From the 1970s to Today*

This chapter has three purposes. The first is to explain how we got where we are today in terms of state and local pension finance. The second is to describe the current pension landscape and to introduce the *Public Plans Database*, which serves as the basis for much of the empirical material covered in subsequent chapters. The final purpose is to tip our hat to the other major component of retirement benefits for public sector employees—namely, retiree health insurance. The unfunded liabilities for state-administered retiree health plans amount to about one-fifth of those for state-administered pensions.

The discussion proceeds as follows. The first section provides a brief history of public sector pensions and the evolution of their governance. The focus is on the three decades since the findings of a 1978 congressionally mandated study, which include the resulting efforts to impose federal legislation, the substantial improvement in pension plan administration and funding during the 1980s, increased investment in equities and benefit expansions during the 1990s, and the impact of the twin stock market crashes of the past decade. The second section shifts from the three-decade trends in governance and funding to an overview of today's pension structure. It also includes a brief discussion of the *Public Plans Database*. The final section offers a bird's eye view of retiree health plans to provide some sense of the total retirement liabilities facing state and local governments.

The conclusions that emerge from this chapter are threefold. First, state and local pensions have come a long way in implementing responsible management since the days of the "Wild West." Second, what remains is an extremely heterogeneous array of plans, where the benefit provisions and funded status vary not only across states but also within states. Anyone who says "all state and local

plans are in trouble” or “all are doing well” has to be wrong, because plans differ so dramatically. Finally, states and localities are committed not only to paying pensions for their workers but also to providing retiree health. Most retiree health insurance plans are unfunded, so the employer share of premiums represents a serious claim on future budgets. But given that comprehensive reporting requirements only became effective in 2007 and that the provisions of these plans are complicated, the topic merits a separate study. The retiree health commitment should simply be kept in mind as the pension discussion proceeds.

## History in a Nutshell

The first state or local plan dates from 1857, when New York City provided lumpsum benefits to policemen injured in the line of duty.<sup>1</sup> Many municipalities created plans during the last half of the nineteenth century, including a number of systems for teachers. In 1911, Massachusetts developed the first state system to cover its general government employees (that is, employees engaged in activities other than teaching or public safety). But the major expansion of coverage came in the wake of the 1935 federal Social Security legislation. During the 1930s and 1940s, nearly half of the large state and local plans were established or significantly restructured (see figure 2-1). By the early 1960s, most states and localities had established their pension systems.

State and local government employment roughly doubled between the early 1960s and the mid-1970s, resulting in an enormous growth in the population covered by state and local pension plans. This growth, combined with interest in private plan reform that culminated in the 1974 passage of the federal Employee Retirement Income Security Act (ERISA), focused attention on public pensions. Originally, both government and private plans were included in the legislative proposals, but by the time ERISA was passed, public plans had been exempted. Instead, Congress mandated a congressional study of retirement plans at all levels of government to determine: (1) the adequacy of existing levels of participation, vesting, and financing; (2) the effectiveness of existing fiduciary standards; and (3) the need for federal legislation.<sup>2</sup>

1. See Bleakney (1972).

2. According to the Congressional Research Service, several factors contributed to the decision to undertake a study rather than include state and local plans in ERISA. First, Congress found itself with a dearth of information on public plans. Second, no flow of complaints had been heard from participants of public plans similar to that from dissatisfied participants in private plans. Third, Congress had its hands full simply tackling the problems in the private sector. Fourth, it was unclear whether Congress could properly set standards for state and local plans that federal plans could not reasonably achieve. Finally, some legislators were unsure whether it was constitutional for the federal government to regulate the pension plans of states and localities. See Schmitt (1976).

**EXHIBIT 3**

designated as section 17, immediately following the new section 16, which shall read as follows:

Reinstatement.

Section 17. Upon reinstatement of a corporation the Secretary of State shall enter upon his records a notation that such corporation is reinstated, and it shall thereupon be reinstated as of the date on which its term of existence expired; and such corporation shall have the right to sue and shall enjoy the same rights and powers as if its term of existence had been continuous or its term of existence had been extended before the expiration of its stated term of existence, and all things done by it in the exercise of its corporate powers before such reinstatement shall be valid acts of the corporation.

Passed the Senate February 27, 1947.

Passed the House March 9, 1947.

Approved by the Governor March 20, 1947.

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CHAPTER 250.

[ S. B. 248. ]

WASHINGTON STATE PATROL RETIREMENT SYSTEM.

AN Act providing for the Washington State Patrol Retirement System; creating a retirement board and prescribing its powers and duties; establishing certain funds in connection therewith; requiring contributions thereto by commissioned members of the Washington State Patrol and the state; making an appropriation therefor; and providing penalties.

*Be it enacted by the Legislature of the State of Washington:*

Definitions.

SECTION 1. The following words or phrases as used in this act, unless a definite meaning is plainly required by the context, shall have the following meanings:

"Retirement System."

(a) "Retirement System" shall mean the Washington State Patrol Retirement System as used in this act.

his retirement, the excess shall be paid to his beneficiary.

SEC. 18. Should a member become permanently and totally disabled, as a direct and proximate result of injury received in the course of employment, such member would receive benefits under chapter 215, Laws of 1943, and during such period would be a nonactive member. If any nonactive member should return to active duty with the Washington State Patrol, he shall be eligible to become an active member by paying into the Retirement Fund all contributions accumulated during such time of disability.

Permanent  
total  
disability.

SEC. 19. A. Beginning on the effective date of this act, every Washington State Patrol employee who is a member of the Washington State Patrol Retirement Fund shall contribute four per centum (4%) of his monthly salary, which the State Auditor shall deduct from the compensation of each member on each and every payroll.

Four  
per cent  
contribution  
by employee  
members of  
fund.

B. There is hereby appropriated the sum of one hundred thousand dollars (\$100,000) from the Highway Safety Fund to the Washington State Patrol Retirement Fund for the purpose of carrying out the provisions of this act. There is further appropriated from the Washington State Patrol Retirement Fund for the purpose of paying pensions, benefits and awards under this act the sum of fifty thousand dollars (\$50,000).

Appropriations.

C. In event a member severs his connection with the Washington State Patrol or is dismissed, the amount paid by the State of Washington shall remain in the Washington State Patrol Retirement Fund.

Retention  
of state's  
payments  
in fund.

SEC. 20. The right of any person to a retirement income under the provisions of this act and all monies and investments and income thereof are hereby exempt from any state, county, municipal

Retirement  
payments  
exempt and  
unassignable.

**EXHIBIT 4**

PROVIDED, That agencies or departments of the state shall provide a method whereby all accumulated vacation leave may be taken as vacation leave.

Sec. 3. Section 43.01.041, chapter 8, Laws of 1965 and RCW 43.01.041 are each amended to read as follows:

Officers and employees referred to in RCW 43.01.040 whose employment is terminated by their death (~~(, reduction in force, resignation, dismissal, or by retirement)~~) and who have accrued vacation leave as specified in RCW 43.01.040, shall ~~((be))~~ have such accrued vacation leave paid ~~((therefor under their contract of employment, or))~~ to their estate ~~((if they are deceased, or if the employee in case of voluntary resignation has provided adequate notice of termination))~~.

NEW SECTION. Sec. 4. This act shall not have the effect of terminating or modifying any rights acquired under a contract in existence prior to the effective date of this act.

NEW SECTION. Sec. 5. This act shall take effect July 1, 1982.

NEW SECTION. Sec. 6. 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.

Passed the Senate April 10, 1982.

Passed the House April 10, 1982.

Approved by the Governor April 20, 1982.

Filed in Office of Secretary of State April 20, 1982.

## CHAPTER 52

[Engrossed Senate Bill No. 4640]

### PUBLIC EMPLOYMENT—RETIREMENT SYSTEMS REVISIONS

AN ACT Relating to retirement from public service; amending section 18, chapter 267, Laws of 1971 ex. sess. as amended by section 1, chapter 205, Laws of 1979 ex. sess. and RCW 2.10.180; amending section 1, chapter 229, Laws of 1937 as last amended by section 4, chapter 106, Laws of 1973 and RCW 2.12.010; amending section 2, chapter 229, Laws of 1937 as last amended by section 2, chapter 18, Laws of 1982 and RCW 2.12.020; amending section 5, chapter 229, Laws of 1937 as last amended by section 1, chapter 75, Laws of 1977 and RCW 2.12.050; amending section 15, chapter 294, Laws of 1977 ex. sess. and RCW 41.26.540; amending section 1, chapter 80, Laws of 1947 as last amended by section 5, chapter 256, Laws of 1981 and RCW 41.32.010; amending section 3, chapter 80, Laws of 1947 as last amended by section 1, chapter 150, Laws of 1969 ex. sess. and RCW 41.32.030; amending section 38, chapter 80, Laws of 1947 and RCW 41.32.380; amending section 11, chapter 14, Laws of 1963 ex. sess. as amended by section 15, chapter 87, Laws of 1980 and RCW 41.32.401; amending section 12, chapter 150, Laws of 1969 ex. sess. as amended by section 8, chapter 189, Laws of 1973 1st ex. sess. and RCW 41.32.405; amending section 41, chapter 80, Laws of 1947 as last amended by section 13, chapter 150, Laws of 1969 ex. sess. and RCW 41.32.410; amending section 46, chapter 80, Laws of 1947 and RCW 41.32.460; amending section 7, chapter 35, Laws of 1970 ex. sess. as last amended by section 1, chapter 148, Laws of 1975 1st ex. sess. and RCW 41.32.4943; amending section 51, chapter 80, Laws of 1947 as last amended by section 17,

chapter 150, Laws of 1969 ex. sess. and RCW 41.32.510; amending section 8, chapter 193, Laws of 1974 ex. sess. and RCW 41.32.567; amending section 15, chapter 293, Laws of 1977 ex. sess. and RCW 41.32.820; amending section 11, chapter 274, Laws of 1947 as last amended by section 4, chapter 190, Laws of 1973 1st ex. sess. and RCW 41.40.100; amending section 13, chapter 274, Laws of 1947 as last amended by section 6, chapter 33, Laws of 1975 and RCW 41.40.120; amending section 16, chapter 274, Laws of 1947 as last amended by section 10, chapter 249, Laws of 1979 ex. sess. and RCW 41.40.150; amending section 19, chapter 274, Laws of 1947 as last amended by section 7, chapter 190, Laws of 1973 1st ex. sess. and RCW 41.40.180; amending section 38, chapter 274, Laws of 1947 as last amended by section 63, chapter 151, Laws of 1979 and RCW 41.40.370; amending section 14, chapter 295, Laws of 1977 ex. sess. and RCW 41.40.730; amending section 43.43.120, chapter 8, Laws of 1965 as last amended by section 1, chapter 77, Laws of 1980 and RCW 43.43.120; amending section 43.43.230, chapter 8, Laws of 1965 and RCW 43.43.230; amending section 43.43.250, chapter 8, Laws of 1965 as last amended by section 1, chapter 116, Laws of 1975-'76 2nd ex. sess. and RCW 43.43.250; amending section 43.43.260, chapter 8, Laws of 1965 as last amended by section 3, chapter 180, Laws of 1973 1st ex. sess. and RCW 43.43.260; amending section 4, chapter 180, Laws of 1973 1st ex. sess. as amended by section 3, chapter 14, Laws of 1973 2nd ex. sess. and RCW 43.43.270; amending section 43.43.280, chapter 8, Laws of 1965 as last amended by section 5, chapter 180, Laws of 1973 1st ex. sess. and RCW 43.43.280; amending section 43.43.290, chapter 8, Laws of 1965 and RCW 43.43.290; amending section 43.43.310, chapter 8, Laws of 1965 as last amended by section 8, chapter 205, Laws of 1979 ex. sess. and RCW 43.43.310; adding a new section to chapter 2.12 RCW; adding a new section to chapter 41.40 RCW; adding a new section to chapter 41.50 RCW; creating new sections; repealing section 21, chapter 200, Laws of 1953 and RCW 41.40.125; repealing section 43.43.150, chapter 8, Laws of 1965 and RCW 43.43.150; repealing section 43.43.265, chapter 8, Laws of 1965 and RCW 43.43.265; repealing section 43.43.266, chapter 8, Laws of 1965 and RCW 43.43.266; repealing section 5, chapter 12, Laws of 1969 and RCW 43.43.267; providing an effective date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 18, chapter 267, Laws of 1971 ex. sess. as amended by section 1, chapter 205, Laws of 1979 ex. sess. and RCW 2.10.180 are each amended to read as follows:

(1) The right of a person to a retirement allowance, disability allowance, or death benefit, the retirement, disability or death allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this chapter, and the moneys in the fund created under this chapter, are hereby exempt from any state, county, municipal, or other local tax and shall not be subject to execution, garnishment, or any other process of law whatsoever: PROVIDED, That benefits under this chapter shall be payable to a spouse or ex-spouse to the extent expressly provided for in any court decree of dissolution or legal separation or in any court order or court-approved property settlement agreement incident to any court decree of dissolution or legal separation.

(2) Subsection (1) of this section shall not be deemed to prohibit a beneficiary of a retirement allowance from authorizing deductions therefrom for payment of premiums due on any group insurance policy or plan issued for the benefit of a group comprised of public employees of the state of Washington.

fifty-five which allowance shall be the actuarial equivalent of the sum necessary to pay regular retirement benefits as of age sixty: PROVIDED, That if such member should withdraw all or part of ~~((his))~~ the member's accumulated contributions, ~~((he))~~ the individual shall thereupon cease to be a member and this subsection shall not apply.

Sec. 30. Section 43.43.290, chapter 8, Laws of 1965 and RCW 43.43.290 are each amended to read as follows:

~~((Should a member become permanently and totally disabled, as a direct and proximate result of injury received in the course of employment he shall receive))~~ A person receiving benefits under RCW 43.43.040 ((and during such period)) will be a nonactive member. ((If any nonactive member returns to active duty with the Washington state patrol, he shall be eligible to become an active member by paying into the retirement fund all contributions accumulated during the period of his disability)) If any person who is or has been receiving benefits under RCW 43.43.040 returns or has returned to active duty with the Washington state patrol, the person shall become an active member of the retirement system on the first day of re-employment. The person may acquire service credit for the period of disablement by paying into the retirement fund all contributions required based on the compensation which would have been received had the person not been disabled. To acquire service credit, the person shall complete the required payment within five years of return to active service or prior to retirement, whichever occurs first. Persons who return to active service prior to the effective date of this amendatory section shall complete the required payment within five years of the effective date of this amendatory section or prior to retirement, whichever occurs first. No service credit for the disability period may be allowed unless full payment is made. Interest shall be charged at the rate set by the director of retirement systems from the date of return to active duty or from the effective date of this amendatory section, whichever is later, until the date of payment. The Washington state patrol shall pay into the retirement system the amount which it would have contributed had the person not been disabled. The payment shall become due and payable, in total, when the person makes the first payment. If the person fails to complete the full payment required within the time period specified, any payments made to the retirement fund under this section shall be refunded with interest and any payment by the Washington state patrol to the retirement fund for this purpose shall be refunded.

Sec. 31. Section 43.43.310, chapter 8, Laws of 1965 as last amended by section 8, chapter 205, Laws of 1979 ex. sess. and RCW 43.43.310 are each amended to read as follows:

(1) The right of any person to a retirement allowance or optional retirement allowance under the provisions hereof and all moneys and investments and income thereof are exempt from any state, county, municipal, or other local tax and shall not be subject to execution, garnishment, attachment, the

**EXHIBIT 5**

buildings, or involves construction on wetlands of buildings to serve only as community social or recreational facilities for the use of owners of platted lots and the buildings do not exceed a height of thirty-five feet above average grade level, and

(e) The development is completed within two years after the effective date of this chapter.

(10) The applicable state agency or local government is authorized to approve a final plat with respect to shorelines of the state included within a preliminary plat approved after April 30, 1969, and prior to April 1, 1971: PROVIDED, That any substantial development within the platted shorelines of the state is authorized by a permit granted pursuant to this section, or does not require a permit as provided in subsection (9) of this section, or does not require a permit because of substantial development occurred prior to June 1, 1971.

(11) Any permit for a variance or a conditional use by local government under approved master programs must be submitted to the department for its approval or disapproval.

NEW SECTION. Sec. 2. This 1973 amendatory act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate September 10, 1973.

Passed the House September 13, 1973.

Approved by the Governor September 22, 1973.

Filed in Office of Secretary of State September 24, 1973.

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CHAPTER 20

[Reengrossed Senate Bill No. 2659]

STATE PATROL DISABILITY BENEFITS

AN ACT Relating to disability of state patrol officers; and amending section 43.43.040, chapter 8, Laws of 1965 and RCW 43.43.040.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. Section 43.43.040, chapter 8, Laws of 1965 and RCW 43.43.040 are each amended to read as follows:

The chief of the Washington state patrol shall relieve from active duty Washington state patrol officers who, while in the performance of their official duties, or while on standby or available for duty, have been or hereafter may be injured or incapacitated to such an extent as to be mentally or physically incapable of active service; PROVIDED, That: (1) Benefits under this section for a disability that is incurred while in other

employment will be reduced by any amount the officer receives or is entitled to receive from workmen's compensation, social security, group insurance, other pension plan, or any other similar source provided by another employer on account of the same disability: AND PROVIDED FURTHER, That an officer injured while engaged in wilfully tortious or criminal conduct shall not be entitled to disability benefits under this section.

(2) Should a disability beneficiary whose disability was not incurred in line of duty, prior to attaining age fifty, engage in a gainful occupation, the chief shall reduce the amount of his retirement allowance to an amount which when added to the compensation earned by him in such occupation shall not exceed the basic salary currently being paid for the rank the retired officer held at the time he was disabled. All such disability beneficiaries under age fifty shall file with the chief every six months a signed and sworn statement of earnings and any person who shall knowingly swear falsely on such statement shall be subject to prosecution for perjury. Should the earning capacity of such beneficiary be further altered, the chief may further alter his disability retirement allowance as indicated above. The failure of any officer to file the required statement of earnings shall be cause for cancellation of retirement benefits.

Such officers shall receive one-half of their compensation at the existing wage, during the time the disability continues in effect, less any compensation received through the department of labor and industries.

They shall be subject to mental or physical examination at any state institution or otherwise under the direction of the chief of the patrol at any time during such relief from duty to ascertain whether or not they are able to resume active duty.

Passed the Senate September 10, 1973.

Passed the House September 12, 1973.

Approved by the Governor September 22, 1973.

Filed in Office of Secretary of State September 24, 1973.

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CHAPTER 21

[Senate Bill No. 2915]

FIRST CLASS SCHOOL DISTRICTS IN  
CLASS AA COUNTIES

AN ACT Relating to education; amending section 28A.57.312, chapter 223, Laws of 1969 ex. sess. as amended by section 8, chapter 131, Laws of 1969 and RCW 28A.57.312; amending section

**EXHIBIT 6**

**Sec. 1.** RCW 7.68.110 and 1989 c 175 s 40 are each amended to read as follows:

The provisions contained in chapter 51.52 RCW relating to appeals shall govern appeals under this chapter: **PROVIDED**, That no provision contained in chapter 51.52 RCW concerning employers as parties to any settlement, appeal, or other action shall apply to this chapter: **PROVIDED FURTHER**, That appeals taken from a decision of the board of industrial insurance appeals under this chapter shall be governed by the provisions relating to judicial review of administrative decisions contained in RCW 34.05.510 through 34.05.598, and the department shall have the same right of review from a decision of the board of industrial insurance appeals as does the claimant; **PROVIDED FURTHER**, That the time in which to file a protest or appeal from any order, decision, or award under this chapter shall be ninety days from the date the order, decision, or award is communicated to the parties.

**NEW SECTION**, **Sec. 2.** A new section is added to chapter 51.52 RCW to read as follows:

This chapter shall not apply to matters concerning employers as parties to any settlement, appeal, or other action in accordance with chapter 7.68 RCW.

Passed the House March 7, 1997.

Passed the Senate April 8, 1997.

Approved by the Governor April 21, 1997.

Filed in Office of Secretary of State April 21, 1997.

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## CHAPTER 103

[Substitute House Bill 1550]

### DISABILITY RETIREMENT BENEFITS—DENIAL TO PUBLIC EMPLOYEES INJURED FROM OWN CRIMINAL CONDUCT

AN ACT Relating to disability retirement benefits resulting from criminal conduct; adding a new section to chapter 41.26 RCW; adding a new section to chapter 41.32 RCW; adding a new section to chapter 41.40 RCW; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION**, **Sec. 1.** A new section is added to chapter 41.26 RCW to read as follows:

A member shall not receive a disability retirement benefit under RCW 41.26.120, 41.26.125, 41.26.130, or 41.26.470 if the disability is the result of criminal conduct by the member committed after the effective date of this act.

**NEW SECTION**, **Sec. 2.** A new section is added to chapter 41.32 RCW to read as follows:

A member shall not receive a disability retirement benefit under RCW 41.32.540, 41.32.550, 41.32.790, or 41.32.880 if the disability is the result of criminal conduct by the member committed after the effective date of this act.

**NEW SECTION.** Sec. 3. A new section is added to chapter 41.40 RCW to read as follows:

A member shall not receive a disability retirement benefit under RCW 41.40.200, 41.40.220, 41.40.230, 41.40.235, 41.40.250, or 41.40.670 if the disability is the result of criminal conduct by the member committed after the effective date of this act.

**NEW SECTION.** Sec. 4. 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.

**NEW SECTION.** Sec. 5. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed the House March 12, 1997.

Passed the Senate April 9, 1997.

Approved by the Governor April 21, 1997.

Filed in Office of Secretary of State April 21, 1997.

## CHAPTER 104

[House Bill 1573]

### ASSISTIVE DEVICES FOR CHILDREN WITH DISABILITIES—INCREASING AVAILABILITY

AN ACT Relating to authorizing educational agencies to rent, sell, or transfer assistive technology for the benefit of individuals with disabilities and authorizing the creation of interagency cooperative agreements for the purpose of providing assistive technology for children with disabilities; amending RCW 28A.335.180; adding a new section to chapter 28A.335 RCW; and adding a new section to chapter 28A.155 RCW.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 28A.335.180 and 1991 c 116 s 1 are each amended to read as follows:

Notwithstanding any other provision of law, school districts, educational service districts, or any other state or local governmental agency concerned with education, when declaring texts and other books, equipment, materials or relocatable facilities as surplus, shall, prior to other disposal thereof, serve notice in writing in a newspaper of general circulation in the school district and to any public school district or private school in Washington state annually requesting such a notice, that the same is available for sale, rent, or lease to public school districts or private schools, at depreciated cost or fair market value, whichever is greater: PROVIDED, That students wishing to purchase texts pursuant to RCW 28A.320.230(2) shall have priority as to such texts. The notice requirement in this section does not apply to the sale or transfer of assistive devices under section 2 of this act or chapter 72.40 RCW. Such districts or agencies shall not otherwise sell, rent or lease such surplus property to any person, firm, organization, or nongovernmental agency for at least thirty days following publication of notice in a newspaper of general circulation in the school district.

No. 43865-8-II

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DOUGLAS MERINO and KAY  
MERINO, husband and wife and the  
marital community composed thereof,

Appellants,

v.

THE STATE OF WASHINGTON and  
ITS AGENCIES; THE WASHINGTON  
STATE DEPARTMENT OF  
RETIREMENT SYSTEMS; THE  
WASHINGTON STATE PATROL and  
JOHN R. BATISTE, Chief Thereof, and  
DAVID J. KARNITZ, Deputy Chief  
Thereof,

Respondents

BY  
DEPUTY

STATE OF WASHINGTON

2013 MAY -9 PM 1:58

FILED  
COURT OF APPEALS  
DIVISION II

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DECLARATION OF SERVICE OF MOTION OF AMICUS CURIAE  
AND AMICUS CURIAE BRIEF OF  
WASHINGTON STATE PATROL TROOPERS ASSOCIATION

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Mr. Paul A. Neal  
Attorney at Law  
1107 West Bay Drive NW  
Olympia, WA 98502  
(360) 789-7722

**DECLARATION OF SERVICE**

I, Paul A. Neal, declare under penalty of perjury under the laws of the State of Washington that on May 7<sup>th</sup>, 2013, I caused to be served on the persons listed below the following:

Motion of Amicus Curiae and Brief of Amicus Curiae of Washington State Patrol Troopers Association

By way of:

- Federal Express Standard Overnight
- By Legal Messenger
- By Facsimile Transmittal
- Other: \_\_\_\_\_

To:

Matthew T. Kuehn  
Assistant Attorney General  
1250 Pacific Avenue, Suite 105  
Tacoma, WA 98401-2317

Hans E. Johnsen  
Attorney at Law  
6513 132<sup>nd</sup> Avenue NE, PMB #348  
Kirkland, WA 98033

The original of the Motion and Brief of Amicus Curiae is being filed with the Court of Appeals, Division II.

DATED at Olympia, Washington this 7<sup>th</sup> day of May, 2013.

  
\_\_\_\_\_  
Paul A. Neal, Declarant