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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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.

DEFENDANTS' RESPONSE TO WASHINGTON STATE PATROL TROOPERS ASSOCIATION BRIEF OF AMICUS CURIAE

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I. INTRODUCTION

The Washington State Patrol Troopers Association labor union (Union) has filed an Amicus Curiae brief that supports the arguments made by the appellant in this case, former State Patrol officer Douglas Merino. The arguments made by the Union do not alter the circumstances of this case, however. By statute, Mr. Merino remained an officer of the State Patrol following his being disabled and, by statute, continued to receive a salary. When Mr. Merino was investigated and, after due process, was terminated for cause by the State Patrol, he lost the right to receive wages or salary of any kind from the State Patrol. Mr. Merino was not entitled to receive disability payments as those are only provided by the State Patrol to officers in the form of wages.

The Union asks this Court to substitute its judgment for that of the Legislature. Since the enactment of Chapter 43.43 RCW, the State Patrol has honored its officers by conferring their ranks and position until death or resignation. RCW 43.43.050. The only exception to this is suspension, demotion or discharge. The Union asks the Court to overturn this so that Mr. Merino, a felon who lied to investigators to attempt to avoid the consequences of insurance fraud, can receive statutory disability wages. Without minimizing Mr. Merino's previous service or sacrifice, he was a State Patrol officer at the point he committed these criminal acts, and the

Court should not obligate the State Patrol to continue to employ, honor and pay Mr. Merino where the statute does not so require. The ruling of the Thurston County Superior Court should be affirmed.

II. LEGAL ARGUMENT

A. Appellants And Union Position Irreconcilable With *Callecod v. Washington State Patrol*

Just as the Merinos did, the Union minimizes where it cannot ignore *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 929 P.2d 510, *review denied,* 132 Wn.2d 1004, 939 P.2d 215 (1997). This is because *Callecod* is irreconcilable with the Merinos' position. *Callecod* requires that Chapter 43.43 RCW be analyzed on its own terms. The Merinos cannot prevail based upon the terms of Chapter 43.43 RCW. To reiterate, *Callecod* holds:

> The Washington State Patrol's disability requirements are governed by an exclusive statute and regulations that are not tied by analogy or otherwise to the LEOFF system or to any earlier Washington police disability statute.

Callecod at 672.

This statement of law is unequivocal. There is nothing "strained" in reading this holding as preventing the union and appellants from applying LEOFF interpretation to Mr. Merino's case. Despite that, the Merinos and Union return to LEOFF cases repeatedly. Without overruling *Callecod*, such reliance is impossible.

The Union and the Merinos build their case on the assumption that a disability benefit is a vested, irrevocable benefit and support their conclusion through case law that arises outside of the context of RCW 43.43. In other words, they ignore *Callecod* altogether, relying on analysis arising out of LEOFF and other disability statutes. These are the exact analytical comparators that *Callecod* specifically forbade reliance upon.

B. The Merinos' And Union's Position Irreconcilable With RCW 43.43

RCW 43.43.040(2)(a) states:

> Officers on disability status 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.

Because of *Callecod*, the Court must look to the specific language of the State Patrol statute. If the disability payments are wages, then one must be an employee to receive them, and the statute states quite clearly that not only must the recipient of disability payments be an employee, the recipient must be an officer. This language is not reconcilable with the argument made that Mr. Merino was not an officer at the point he was

terminated for cause from the State Patrol and that he is entitled to receive ongoing disability payments.

1. RCW 43.43.040 Provides Disability Wage To Officers

The statute states that disability payments are made to officers and those payments are made "at the existing wage." This language leaves no doubt that the State Patrol is obliged to retain disabled officers on their payroll. There is no legitimate interpretation of this section that would accept the Union's position that there is a fully separate, non-officer category of disabled former State Patrol officers that permits ongoing disability payments.

If the officers retain an employment relationship with the State Patrol, then they are being paid a salary.[1] The plain language of the statute confirms this, as it specifically describes paying officers' half wages.[2] This interpretation is supported by the AGO Opinion cited by the Union, which indicated that legislative action would be required to move officers

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[1] *See* Declaration of Washington State Patrol Chief Financial Officer Robert Maki, CP at 228-30. Not only are disabled officers paid wages, they receive the same medical benefits as active officers, they are classified as one-half a full time employee designation for budgetary purposes, and their wages are reported on a W-2 form. Mr. Merino derived the benefits of his officer status, described here, without complaint until his termination for cause.

[2] The Union and the Merinos focus on the term "during the time the disability continues in effect" but ignore the requirement that officers receive the payments and that the payments are made in the form of wages. The statutory construction would require the condition precedent of being an officer to allow for the receipt of disability wages. A reading of RCW 43.43.040(2)(a) as a clause that supports perpetual disability payments departs from any logical statutory interpretation.

on inactive disability status into retirement. Op. Att'y Gen. 51-53 No. 274 (1952). Since no such action ever has occurred, disabled State Patrol officers retain their disability status, along with their officer status, until death. Those officers are thus not paid retirement, since they are not retired. They can save or withdraw their accumulated retirement as they see fit.[3]

2. State Patrol Officers May Be Discharged Regardless Of Status

By the specific terms of RCW 43.43.050, an officer disabled under RCW 43.43.040 remains an officer. The terms of the statute and the cases interpreting the statute make it clear that a disabled officer is merely on inactive status. The question at the heart of this matter, then, is whether the State Patrol has authority to terminate for cause an officer, regardless of their status.

RCW 43.43.070 addresses the termination of officers, and devises a process for that termination. The section also divides officers into probationary and non-probationary officers. There is no distinction made between active status and inactive status officers. The statute requires the discharge of a non-probationary officer be for cause and allows for a

[3] Mr. Merino withdrew his retirement in full. Had he not done so, he would be entitled to these ongoing pension benefits, consistent with *Bakenhus v, City of Seattle,* 48 Wn.2d 695, 296 P.2d 536 (1956).

public hearing. *Id.* There is no dispute that Mr. Merino was permitted this statutory due process.

Indeed, Mr. Merino *was* terminated. CP 137-144. Were he fundamentally a non-employee or fully retired, as the Merinos and Union suggest, that termination would have been unnecessary. It is significant, however, that although he had been on inactive status for 14 years at the point of the disciplinary actions, it was still an action required to terminate his employment relationship with the State Patrol.[4]

The Union cites to passing statutory references to "persons receiving benefits," and "disability beneficiaries" as dispositive proof that disabled, inactive officers are retired and not actually officers any longer. *See* Amicus Curiae Brief at 20-21. In doing so, the Union ignores the sections of the State Patrol statute that specifically pertain to this issue, dismissing the clear language in RCW 43.43.040 and .050. The Union attempts to obfuscate the fact that the statute speaks clearly for itself on the question of whether an officer remains an officer when disabled.

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[4] The Union argues that this termination was gratuitous or punitive, and that Mr. Merino had been "retired" for the 14 years that had elapsed. Amicus Curiae Brief at 4. There is no support whatsoever for the contention that Mr. Merino was retired and had severed his employment relationship. In fact, this argument is specifically contradicted by Mr. Merino's own actions: On January 31, 2008, Mr. Merino sent a formal letter in an attempt to retire (clearly in order to avoid this termination). CP at 226. Regardless of what the Union believes, Mr. Merino was under no misapprehension during the years following his disability that he still retained an employment relationship with the State Patrol.

Since officers remain officers until death, resignation or demotion under RCW 43.43.050, and any officer may be removed for cause by the Chief under RCW 43.43.020, it then must follow that even an officer on disability status is subject to termination for cause. So long as one is an officer of the State Patrol, they are eligible for removal for cause. Mr. Merino's actions were indisputably such that his termination was justified. Since the statute only provides disability benefits to officers, and provides the benefit in the form of a wage, Mr. Merino was no longer eligible to receive that disability benefit. To say otherwise requires the State Patrol to retain Mr. Merino as a convicted felon as a State Patrol officer.

C. Disability Benefits Do Not Automatically Vest Under RCW 43.43.040

The Union's position and the Merinos' position are not substantially different. Both claim that, notwithstanding the language of RCW 43.43, the Court should look to analogous legal authority and find that Mr. Merino's benefit vested. That authority, according to the Union and appellant, demonstrates that the disability benefit Mr. Merino was receiving was in fact vested, and was thus irrevocable, regardless of how reprehensible Mr. Merino's personal behavior became.[5]

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[5] Since there is no dispute that the disability benefit should have begun, the question before the Court is actually not whether the benefit vests, but rather whether the benefit was revocable. This distinction is not intrinsic to the State's view of the case, since the State believes that the plain language of *Callecod* controls this situation and the

First and foremost, such an argument is prevented by *Callecod's* specific rejection of non-Chapter 43.43 RCW analysis, as discussed *supra*. The plaintiff and Union are simply ignoring case law that is inconvenient to their position, and *Callecod* thoroughly forecloses the tactic chosen by the parties wishing reversal. Without overruling *Callecod*, this Court cannot accept the invitation of the Union and the Merinos to apply principals and authority that arise out of LEOFF or other disability and retirement systems.

Even if this argument is indulged, however, the Union and the Merinos are incorrect in classifying this disability benefit as a vested benefit. State Patrol disability payments are not a vested benefit. The determination of whether a benefit vests is contractual. *Bakenhus v. City of Seattle*. 48 Wn.2d 695, 296 P.2d 536 (1956). The contract in this case is the statutory provisions that govern the provision of benefits to disabled State Patrol officers. The contractual terms of LEOFF permit a finding that disability vests, but the State Patrol does not render disability

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question of vesting is not reached. It is worth noting, however, that even the *appellants* do not actually argue that the disability benefit fully vests: there is no dispute that recovery from the disability ends the benefit. The question, in fact, is whether there are more than one contingency *beyond recovery from disability* that would cease a State Patrol benefit. Based on the plain language of RCW 43.43, there clearly is. This is what is meant, in this context, by a "contingent" benefit.

payments a certainty even where a physical disability continues. Because of that, the benefit is contingent, not vested.[6]

1. LEOFF And State Patrol Disability Systems Are Distinguishable

The Union and the Merinos conflate disability and pension benefits because LEOFF statutorily permits such conflation. The plaintiffs in *Leonard v. City of Seattle,* 81 Wn.2d 479, 503 P.2d 741 (1972), and *Knudson v. City of Ellensburg,* 832 F.2d 1142 (9th Cir. 1987), retained disability benefits following criminal convictions in circumstances similar to Mr. Merino's. Each is a LEOFF case, however, and LEOFF's treatment of disability situations vastly differs from the State Patrol's.

To begin with, an officer disabled under LEOFF is not subject to reinstatement at the discretion of anyone other than a disability board, which is itself independent from whatever agency the officer had been employed at the time of disability. The disability board must rely upon

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[6] It is important to recognize that the absence of vesting does not render the cessation of disability arbitrary. Mr. Merino's was lost only after due process and finding that he demanded termination for cause. The Union attempts to portray the State Patrol's actions as cruel or a threat to the wellbeing of all those who have been injured in the service of the state, but the reality is that the events that led to Mr. Merino's termination are unique. The cessation of disability in conjunction with termination can only be achieved through a termination for cause under RCW 43.43.070. In a very genuine sense, Mr. Merino has nobody to blame but himself for the cessation of his disability payments, since those payments came to him in the course of his ongoing employment by the State Patrol and he had signed just a few years previously an acknowledgment that he could be terminated and his disability benefits could be ceased if he failed to follow State Patrol rules and regulations. The only threat to disabled State Patrol officers' ongoing disability would be their own failure to follow these rules and regulations and to act dishonorably despite their officer status.

examinations by a physician to reinstate a disabled member. The board is subject to statutory appeal from disabled members who disagree with their decision to reinstate. *See* RCW 41.26.110, .115, .130, and.140. Once a LEOFF officer reaches 50 years of age, they are no longer even required to submit to physical examinations to maintain ongoing disability payments. RCW 41.26.140(4). This is substantially different than the broad authority of the State Patrol Chief to reinstate inactive officers without limitation. *See* RCW 43.43.040(2)(a). An officer who is disabled under LEOFF is receiving a benefit that is dependent only upon remaining disabled. A disabled State Patrol officer, on the other hand, can be reinstated at any time by the Chief himself, and there is no limitation on medical recovery, nor is there an appeal mechanism.

Beyond the mechanics of the disability system, a State Patrol officer remains a paid State Patrol employee while a LEOFF disability recipient is separated from their employer and paid by Department of Retirement Systems. RCW 41.26.120. The Merinos and the Union dismiss the significance of who pays the disability of an officer, but the distinction is vital; the State Patrol system by statute retains control over and responsibility for the actions of those who are on disability. An officer disabled under LEOFF no longer has any such a connection to their agency.

These factual distinctions serve to demonstrate the point already made by *Callecod*: LEOFF and the State Patrol system are not comparable and a decision under LEOFF is not applicable to the State Patrol system.

2. Mr. Merino Was Aware Of The Contractual Terms And Conditions Of Disability Status

Beyond the basic terms of the statute, it is undisputed that Mr. Merino signed documents acknowledging his continuing obligation to comply with State Patrol regulations and policies under penalty of potential termination and loss of disability benefits. CP at 212. The November 1, 1999, letter is addressed to then-Trooper Merino, which is the first example that Mr. Merino was still being viewed as an officer despite over five years have passed between his being placed in disability status and the service of this certified letter. The letter goes on to state,

> In accordance with RCW 43.43.040, you were placed in disability status on February 10, 1994.
> This is to advise that when placing you in disability status, in accordance with RCW 43.43.040, the Chief relieved you from active duty status; therefore you cannot perform all of the duties of active service as required under the definition of active service as found in WAC 446-40-020.
> As a Washington State Patrol (WSP) employee on inactive status due to a disability, you no longer have authority to enforce the laws, rules, and regulations of the state of Washington. You are to refrain from exercising your WSP law enforcement authority which in inactive status.

> While in inactive status you are required to comply with certain regulations and policies, including, but not limited to, the following:
>
> Regulation 8.00.010, Rules of Conduct
> Regulation 8.00.020, Internal Investigation
> Regulation 8.00.030, Unbecoming Conduct
> Regulation 8.00.060, Abuse of Position
> Regulation 8.00.260, Insubordination
> Regulation 8.00.300, Truthfulness
>
> Failure to comply with these regulations and policies may result in disciplinary action, up to and including termination and denial of disability allowance.
>
> Sincerely,
> Chief Annette M. Sandberg
> Captain Lowell M. Porter
> Human Resource Division."

CP at 212.

The letter then concludes with an admonition and signature line. The admonition reads, in capital letters, "I HAVE READ AND UNDERSTAND MY OBLIGATIONS. I REALIZE THAT MY FAILURE TO COMPLY WITH ANY OF THE ABOVE AND ANY OTHER STATUTORY REQUIREMENTS NOT SPECIFICALLY OUTLINED, MAY CAUSE MY DISABILITY ALLOWANCE TO BE DENIED." *Id.*

Mr. Merino signed and dated the letter on November 6, 1999. *Id.* The State Patrol Human Resources Department received the document on November 10, 1999. *Id.*

The existence of this letter entirely subverts any Union argument that the revocation of Mr. Merino's disability was surprising or that Mr. Merino was somehow targeted by the State Patrol due to his conduct. Based upon the letter, there is absolutely no doubt that the Union and disabled inactive officers were:

- Notified that they were still considered officers, albeit inactive officers;
- Notified that as inactive officers, they lacked the law enforcement powers of active officers; [7]
- Notified that they were still expected to follow the rules and regulations of the State Patrol, despite their inactive status;
- Notified that the consequences of failing to follow those rules and regulations could include termination and disability allowance denial.

If, as the case law states, the contractual basis for the agreement is important, the signed understanding of the terms of Mr. Merino's inactive status obligations is a profoundly vital piece of evidence regarding the terms of the agreement between Mr. Merino and the State Patrol.

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[7] This notification is clearly in response to *State v. Hendrickson*, 98 Wn. App. 238, 989 P.2d 1210 (1999). The Union misreads *Hendrickson* as holding that "disability beneficiaries are not officers." The case actually holds that inactive officers do not possess the same law enforcement powers as active officers. The case does not further comment on whether an inactive officer is an officer and is thus not relevant to the subject at hand, beyond being further confirmation that the State Patrol retains a direct employment relationship with inactive officers.

Mr. Merino's acceptance of those terms, to the extent that they differ from the terms of the statute, further solidifies that the contractual understanding of the disability was that it was contingent upon ongoing compliance with the rules and regulations of the State Patrol, and was not vested.

III. CONCLUSION

The Merinos and the Union ask this Court to ignore settled case law and specific statutory terms in an effort to restore disability wages to a person terminated for cause for fraudulent and deceptive behavior that ultimately led to his conviction of a felony. There is no legal support to do so. The State Patrol respectfully requests this Court affirm the decision of the Superior Court.

RESPECTFULLY SUBMITTED this 10th day of June, 2013.

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PROOF OF SERVICE

I certify that I had served a copy of Defendants' Response to Washington State Patrol Troopers Association Brief of Amicus Curiae, on appellant's and the Washington State Patrol Troopers Association's counsel of record on the date below by e-mail and U.S. Mail, postage prepaid, to:

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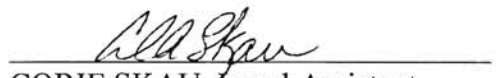
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of June, 2013, at Tacoma, Washington.



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