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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JACK M. NAVLET, ET AL, INDIVIDUALLY)
AND ON BEHALF OF A CLASS OF OTHERS)
SIMILARLY SITUATED,)

Appellant,)

v.)

THE PORT OF SEATTLE,)

Respondent.)
_____)

Court of Appeals
No. 56766-7

**RESPONDENT'S, PORT
OF SEATTLE,
ANSWERING BRIEF**

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I. Response to Assignment of Error.

The Trial Court correctly held that the Navlet Plaintiffs did not establish a contractual or statutory right to retiree medical benefits.

II. Response to Issues Relating to Assignment of Error.

1) The Port has no contractual or statutory obligation to provide retiree medical benefits.

2) The Port has no obligation under Washington law to provide retiree medical benefits.

3) The Navlet Plaintiffs failed to name Necessary Parties and exhaust administrative remedies.

III. Port's Statement of Case.

The Plaintiffs were Participants in a I.L.W.U. Local 9 Welfare Trust Fund ("Union Welfare Trust") that provided medical and retiree medical benefits. (CP 331) Contrary to Plaintiffs statement, the Union Welfare Trust was sponsored and administered by a joint labor management Board of Trustees and not by the Port of Seattle. (CP 406) The Port of Seattle was a participating employer in the Union Welfare Trust and made contributions pursuant to terms of its collective bargaining agreement with the International Longshore and Warehouse Union, Local 9 ("Union"). (CP 52) By its terms the Union Welfare Trust

indicated that it was subject to ERISA (the Employee Retirement Security Act of 1974, as amended) and that it should be interpreted in accordance with ERISA. (CP 91) With the exception of certain specified contributions, the Port's obligation to make contributions to the Union Welfare Trust terminated on December 23, 2002. (CP 70) Both the Union and the Trustees have acknowledged that the Port made all the contributions required under its collective bargaining agreement with the Union. (CP 76-77; CP 81)

After the Port stopped contributing to the Union Welfare Trust, the Union Welfare Fund decided to terminate the Trust. (CP 84) The Union Welfare Trust informed both active union members and retirees that medical claims incurred after April 30, 2003 would not be honored by the Union Welfare Trust. The Trust advised its members to obtain health coverage elsewhere. The decision to terminate active and retiree medical coverage was made by the Board of Trustees of the Union Welfare Trust. (CP 84) The decision to terminate active and retiree medical coverage was, therefore, not made by the Port of Seattle.

Despite the fact that Union members had previously negotiated that medical and retiree medical benefits would be provided by the Union Welfare Trust and not pursuant to Port Plans maintained for its own non-union members (CP 52; CP 78), the Navlet Plaintiffs are alleging,

without factual support in any document, that the Port is now obligated to draft, adopt and maintain a retiree medical plan that is equivalent to retiree medical coverage provided Union employees in effect immediately prior to April 30, 2003. *Appellants Opening Brief at P. 4.* Moreover, the Navlet Plaintiffs are apparently arguing that once such new plan is drafted and adopted by the Port of Seattle, such plan can not be amended, terminated or altered and the cost of providing such benefits can not be significantly changed from that provided immediately prior to April 30, 2003. *Id.* Such arguments are contrary to specific contract provisions governing both the rights of the Union retirees and the obligations of the Port of Seattle.

The fundamental flaws in the Navlett Plaintiffs' claim are: (1) the Union retirees had no contractual right to have medical benefits guaranteed for their lifetime under the Union Welfare Trust and (2) the Port of Seattle has no contractual liability for the obligations of the third-party Union Welfare Trust. With respect to the allegations of lifetime benefits, the Union Welfare Trust specifically informed the Union retirees that their benefits were not guaranteed lifetime benefits. Two specific statements in the Union Welfare Plan informed the retirees that they were not entitled to guaranteed lifetime benefits:

The Retired Employee Program is not guaranteed. The Board of Trustees is providing retiree health and welfare benefits to the extent that monies are currently available to pay the cost of such programs...The program is not guaranteed to continue indefinitely. The Board of Trustees reserves the right to change the eligibility rules of the benefits, reduce the benefits, or eliminate the plan entirely, as may be required by future circumstances. (CP 410)

In addition, a second bold faced disclaimer is set forth in the section of the Plan document and Summary that describes the retiree eligibility for medical benefits:

Benefits under this Retired Employee program are not guaranteed for any definite period of time and benefits will be provided only to the extent that sufficient funds are available in the Trust. The Trustees reserve the right to make any changes in this retiree Plan they deem necessary, and to terminate the retiree Plan. (CP 348)

Consistent with these provisions, the Navlet Plaintiffs have testified that they were never informed by the Port, Union management or Union Trustees that they were entitled to lifetime benefits. (CP 171; CP 182; CP 198; CP 202-203; CP 219; CP 224; CP 232; CP 248; CP 255) Therefore, the Navlet Plaintiffs can not point to a single document or

statement that supports their contractual claim to a guarantee of lifetime retiree benefits.

Even assuming that the Navlet Plaintiffs can somehow establish a claim for lifetime retiree medical benefits, such an obligation would be an obligation of the Union Welfare Trust and would not be an obligation of the Port of Seattle. The Port's obligation as a participating employer in the Union Welfare Trust is limited by contract. The Union Welfare Trust agreement specifically states that the Port shall have no responsibility for the liabilities of the Union Welfare Trust:

...no participating employer...shall be responsible for the liabilities or debts of the Trust Fund. (CP 116)

The Union Welfare Trust agreement further specifically states that the Port shall have no liability for the debts of others:

No participating employer...shall become responsible by reason of their participation in the Trust Fund for the liabilities or debts of any other participating employer, employer association or labor organization. (CP 116)

The Trust Agreement further states that no employee or beneficiary has a right or claim on contributions or future benefits:

...no...employee, or any beneficiary of a participating employee shall have any right, title, or interest in or to the Trust Fund, or in

or to the contributions, or in or to the benefits provided. (CP 117)

These disclaimers specifically negate the Navlet Plaintiffs' argument that the Port of Seattle is obligated to assume the alleged obligation of the Union Welfare Trust. Despite the fact that the Union Retirees had no contractual right to retiree medical benefits and despite the fact that the Port had no contractual obligation to provide any medical benefits, the Port, nevertheless, did take extraordinary steps to assist the active union members and its current retirees with respect to medical coverage. In the event the Union Welfare Trust did not have sufficient assets to cover medical claims incurred prior to April 30, 2003, i.e. the announced termination date of the medical Plan by the Board of Trustees, the Port agreed to make contributions to the Union Welfare Trust sufficient to cover the claims of participants. (CP 81) It also agreed to allow the union members to purchase COBRA coverage under the Port's own medical plan. (CP 320) This would ensure that terminated employees would have an additional 18 months of coverage. Finally, with respect to current retirees who were currently receiving medical benefits from the Union Welfare Trust, the Port allowed such retirees to purchase retiree coverage under the Port's retiree medical plan. (CP 323) Not satisfied with having coverage extended under the Port's own retiree

medical plan, the Plaintiffs are asking the Port to draft, adopt and fund a new plan with terms contrary to previously negotiated collective bargaining agreements. The Navlet Plaintiffs' claims have no foundation in either contract or statute and such claims were properly dismissed by the trial court.

IV. Summary of Arguments.

Regardless of whether the claims of the Navlet Plaintiffs are analyzed under state law or ERISA, the Plaintiffs can not establish a contractual or statutory guarantee to lifetime retiree medical benefits. Moreover, even if such alleged contractual rights existed under the Union Welfare Trust, the Port of Seattle has no liability for the obligations of the third-party Union Welfare Trust. Finally, the Navlet Plaintiffs have failed to join Necessary Parties and have failed to exhaust administrative remedies.

V. Argument.

A. The Evidence in the Record Does Not Support Plaintiffs Position that the Retiree Medical Plan is a Governmental Plan Not Subject to ERISA.

The Union Welfare Trust Agreement indicates that the parties intended the retiree medical plan to be subject to ERISA:

It is the intent of the Parties that this Trust be organized and operated pursuant to the provisions of the Employee Retirement

Income Security Act of 1974, as amended...(CP 91)

Notwithstanding this language, the Navlet Plaintiffs argue that because all the active Participants in the Welfare Plan were, with one exception, employees of a governmental agency, the Port of Seattle, the Plan is a governmental Plan not subject to ERISA. (CP 456)

The Navlet Plaintiffs, however, have not alleged that the medical plan for active employees should be continued by the Port. Rather, the Plaintiffs have alleged that the Retiree Medical Plan should be continued by the Port. *Appellants Opening Brief at P. 4*. There is nothing in the record to establish who is or may be entitled to retiree medical benefits and whether such individuals were employed by the Port or by other employers. (CP 288) The record does establish that non-governmental employers had previously made contributions to the Union Welfare Trust. (CP 188) Under the terms of the Retiree Medical Plan, individuals who retire under the Warehousemen Pension Trust, and had employer contributions to the Union Welfare Trust for at least 10 years are eligible for retiree medical coverage. (CP 347) Without any evidence as to who retired, or may retire, under the Warehousemen Pension Trust and whether contributions had previously been made for such individuals for at least ten years, the Navlet Plaintiffs can not establish that the only individuals

eligible or who may become eligible for retiree medical coverage are governmental employees. In the absence of any evidence to the contrary, this Court must construe the Union Welfare Trust Agreement in accordance with the specific intentions of the Parties, as an ERISA Welfare Plan.

Even if the Navlet Plaintiffs were correct that the Union Welfare Trust is a governmental plan, the Union Welfare Trust document must still be construed by this Court in accordance with the parties intentions - which was to construe the document in accordance with ERISA. While the Port recognizes that the parties cannot contractually confer ERISA jurisdiction on this Court or make the plan subject to the jurisdiction of governmental agencies, such as the Internal Revenue Service or the Department of Labor, the parties can certainly contractually agree as to how their document should be construed and interpreted. The Ninth Circuit recently held that the manifestation theory of contracts requires a Court to interpret a contract in a reasonable manner consistent with a person's words or acts. The Ninth Circuit, citing Washington state law, found that where the settlor intended the plan to qualify under the Internal Revenue Code, the plan must be construed in a manner consistent with the requirements of the Code. *See, Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1197 (9th Cir. 1996), withdrawn on other grounds, 120 F.3d

1006 (9th Cir. 1997) (citing *Multicare Medical Ctr. v. DSHS*, 114 Wn.2d 572, 790 P.2d 124, 133 (1990)). Similarly, the courts have found that where the settlor intended the plan to be an ERISA plan, the plan must be construed in accordance with ERISA. See, *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 809 (10th Circuit 1984) (Plan intended to be an ERISA Plan shall be construed in accordance with ERISA). Because the parties agreed to construe this document in accordance with ERISA “as well as any other applicable state law,” (CP 91), the Union Welfare Trust Agreement must be construed in accordance with ERISA, unless state contract law would forbid such an interpretation. The Navlet Plaintiffs, however, have not cited a single state law case that would prohibit the parties from contractually limiting their retiree medical liability. This is because limits on contractual liability have been upheld by the state courts that have considered the issue. See, *San Bernardino Public Employees Association v. City of Fontana*, 67 Ca. App. 4th 1215, 1223-25, 79 Cal. Rptr. 2d 634, 639-40 (1998) (rejecting contention that longevity based benefits are entitled to same protection as state retirement benefits); *Colorado Springs Fire Fighters Association Local 5 v. City of Colorado Springs*, 784 P.2d 766, 772 (S.Ct. Co. 1989) (retiree health plan benefits are not vested in a manner similar to state retirement benefits); *Davis v. Wilson County, Tennessee*, 70 S.W. 3d 724, 727-28 (S. Ct. Tenn.

2002) (absent a specific contractual provision to the contrary, governmental retiree medical health benefits can be terminated at any time). Moreover, any finding that the Port is *not* free to establish a retiree medical plan without binding itself contractually to such benefits would conflict with R.C.W. 41.04.208(10), which specifically states that benefits provided under a retiree medical plan to a governmental employee shall not constitute a contract.

B. The Plaintiffs Have No Contractual Right to Retiree Medical Benefits Under ERISA or State Law.

This Court need not decide the issue of whether ERISA or State law governs, because under either approach the Plaintiffs can not establish a contractual claim to guaranteed retiree medical benefits for life. Under ERISA, where there is no clear language to the contrary, some courts have established a presumption that welfare benefits are not vested. Conversely, some states, where there is no clear language to the contrary, have looked to state law governing pension benefits and have applied a presumption that welfare benefits are vested. *See, Poole v. Waterbury*, 266 Conn. 68, 82-83; 831 A.2d 211, 221-22 (S. Ct. Conn. 2003) (governmental retiree benefits under a collective bargaining continued for lifetime due to specific contract language and testimony that benefits were

meant to continue beyond the expiration of the collective bargaining agreement for the life of the retiree).

In the instant case, neither presumption is relevant because the Parties unambiguously provided that the retiree medical benefits are not guaranteed for the Plaintiffs' lifetime:

Benefits under this Retired Employee program are not guaranteed for any definite period of time and benefits will be provided only to the extent that sufficient funds are available in the Trust. The Trustees reserve the right to make any changes in this retiree Plan they deem necessary, and to terminate the retiree Plan. (CP 348)

Both the benefits and the cost of providing such benefits can be changed at any time:

The Retired Employee Program is not guaranteed. The Board of Trustees is providing retiree health and welfare benefits to the extent that monies are currently available to pay the cost of such programs...The program is not guaranteed to continue indefinitely. The Board of Trustees reserves the right to change the eligibility rules of the benefits, reduce the benefits, or eliminate the plan entirely, as may be required by future circumstances. (CP 410)

There is no case law that would permit this Court to impose an obligation that is contrary to the specific terms of the Parties' contractual

agreement. Moreover, there is no policy that would support such a decision. In the instant case, the Parties are of relatively equal bargaining power, i.e. the medical benefits were negotiated with the Union through the collective bargaining process. The terms of that coverage and the liability for that coverage were specifically negotiated. To ignore the Parties specific concessions and impose terms not negotiated would undermine the collective bargaining process, as a party would be free to sue for all benefits previously rejected and ignore concessions previously made. See, *San Bernardino Public Employees Association v. City of Fontana*, 67 Cal. App. 4th 1215, 1224-25; 79 Cal. Rptr. 2nd 634, 639-40 (4th Dist., Div. 2 1998).

C. Washington Law Does Not Support the Plaintiffs' Claim for Retiree Benefits.

Absent from the Navlet Plaintiffs' brief is any reference to a contractual provision or statutory provision that supports their claim to a guarantee of lifetime retiree medical benefits. The reason for such absence is that no such provision exists. At oral argument on Summary Judgment, Plaintiffs' Counsel indicated that their contractual claim for benefits is based on the "eligibility" language found on Page 12 of the Summary Plan Description, which also served as the Plan document. (RP 18; RP 30). That language reads, in part, as follows:

Retiree Eligibility

You and your eligible dependents will become eligible for retired employee benefits on the date of your retirement if you meet the following requirements: (CP 347)

....

Benefits under this Retired Employee Program are not guaranteed for any definite period of time and benefits will be provided only to the extent that sufficient funds are available in the Trust. The Trustees reserve the right to make any changes in this retiree Plan they deem necessary and to terminate the retiree Plan.
(CP 348)

Thus, the Navlet Plaintiffs’ contractual claim to benefits included specific words of limitation. These words of limitation were not hidden – the words were in bold face type and were in the same provision that governed the eligibility to receive benefits. Nor are the words ambiguous – the contractual language clearly indicates that benefits are not **“guaranteed for any definite period of time.”** Thus, Plaintiffs’ claim of “guaranteed lifetime benefits” is clearly negated by the clear language of the contract.

Navlet’s reliance on *Bakenhus v. Seattle*, 48 Wn.2d 695 (1956) is misplaced. *Bakenhus* dealt with pension benefits and not retiree medical benefits. Without authority, Navlet suggests that the legislature and the Courts intended to give the same protection to retiree medical benefits as they extended to statutory pension benefits. *Appellants’ Opening Brief at*

P. 12-13. Plaintiffs' argument that the legislature intended retiree medical benefits to have the same protection as pension benefits is contrary to the specific language of RCW 41.04.208, a statute that governs retiree health benefits provided to governmental employees. The statute expressly states that employees have no contractual right to retiree medical benefits:

(10) The benefits [retiree medical] granted under this section are not considered a matter of contractual right. Should the legislature, a county, municipality, or other political subdivision of the State revoke or change any benefits granted under this section, an affected person is not entitled to receive the benefits as a matter of contractual rights. *See*, RCW 41.04.208(10).

In addition, Plaintiffs' assertion that Port employees are entitled to retiree medical at no cost to them is directly contrary to the specific terms of such statute:

(3) A county, municipality, or other political subdivision has full authority to require a person who requests continued participation in a [retiree medical plan]...to pay the full cost of such participation, including any amounts necessary for administration. *See*, RCW 41.04.208(3).

Thus, Washington statutory law is clear that Port employees can be required to pay the full cost of any retiree medical benefit and that the amount charged to employees can be changed without violating any contractual obligation between the Port and an employee.

Plaintiff's reliance on Attorney General Opinion 1975-2, while not proper or binding authority, is similarly misplaced¹. See, *Appellant Brief P. 12 – 13*. The Attorney General in that opinion recognized a distinction between medical and retiree medical benefits subject to RCW 41.04, et. seq., which can be changed and downgraded by the legislature, and benefits that are found in the LEOFF (or the PERS) System that are entitled to a higher degree of protection. The Attorney General found that the benefits at issue were contained in RCW 41.26.150, which is part of the LEOFF System and therefore were entitled to a higher degree of protection. In the instant case, the retiree medical benefits at issue are not subject to any statutory scheme. The most analogous statutory scheme, however, is not LEOFF or PERS, but rather, RCW 41.04.208 governing the retiree benefits of governmental workers. As that statutory scheme

¹ Plaintiffs strained interpretation of Attorney General Opinion 1975-2 and *Bakenhus* is also directly contrary to recently issued Attorney General Opinion 2005-16. The Attorney General's recent opinion states that while pension rights are contractual in nature, the specific contractual language must be examined to determine the nature of the contract and the reasonable expectations of the parties. The Attorney General went on to hold that even in the context of PERS, when the legislature has attached words of limitation to a PERS benefit, such words of limitation are effective in limiting the contractual rights of the employee. In particular, the Attorney General indicated that language added to the PERS statute that stated participants had no contractual right to gain-sharing distributions would defeat a claim to such benefits under *Bakenhus*. Similarly, in the instant case, the words of limitation found in the retiree medical plan - **Benefits under this Retired Employee program are not guaranteed for any definite period of time and benefits will be provided only to the extent that sufficient funds are available in the Trust** – are sufficient to negate any claim for guaranteed lifetime benefits.

states, and the Attorney General Opinion confirms, such benefits can be downgraded at any time.

Plaintiffs further assert that because the WA Supreme Court has held that individuals have a contractual right to a pension, it must also be inferred that Plaintiffs have a contractual right to any benefit that references retirement and benefits. *See, Appellant Brief at P. 11-12.* All case law relied upon by the plaintiffs, however, holds that contractual rights are not inferred, but rather such rights are found in the unambiguous language of the statute or ordinance. In *Bakenhus v. Seattle*, 48 Wn.2d 695 (1956), *Eagan v. Spellman (PERS)*, 90 Wn.2d 248 (1978), *WFSE v. State of WA. (PERS)*, 98 Wn.2d 677 (1983), *Johnson v. Aberdeen (sick leave ordinance)*, 14 Wn. App. 545 (1975), the Court found that the terms of the statute or ordinance created a contract. These findings are consistent with other jurisdictions that have found that without language of limitation, the PERS statutes create unilateral contracts that vest upon acceptance of employment. *See Generally, Oregon Police Officers' Assoc. v. State of Oregon*, 918 P.2d 765, 773 (Or. 1996). The only non-statutory case relied upon by Plaintiffs, *Dorward v. ILWU-PMA Pension Plan, Appellant's Brief P. 11*, the Court found an entitlement to a pension based on the terms of the collective bargaining agreement, the

plan document and the doctrine of estoppel.² 75 Wn.2d 478, 484; 425 P.2d 258, 262 (1969).

Contrary to the Navlet Plaintiffs' suggestion, the line of cases Plaintiffs cite do not hold that the mere mention of the word retirement means that all benefits are immediately guaranteed and can not be changed regardless of the specific contractual language. Rather, the cases hold the opposite, the nature and extent of the obligation to provide the benefit is determined by an examination of the specific words of the underlying statute, ordinance or written agreement:

...the first step...[in a] contract clause analysis is to determine whether a contract exists to which the person asserting an impairment is a party. Also, as noted, in determining whether a contract exists, because this case involves state legislation alleged to be a contract, a contract will not be inferred from the legislation unless it unambiguously expresses an intention to create a contract. *See, Hughes v. State of Oregon*, 838 P.2d 1018, 1027 (Or. 1992).

If after examination of the specific language, a contract is found to exist, the case law holds that a court must then analyze: (1) the terms of the contract and (2) the specific obligations imposed by those terms. *Id.* 838 P.2d 1025; *See also, Strunk v. Public Employee Retirement Board*, 108 P.3d 1058, 1075 (St.Ct. Or. 2005). Because the Union Welfare Trust was being funded through collective bargaining contributions, which by

² The plaintiffs have not alleged facts sufficient to raise estoppel.

their nature are of limited duration, the terms of the contract and the obligations created thereby were specific and limited, i.e. the retirees medical benefits were not lifetime benefits – such benefits were not “guaranteed to continue indefinitely.” Rather, the retiree medical benefits were provided only to the extent that the Union Welfare Trust had “monies...currently available to pay the cost of such programs.” If the circumstances of the Trust so required, the retiree medical benefit obligation could be reduced or eliminated:

The Retired Employee Program is not guaranteed. The Board of Trustees is providing retiree health and medical benefits to the extent that monies are currently available to pay the cost of such programs. The program is not guaranteed to continue indefinitely. The Board of Trustees reserves the right to change the eligibility rules of the benefits, reduce the benefits, or eliminate the Plan entirely, as may be required by future circumstances. (CP 410)

The Courts are uniform in holding that agreements with such unambiguous reservation of rights clauses do not create a lifetime contractual right to lifetime benefits. *See, International Union of United Automobile Aerospace and Agricultural Implement Workers of America v. Rockford Powertrain, Inc.*, 350 F.3d 698, 703-4 (7th Cir., 2003) (Reservation of rights language controls despite promise of lifetime benefits in Summary Plan Description); *United Paperworkers Int’l Union*

v. Jefferson Smurfit Corp., 961 F.2d 1384, 1385 (8th Cir. 1992) (Unambiguous reservation of rights claim defeats claim for vested benefits); *Hughes v. 3M Retiree Medical Plan*, 281 F.3d 786, 792-793 (8th Cir. 2002) (Reservation of rights claim defeats claim for retiree and medical benefits).

Plaintiff, nevertheless, continue to insist that under Washington law a reservation of rights clause can not defeat a vested right. *See, Appellant's Brief at P. 22.* Plaintiff's reliance on *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 915 (1970) for this principle is misplaced because the *Jacoby* Court merely held that in order to determine the rights and obligations of the parties, the terms of the contract must be examined utilizing ordinary rules of contractual construction. *Id.* Wn.2d at 916-17; 468 P.2d at 670. The *Jacoby* Court denied the Plaintiffs claim for pension benefits, even though the Plaintiffs had 10 years of service, because the unambiguous terms of the contract required the Plaintiffs to have 10 years of participation under the plan. *Id.* Wn.2d at 920-21, 468 P.2d at 672. Under the reasoning in *Jacoby*, this Court is to examine the terms of the contract to determine the rights and obligations of the parties. Again, in the instant case, the contractual terms clearly negate the Plaintiffs' claim for lifetime retiree medical in perpetuity at no cost:

The Retired Employee Program is not guaranteed. The Board of Trustees is providing retiree health and welfare benefits to the extent that monies are currently available to pay the cost of such programs...The program is not guaranteed to continue indefinitely. The Board of Trustees reserves the right to change the eligibility rules of the benefits, reduce the benefits, or eliminate the Plan entirely as may be required by future circumstances. (CP 410)

Plaintiffs' reliance on *Cantor v. Berkshire Life Ins. Co.* 171 Ohio St. 405, 171 N.E. 2d 518 (1960) and *In re: Erie Lakawanna Railway Co. Non-Contract Employees*, 548 F.2d 621, 627 (6th Cir. 1977), is also misplaced³. In *Kolentus v. Avco Corporation*, 798 F.2d 949, 957 (7th Cir. 1986) the Seventh Circuit Court of Appeals upheld the ability of *Avco* to terminate four union pension plans and to avoid liability for deficit funding due to a limitation on contributions contained in the collective bargaining agreement and a reservation of rights clause contained in the plan. The Court found the plaintiff's reliance on *Cantor* unpersuasive, as the disclaimers in that case was not specific in limiting the employer's obligation:

³ The holding of *In re Erie Lackawanna Railway Co. v. Non-Contract Employees* was later overruled by the Sixth Circuit:

Plaintiffs also rely on the pre-ERISA case of *In re Erie Lackawanna Railway Co.*, 548 F.2d 621 (6th Cir. 1977). Because *Lackawanna* has been rejected by this court in post-ERISA cases dealing with benefit plans where companies reserved the right to terminate, modify or amend benefits, we are not bound to follow the Ohio law construed there. See *Cattin v. General Motors Corporation*, 955 F.2d 416, 425 (6th Cir. 1992).

The *Hoefel*, *Hurd*, and *Cantor* cases, furthermore, are factually distinguishable from this case. In none of these cases, unlike the present case, did the agreements at issue contain clear-cut disclaimer provisions stating that the employer's obligation was limited to contributing to the pension fund only during the term of the agreements and that benefits were payable only from the money held in the pension funds. In fact, the court in *Hurd*, *supra*, 419 F.Supp. at 655, expressly recognized that:

...nothing prevents employers from specifically limiting their liability under a multi-employer plan to the specific contributions to be made by them on a per-hour basis for the life of each collective bargaining agreement, provided that this limitation is the express intention and understanding of the parties.

The Avco pension agreements contained just such limitation provisions bargained for at arm's length by the four collective bargaining units representing the plaintiffs. *Id.* at 957.

The *Cantor* and *Jacoby* cases were similarly analyzed by the Illinois Court of Appeal in *Stevenson v. ITT Harper*, 51 Ill.App.3d 568, 366 N.E.2d 561 (1977). The Court read such decisions in the same manner as the Port to hold that the specific terms of the Plan must be examined to determine whether the employee was granted a vested right to the benefits. Where the terms of the plan specifically negated a right to the vested benefits, the plaintiff was denied relief:

The remaining decisions relied on *Jacoby v. Grays Harbor Chair & Mfg. Co.* (1970), 77 Wash.2d 911, 468 P.2d 666; *Cantor v. Berkshire Life Ins. Co.* (1960), 171 Ohio St. 405, 171 N.E. 2d 518; *Matthews v. Swift & Co.* (5th Cir. 1972), 465 F.2d 814, highlight the principle that an employee's rights to benefits depend upon the vesting and qualification provisions of the plan. Since the writing before us excludes vesting or other benefits prior to the later of retirement and age 65, these cases do not assist plaintiff. *Stevenson v. ITT Harper*, 51 Ill.App.3d 568, 366 N.E.2d at 567.

Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1014 (9th Cir. 1997), does not hold to the contrary. *Appellant's Brief at P. 18-19.* In *Vizcaino*, Microsoft maintained an employee stock purchase plan (ESPP) for employees. The Ninth Circuit held that workers that were misclassified as independent contractors and later reclassified as employees had contractual rights under the plan. *Id.* at 1013. In so holding, the Ninth Circuit merely examined the explicit language of the plan to see who was entitled to the benefits offered. Because the plan was offered to all employees, the Ninth Circuit held that employees mistakenly classified as independent contractors, could enforce the specific contractual language of the plan document. *Id.*, 1014-15.

All of the cases cited by Plaintiffs, upholding a right to a pension or medical benefits, are distinguishable because none of the cases involved statutes or provisions containing unambiguous words of specific limitation

on the nature of the benefit obtained. Courts that have examined retiree medical benefits that contain unambiguous reservation of rights clauses are uniform in finding that a lifetime contractual right to retiree medical benefits was not created. *See, International Union of United Automobile Aerospace and Agricultural Implement Workers of America v. Rockford Powertrain, Inc.*, 350 F.3d 698, 703-4 (7th Cir., 2003) (Reservation of rights language controls despite promise of lifetime benefits in Summary Plan Description); *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1385 (8th Cir. 1992) (Unambiguous reservation of rights claim defeats claim for vested benefits); *Hughes v. 3M Retiree Medical Plan*, 281 F.3d 786, 792-793 (8th Cir. 2002) (Reservation of rights claim defeats claim for retiree and medical benefits). The result is the same regardless of whether the words of limitation are contained in an ERISA plan or a governmental plan. *See, Colorado Springs Fire Fighters Association Local 5 v. City of Colorado Springs*, 748 P.2d 766, 772 (S.Ct. Co. 1989) (governmental retiree medical benefits can be terminated at any time); *Davis v. Wilson County, Tennessee*, 70 S.W. 3d 724, 727-28 (S.Ct. Tenn. 2002) (governmental retiree medical benefits can be terminated); *San Bernardino Public Employees Association v. City of Fontana*, 67 Ca. App. 4th 1215, 1224-25; 79 Cal. Rptr. 2nd 634, 639-40 (4th Dist., Div. 2 1998) (longevity benefits of governmental employees can be terminated);

Ventura County Retiree Employees' Assoc. Inc. v. County of Ventura, 228 Cal. App. 3d 1594, 1598, 279 Cal. Rptr. 676 (2nd Dist., Div. 6 1991) (governmental retiree benefits can be changed or modified); *Orange County Employee Association, Inc. v. County of Orange*, 234 Cal. App. 3d 833, 285 Cal. Rptr. 799 (4th Dist., Div. 3, 1991).

D. Plaintiffs Have Not Met Their Burden of Proof; Have Failed to Name Necessary Parties and Have Failed to Exhaust Administrative Remedies.

Plaintiffs have not met their burden of establishing a statutory provision or contractual term that makes their right unchangeable. *Accord, Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1516-17 (8th Cir. 1998) (plaintiff had burden of proving vested retiree medical benefits were guaranteed for lifetime). Moreover, any alleged promise was made by the Union Welfare Fund and not the Port of Seattle. It is well established law that a proper defendant in a suit for retiree medical benefits is the Welfare Plan and not the employer. *See, Lee v. Burkhardt*, 991 F.2d 1004, 1011-12 (2nd Cir. 1993); *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1287 (9th Cir. 1990), cert denied 498 U.S. 1087 (1991), *Pecor v. Northwestern National Insurance Company*, 869 F. Supp. 651, 653 (E.D. Wis. 1994), *Roeder v. ChemRex Insurance*, 863 F. Supp. 817, 828 (E.D. Wis. 1994)

(the Plan is the only proper defendant to a claim for benefits). Because the Port is not a proper party to an action for retiree benefits, the claims against the Port must be dismissed with prejudice⁴.

Finally, the Union Welfare Plan has an established claim procedure for anyone seeking benefits, such as retiree benefits, from the plan. (CP 411-412) It is well-established law that a participant must first exhaust administrative remedies before a lawsuit can be filed. *See, Diaz v. United Agric. Employee Welfare Benefit Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995); *Sarraf v. Standard Insurance Co.*, 102 F.3d 991, 993 (9th Cir. 1996). In the instant case, it is undisputed that Plaintiffs failed to exhaust their administrative remedies and, therefore, their lawsuit must be dismissed. (CP 181-82)

VI. Conclusion.

The Trial Court correctly held that the Plaintiffs can not establish a contractual or statutory right to guaranteed retiree medical benefits for life. Even if such a right could be established, the Port of Seattle has no

⁴ *See also, Rossetto v. Pabst Brewing Company, Inc.*, 217 F.3d 539, 541-42 (7th Cir. 2000) (the issue of whether retiree medical benefits survive the expiration of a collective bargaining agreement must be decided as a matter of federal common law under Section 301 of the Taft-Hartley Act).

liability for the obligations of the third-party Union Welfare Trust.
Therefore, the Navlet Plaintiffs' appeal should be denied and The Port of
Seattle should be granted its costs associated with this appeal.

Respectfully submitted, this 17th day of February, 2006.

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