

Original

79951-2

No. 35568-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JAMES A. DENSLEY, Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS, Respondent,

and

THE ATTORNEY GENERAL FOR THE STATE OF WASHINGTON, Defendant and
Intervenor.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. Reply Introduction	Page 1
B. Disputed Factual Issues	Page 1
1. Pattern of Department's Misstatements	Page 2
2. Drills Conducted In Tacoma	Page 3
3. Misstatement of Statutory Authority of Annual Training Orders	Page 3
4. Challenge to Presiding Officer's Findings	Page 4
5. Improper Footnote	Page 6
6. Consistent Interpretation Claim	Page 6
7. Special Expertise Claim	Page 7
8. Financial Impact Claim	Page 8
9. Silent Acquiescence Claim	Page 10
C. Legal Analysis Issues	Page 11
1. Is deference warranted to DRS's interpretation of RCW 41.40.170 (3)?	Page 11
2. Is the computation of retirement benefits made on the basis of law in effect at the time of retirement?	Page 13
3. Is there retroactive application of RCW 41.04.190 (9)?	Page 14
4. Is RCW 41.40.170 (3) ambiguous?	Page 14

- 5. Does the Absurd Results method of statutory construction lead to the conclusion drawn by DRS? Page 15
- 6. The term “Active Federal *Duty*” is not an issue Page 16
- 7. Is state duty an issue? Page 18
- 8. Did the petition examiner fail to follow established procedure? Page 20

D. Conclusion Page 22

E. Appendix

Sleasman v. City of Lacey, __ Wn. 2d __, __ P3d __, Docket No
77590-7 (Feb 8, 2007) Appendix A

TABLE OF AUTHORITIES

Table of Federal Cases

Perpich v. Department of Defense, p. 6, 18
496 U.S 334 (1990)

Public Employees Retirement System of Ohio v. Betts, . . . p. 11
492 U.S. 158, 171 (1989)

Table of State Cases

Appeal of Simko, p. 6, 12
DRS Docket Number 04-P-005 (October 14, 2004)

Sleasman v. City of Lacey, p. 11 - 13
__ Wn. 2d __, __ P3d __, Docket No 77590-7 (Feb 8, 2007)

Strong v. Department of Retirement Systems, p. 13
61 Wn. App. 457, 810 P.2d 974 (1991)

Legislation and Statutes

Chapter 343 Laws of 1991 p. 13

Chapter 95 Laws of 1993 p. 14

Title 4 RCW p. 20

Title 38 RCW p. 19

Chapter 38.42 RCW(Service Members Civil Relief Act) p. 20

Chapter 73.16 RCW p. 7, 16

RCW 34.05.570 (Administrative Procedures Act) . . . p. 21

RCW 38.14.006	p. 9
RCW 38.24.060	p. 30
RCW 41.40.010	p. 14
RCW 41.40.170	p. 6, 8, 10, 14- 17, 19
RCW 41.40.185	p. 13
RCW 41.50.005	p. 13

Federal Statutes

Title 10 USC	p. 5, 8
Title 32 USC	p. 18
10 USC 101	p. 4, 15, 17
10 USC 10101	p. 9, 15
10 USC 12602	p. 4, 17
32 USC 502	p. 3, 4, 7, 17
32 USC 503	p. 4, 7, 12, 17, 19
38 USC 4303 (Uniformed Services Employment and Reemployment Rights Act - USERRA)	p. 7, 12, 16

Regulations and Rules

WAC 415-40-040	p. 21
20 CFR 1002.57	p. 13

CR 11	p. 2
-------------	------

Other Authorities

Attorney General Opinion 1988 No 16	p. 15
Attorney General Opinion 2001 No 7	p. 15
Anonymous Attorney General Opinion	p. 8
Volume 2A Sutherland Statutory Construction 45:02	p. 15
Volume 2A Sutherland Statutory Construction 46:06	p. 15

I. REPLY INTRODUCTION

Appellant James Densley disputes a portion of the “factual” statements and the legal analysis set forth by the Department of Retirement Systems (DRS)(Department) in its brief. While there is not a dispute as to many of the facts concerning the military duty, some of the details require clarification by reference to the administrative record. Some of the legal issues brought up by the Department also warrant further discussion which leads to the conclusion that the Presiding Officer’s decision was erroneous and must be reversed

II. DISPUTED FACTUAL ISSUES

In its appeal brief the Department has misstated the some of facts upon which this appeal is based. In some instances the misstatements are incorrect, yet do not substantially effect the nature of the legal arguments; but in many instances the misstated items strike to the core of the Department’s improper denial of pension benefits based upon James Densley’s prior service in the armed forces. Likewise, the department has put forth to this court allegations for which there is no factual support in the record or where the evidence in the record is to the contrary. DRS’s faulty reliance upon these unsupported allegations means DRS’s arguments should be stricken.

A. PATTERN OF DEPARTMENT'S MISSTATEMENTS

The Department's pattern of haphazard factual statements in this case goes back to pleadings before the presiding officer. There DRS described duty with the Air National Guard and Oregon Guard when nothing in this case deals with such service. (AR 054)

On May 18, 2006, DRS filed a memorandum with the Superior Court. (CP 264 - 272) The first several pages were nothing but gibberish with "facts" and law which clearly were product of imagination, yet still signed by the assistant attorney general despite CR 11. After this nonsense filing was pointed out by James Densley, the Department filed a corrected copy. (CP 283-290) The assistant attorney general then claimed in a subsequent pleading (CP 295-296) that a twenty-first century version of the "dog ate my homework" problem happened: "Between the time that the memorandum was submitted to the attorney of record's legal assistant and the time it was printed for signature, an unknown technical/computer malfunction occurred which merged a portion of another document with the Department's memorandum."

In DRS's response brief before the Superior Court dated August 25, 2006, (CP 316-376) the Department continued to misstate "facts" and attempted to introduce "facts" which were not supported by the record.

Again, James Densley in his reply memorandum of September 7, 2006, had to spend three pages correcting the record. (CP 377-380)

B. DRILLS CONDUCTED IN TACOMA

Rather than correcting these misstatements in its appeal brief, the Department has chosen to repeat and even to enlarge upon them. One of DRS's misstated "facts" which doesn't substantially effect the nature of the legal arguments is found at page 5 of the Department's brief. There DRS claims that the weekend drills were performed in Yakima, despite the all evidence in the record and presiding officer's finding that the drills were performed in Tacoma. (AR 003) While this misstatement is relatively innocuous in the legal aspects of this appeal, it clearly illustrates the sloppiness of the Department's dealing with even simple matters. For the sake of brevity, the other DRS misstatements which do not have a material impact upon the analysis are not listed herein.

C. MISSTATEMENT OF STATUTORY AUTHORITY OF ANNUAL TRAINING ORDERS

Other misstatements made by DRS are substantially more insidious. For example, page 39 of DRS's brief states that "32 USC 502 specifically addresses Mr. Densley's three two-week summer trainings which were conducted in 1973, 1974 and 1975." However, the true facts

are that the orders to these annual training are specifically under the authority of 32 USC 503 and say so on the face of the orders. (AR 153 and 163)

What makes this DRS misstatement of the statutory authority particularly improper and irksome is that DRS even included in the appendix of its brief copies of these orders with their specific citations of statutory authority. The impact of the misstatement is that 10 USC 101 (d)(3) defines active service to include full-time National Guard duty. 10 USC 101 (d)(5) defines training under the provisions of 32 USC 503 as full time National Guard duty. Yet, DRS surprisingly and improperly alleges Lt. Densley's active training to be inactive 502 service. DRS quoted paragraph 3 of 10 USC 12602 (a), yet failed to cite to paragraph 2. 10 USC 12602 (a)(2) provides "full-time National Guard duty performed by a member of the Army National Guard of the United States shall be considered active duty in Federal service as a Reserve of the Army. . . ."

D. CHALLENGE TO PRESIDING OFFICER'S FINDINGS

The claim made by DRS that there has been no challenge to the findings of the presiding officer is only correct as far as DRS not making a challenge, but appellant has. For example, the presiding officer's corrected decision in paragraph 3 page 5 (AR 005) says that James

Densley “has effectively conceded that the drills, annual training and inactive duty for which he claims credit here were not performed under orders citing federal authority.” Contrary to this finding, James Densley’s has consistently submitted that his service in the National Guard *was* federal service due to his statement acknowledging service, precommissioning letter of instruction, his orders to Title 10 active duty, federal pay stubs and Leave and Earnings Statements, and his USC Title 10 promotion to First Lieutenant while in the National Guard. Furthermore, he has relied upon the authority of the annual training orders described above to show the federal authority of his service in the National Guard. (AR 153 and 163). His only claim regarding the state service is to point out the protections given for state service, if for the sake of argument, the presiding officer’s decision about state service were proper.

There also has been a challenge to the presiding officer’s finding (AR 019) that there has been but one period of interruptive service in 1990. In page 7 of his brief James Densley described the many other periods of interruptive service which were documented on the Chronological Statement of Retirement Points (AR 187) and attached as appendix D.

E. IMPROPER FOOTNOTE

The Department in its brief at page 30, footnote 70, refers to legislative history which it claims is Appendix E. Appendix E is actually a copy of the Perpich decision. This footnote also makes an unsupported claim about markings on the bill. The kindest interpretation that can be given on the inclusion this footnote is that Attorney General's Office may have inadvertently retained it from an earlier brief and not read its appeal brief before signing it.¹

F. CONSISTENT INTERPRETATION CLAIM

In its brief at page 13, the Department claims it has consistently interpreted the RCW 41.40.170 throughout its history. DRS gives no reference in the record to this claim, probably since there is no such finding in the record. In fact and contrary to the allegation of DRS, the decision of the presiding officer (AR 005) states that the first consideration of crediting National Guard duty was in the Appeal of Simko, DRS Docket Number 04-P-005 (October 14, 2004) which was rendered only a few months prior to the denial of James Densley's petition. Even more telling about the misstatement of consistency is the

¹ See the prior discussion about the Attorney General's August 26, 2006, pleadings before the superior court with this same problem.

series of internal DRS emails from late 2004. (AR 208-210) Here, Denise Oster tells DRS Plan Administrator Hardesty that James Densley's call up under 32 USC 503 calls for a review since earlier analysis doesn't apply.² What is to be gleaned from these emails is that James Densley's request is one of first consideration rather than part of a consistent pattern of interpretation. What is to be further gleaned from the statement of the department that if DRS requires active federal service for interruptive service credits, it admits violating USERRA and RCW 73.16 which do not require active federal service, rather service in the uniformed services, both active and inactive, state and federal, veteran and non-veteran.

G. SPECIAL EXPERTISE CLAIM

DRS at page 17 of its brief makes the "factual" claim that it has "expertise in a special field of the law." Again the Department makes no reference to the record to support this claim, and again the record shows facts to the contrary, that the Department indeed has no "special expertise" in understanding the position of the National Guard in the scheme of national defense or service member protections. This lack of expertise in interpreting federal military law is shown especially well in the letter of denial from the DRS Plan Administrator Michelle Hardesty

² Compare this earlier departmental recognition of the nature of the service under 32 USC 503 with the department's current claim that it was performed under 32 USC 502.

dated December 3, 2004. (AR 205-206). In that letter the requirement for Title 10 USC duty is not based on any “special expertise” of the department, rather it is based upon an anonymous Attorney General’s Opinion.

H. FINANCIAL IMPACT CLAIM

DRS makes yet another unsupported claim of fact at page 30 of its brief: “The financial impact to the public pension trust funds to pay for costs of up to five years of free military service to *every* PERS member who served in the *state* guard would be enormous.” Again, there is no reference to the record of such allegations, as none is to be found. Moreover, even a cursory analysis of this wild and inflammatory claim shows it at best to be a gross exaggeration and certainly not applicable to the facts before the court. This isn’t a class action lawsuit, merely an administrative appeal by pro se who sees DRS’s improper application of a clear statute. RCW 41.40.170 applies only to PERS I members, not to PERS II or III. RCW 41.40.170 (3) requires the additional condition that the soldier have veteran earned status. DRS has already interpreted the statute to provide armed service credits for prior service in the reserve components of the Army Reserve, Air Force Reserve, Navy Reserve, and Marine Corps Reserve. (AR 248) Only the members of the Army National

Guard and Air National Guard, who are also members of the reserve component of the armed forces and perform the same federal military training as well as additional state requirements are denied these benefits.³

The *state* guard is an entirely different force than the National Guard.⁴ Since the state guard isn't specifically included in the 10 USC § 10101 list, it may not be a reserve component of the armed forces.

In order to qualify for the non-interruptive military service credits, the military service must be prior to PERS covered employment. For example, a person decides at age 20 to join the reserve component of the armed forces. The soldier performs his or her annual two-week training periods while a member. In order to get five years credit, he or she would have to perform 60 such summer camps and obtain veteran status. Then at 80 years of age, after the 60 summer camps, the person would have to

³ See 10 USC § 10101 Reserve components named

PART I - ORGANIZATION AND ADMINISTRATION

The reserve components of the armed forces are:

- (1) The Army National Guard of the United States.
- (2) The Army Reserve.
- (3) The Naval Reserve.
- (4) The Marine Corps Reserve.
- (5) The Air National Guard of the United States.
- (6) The Air Force Reserve.
- (7) The Coast Guard Reserve.

⁴ **RCW 38.14.006 Availability and composition of state guard.** The Washington state guard will be available to serve, at the call of the governor **in the place** of the national guard of the state of Washington under the provisions of this title when the national guard is in the service of the United States, or when otherwise ordered to active state service by the governor. . . .

become employed in a PERS I covered job. And then only after putting in 25 years of PERS I service, at age 105 years, could the person then ask for credit for the five years of prior service in the armed forces. Is the parade of angry super-centenarian citizen-soldiers demanding a bit more retirement credit for their pending old age the fear that the Department is attempting to instill by the claim of enormous financial impact?

J. SILENT ACQUIESCENCE CLAIM

The Department at page 34 of its brief claims that there has been a silent acquiescence by the legislature of DRS's application of RCW 41.40.170. Again, there is no reference to the record. And yet again the record shows facts to the contrary. James Densley was unable to locate any recorded court decisions upon which the legislature could understand how DRS was applying the statute. RCW 41.40.170 was amended in 2005.⁵ A look at the legislative history of the 2005 amendments shows that the legislature was displeased with the interpretation given the statute by the attorney general and DRS in a situation slightly different than the current. (AR 037-039) The testimony given regarding the bill was from Col. Mike Price, who detailed how he was forced to go to hearings due to DRS's denial of his military service benefits. Consequently, the

⁵ The presiding officer, sua sponte, disregarded these amendments as not relevant at footnote 2 of her decision. (AR 007)

legislature amended RCW 41.40.170 to reverse DRS's application of the law.

III. LEGAL ISSUES

A. IS DEFERENCE WARRANTED TO DRS'S INTRPRETATION OF RCW 41.40.170 (3)?

DRS's brief lists some cases that provide that judicial deference is granted at times to agency interpretation of the law. However, this deference isn't a blank check for agencies. First there must be ambiguity. Next, the plain words of the statute prevail. For example, in discussing the interpretation of state employee retirement benefits, the United States Supreme Court in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171 (1989) ruled "(b)ut, of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."

The recent unanimous decision in Sleasman v. City of Lacey, __ Wn. 2d __, __ P3d __, Docket No 77590-7 (Feb 8, 2007) discussed the concept of deference to agency interpretations of ordinances which they enforce. The court treated the interpretation of ordinances the same as statutes. At the third page of the decision the court stated: "(A)n

unambiguous ordinance will be applied by its plain meaning while only ambiguous ordinances will be construed.” The court specifically addressed the concept of agency deference at page 8. In order to merit deference, the agency must show it adopted its interpretation as a “matter of agency policy.” While the construction does not have to be memorialized as a formal rule, it cannot merely “bootstrap a legal argument into the place of agency interpretation,” but must prove an established practice of enforcement. The court said that there needed to be more than two nearly simultaneous examples of its application prior to deference. A copy of the decision is attached as Appendix 1.

DRS’s faulty requirement for active federal service is on point with the Sleasman case. As described above, the evidence in the record shows that DRS only formally considered this active federal service requirement twice, the current matter and that of Major Simko. The Simko decision was nearly simultaneous, having been issued only months earlier (AR 005). As shown in the internal emails, Lt. Densley’s 32 USC 503 service was a matter of first impression for the department. (AR 208-210) The denial letter from Plan Administrator Hardesty (AR 205-206) was not based upon agency policy, but rather upon the legal argument of

the attorney general. Consequently, deference to DRS's statutory interpretation is not warranted even if the statute were ambiguous.

A situation in this case when judicial deference to an agency's interpretation of a statute would be appropriate would be that of the United States Department of Labor and the USERRA statute. 20 CFR 1002.57, cited in appellant's initial brief is the type of agency policy worthy of judicial deference contemplated by the Sleasman decision.

B. IS COMPUTATION OF RETIREMENT BENEFITS MADE ON BASIS OF LAW IN EFFECT AT TIME OF RETIREMENT?

DRS relies upon the decision of Strong v. Department of Retirement Systems, 61 Wn. App. 457, 810 P.2d 974 (1991) to support its contention that military service is credited at the time it was performed, rather than according to the law in effect at the time of retirement. This decision was filed May 28, 1991. About three months later, on September 1, 1991, Laws of 1991 Chapter 343 became effective. Section 7 of this bill amended RCW 41.40.185 upon which the Strong decision relied. The current version of RCW 41.40.185 provides that retirement allowances are computed upon the basis of the law in effect at the time of retirement. Section 2 of the bill became codified as RCW 41.50.005, also effective September 1, 1991. In relevant part this provides: "The legislature sets for

as retirement policy and intent: . . . (2) Persons hired into eligible positions shall accrue service credits for all service rendered” The version of RCW 41.40.010 (9) effective at the time of James Densley’s retirement provides for quarter month credit for less than ten days service in a month.

C. IS THERE RETROACTIVE APPLICATION OF RCW 41.40.190 (9)?

The Department, at page 21 of its brief, discusses the 1991 amendments to RCW 41.40.010, creating the quarter-month service credit and concludes that retroactive application is not warranted. Contrary to relying upon the 1991 amendments, appellant relies upon the 1993 amendments, Chapter 95, Laws of 1993. Section 9 of the 1993 bill specifically applies on a retroactive basis to RCW 41.40.170. This bill was attached as Appendix I to James Densley’s initial brief.

D. IS RCW 41.40.170 (3) AMBIGUOUS?

DRS argues to this court at page 29 of its brief that RCW 41.40.170 (3) is ambiguous. This argument begs for comparison to the prior inconsistent argument of the Department before the Superior Court. There, in its response brief filed August 25, 2006, (CP 316-376 at 330) the Attorney General told the court: **“When examined in its historical context, RCW 41.40.170 is plain and unambiguous and supports the**

meaning that the Department ascribed to it. (Emphasis in original)”

The way that the department now reaches its conclusion of ambiguity is to disregard AGO 2001, Number 7, about not reading words into a statute that are not there, disregard AGO 1988, Number 16, and Professor Sutherland’s admonition that different phrases mean different things, disregard the legislature’s use of the terms such as armed forces including its reserve components, and disregard 10 USC 101 and 10101 which define the armed forces as the active component and the reserve component, of which the Army National Guard is a part. Finally, once the department has abandoned a portion of the English language and in its place adopted the “shorthand terms” at page 32 of its brief perhaps it can equate the phrase “active federal service” with “service in the armed forces.” All that can be said is that this “shorthand term” isn’t shorter, doesn’t conserve much ink and paper and is not reasonable.

E. DOES THE ABUSRD RESULTS METHOD OF STATUTORY CONSTRUCTION LEAD TO THE CONCLUSION DRAWN BY DRS?

At page 32 of DRS’s brief, the argument is made that James Densley’s reading of RCW 41.40.170 (3) should be rejected as it would lead to an absurd result. This so-called absurd result is that different rules

would be applied to non-interruptive service than to interruptive service. While the appellant has attempted to provide policy reasons in his initial brief why different rules could apply, he also compared the rules. While the RCW 41.40.170 (3) provides rules for prior non-interruptive service, the rules for crediting interruptive service are found in more statutes than acknowledged by the Department. Not only does RCW 41.40.170 (1) provide interruptive service credits, but RCW 73.16.055 and USERRA also provide interruptive service credits. As discussed at length in appellant's initial brief the interruptive uniformed service credits provided by these other statutes are much more liberal than merely "active federal service" and include all uniformed service including state duty and inactive duty. If equality in the types of military service qualifying for credits for either interruptive and non-interruptive service is the means to avoid an absurd result, then the broad "service in the uniformed services" rule for interruptive service is more like the "service in the armed forces" rule of RCW 41.40.170 (3) than "active federal service" rule suggested by DRS.

F. THE TERM "ACTIVE FEDERAL DUTY" IS NOT AN ISSUE.

RCW 41.40.170 (1) calls for "active federal service" - not "active federal duty". This simplifies the analysis of what is meant by "active

federal service” under federal law and eliminates much of the Department’s discussion set forth in pages 35-39 of its brief. The Department engaged in long discussions regarding the inapplicable term “active duty.” The appellant set out the applicable statutes and CFR in his initial brief which define federal service and federal authority. To clarify the potential confusion created by DRS’s brief a short additional discussion appears warranted. This time a mathematical model will be presented to illustrate the relationship of the definitions of the federal statutes pertaining to federal service.

The following are mathematical symbols to be used:

AFS - Active Federal Service 10 USC 101 (d)(3)

AD - Active Duty

FTNGD - Full-time National Guard Duty 10 USC 101 (d)(5), 10 USC 12602 (2), 32 USC 503 (annual training)

IDT - Inactive Duty Training 10 USC 12602 (3), 32 USC 502 (weekend drills)

The formulae describing Federal law are:

$AFS = AD \text{ or } FTNGD$

$FTNGD = 32 \text{ USC } 503 \text{ service (or other types not at issue)}$

Thus 32 USC 503 annual training = FTNGD = AFS = Active Federal Service

and 32 USC 502 weekend drills = IDT = Inactive Federal Service

G. IS STATE DUTY AN ISSUE?

At page 42 of the Department's brief, there appears to be a concession: "There is no issue in this case that involves state active duty." If this means what it appears to say, then the Department is retreating from the presiding officer's decision statement (AR 005) that James Densley "has effectively conceded that the drills, annual training and inactive duty for which he claims credit here were not performed under orders citing federal authority." The Department also surrenders on defending the presiding officer's conclusion (AR 006) stating: "Annual training performed under Title 32 U.S.C. is state service rather than federal." This recent concession does appear to be in line with the September 6, 2006, stipulation by which the attorney general was dismissed as a party and agreed that Lt. Densley's military service at issue was not state service. (CP 113-115) The Department's concession also appears to conform with the Perpich decision's analogy that a National Guard member has three hats in his closet - a civilian hat, a state service hat, and a federal service hat - wearing but one at a time, and the one worn by Lt. Densley was federal. Thus, if the Department now agrees that the military service performed by Lt. Densley which is at issue here was actually "federal service" rather than "state service", then this appeal is

substantially simplified. The issue remaining before the court would then condense down to how much of Lt. Densley's military service qualifies for PERS I credit. As been shown earlier, the three summer training camps performed under 32 USC 503 were active federal service. This means, at a minimum and merely accepting the Department's interpretation of RCW 41.40.170, that the presiding officer's decision must be reversed, at least three months credit authorized and the petitioner awarded fees and costs for bringing this appeal. What the court would then have to decide is whether RCW 41.40.170 (3) actually provides credit for "service in the armed forces" so that inactive service could be considered and (a) whether the various statutory amendments for quarter-month's credit are retroactive to RCW 41.40.170 or (b) whether the laws in effect at the time of retirement apply to retirement calculations.

On the other hand, if DRS has silently reserved some nuance that the military service wasn't state service nor was it federal, then appellant's earlier references stand to the various state statutes. In this event, reference is made also to page 43 of the Department's brief. There the Department argues that since various service member protections are found in Title 38, they relate in no way to PERS. This is like a civil litigant arguing that the since the Service Member Civil Relief Act is

found in Chapter 38.42 RCW and not in Title 4 RCW Civil Procedure that compliance with the statute is not necessary and default protection really isn't offered to the service member in a civil case. The Department has not shown that it is exempt from compliance with the laws of the State and Federal Government. The Department must not be allowed to pick and choose which laws to obey based solely upon the statute's page number within the Revised Code of Washington.

H. DID THE PETITION EXAMINER FAIL TO FOLLOW ESTABLISHED PROCEDURE?

At page 47 of its brief, the Department submits that the only evidence of contact by the petition examiner with other interested parties is James Densley's letter confirming a telephone voice mail from the petition examiner. Part of the problem in this situation is that the petition examiner conducted her "investigation" in secret without properly disclosing with whom she spoke or what evidence she gathered. Yet, there is additional evidence in the record that the petition examiner conducted her secret investigation and relied upon its results. For example the Notice of Appeal from Decision of Petitions Examiner (AR 286 - 297 at 289 -290) contains three separate examples of how the

decision incorporated evidence gathered from the secret investigation and not included in James Densley's pleadings.

At page 47 of its brief, the Department properly indicates that the petition examiner may seek input from the Department or the Attorney General's Office.⁶ However, what the Department fails to acknowledge is that WAC 415-04-040 requires that interested parties who wish to respond, including the Department, appear, that their responses must be in writing, that the presiding officer forward these responses to the petitioner and then give the petitioner an opportunity to reply to the responses. James Densley asked in three different documents for either a chance to respond or for a default, but was denied this relief. (AR 304, AR 305-306, and AR 307-309)

The department at page 48 has now added another element to the APA remedy, *prejudice*. Where RCW 34.05.070 (3) states: "The court **shall** grant relief from an agency order in an adjudicative proceeding only if it determines . . . (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure," DRS now claims, without citing any legal authority, that there is an additional invisible element stating that the aggrieved party must prove

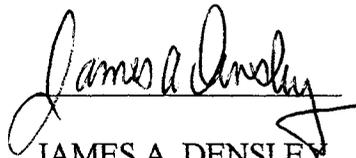
⁶ As the attorney for an interested party, DRS, the Attorney General is not exempt from compliance with the WAC.

prejudice from the department's failure to comply with the law or prescribed procedure. This is an element not set forth in the statute.

IV. CONCLUSION

The Department Of Retirement Systems decision denying military service retirement credits was improper. It should be reversed and James Densley should be awarded military service retirement credits for the period between November 1972 and September 1976. Such award should be retroactive to the date of his retirement. He should be awarded costs and fees for bringing this action.

RESPECTFULLY SUBMITTED this 27 day of February,
2007.



JAMES A. DENSLEY
PRO SE APPELLANT
WSBA 6789



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Opinion in PDF Format

Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 77590-7
Title of Case: Sleasman v. City of Lacey
File Date: 02/08/2007
Oral Argument Date: 09/12/2006

SOURCE OF APPEAL

Appeal from Thurston Superior Court
03-2-01107-7
Honorable Christine A Pomeroy

JUSTICES

See the end of the opinion for the names of the signing Justices.

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View the Opinion in PDF Format

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN SLEASMAN and)	
BARBARA SLEASMAN, husband)	
and wife,)	
)	No. 77590-7
Petitioners,)	
)	En Banc
v.)	
)	Filed February 8, 2007
CITY OF LACEY, a Washington)	
municipal corporation,)	
)	
Respondent.)	

SANDERS, J. -- We are asked to determine the meaning of "undeveloped" and "partially developed" lot as these terms were used in a Lacey ordinance. In May 2002 Stephen and Barbara Sleasman cut down trees in their backyard. City of Lacey (Lacey or city) regulates tree removal on "undeveloped" or "partially developed" property, former Lacey Municipal Code (LMC) 14.32.030(C), and fined the Sleasmans \$16,861 for allegedly violating chapter 14.32 LMC. Clerk's Papers (CP) at 42-43. A reduced fine was upheld by the Court of Appeals. We reverse.

We hold the Lacey ordinance does not apply to the Sleasmans' property. Their No. 77590-7 property is developed because it is a lawful building site that is already suited for sale or use. It is irrelevant that the Sleasmans may further improve the property.

I

The Sleasmans live in a 1,967 square foot, single-family residence on a 12,632 square foot, or .29 acre, lot in Lacey. CP at 195 (citing Thurston County GeoData Center and Thurston County Assessor's Office). Soon after cutting down 18 trees, the Sleasmens were notified by Lacey they violated chapter 14.32 LMC by removing trees without a permit. The city hired Galen Wright, an arborist with Washington Forestry Consultants, Inc. Wright assessed the trees' "appraised value" at \$16,861. CP at 42, 50.

The hearings examiner held the Sleasmans violated the ordinance but reduced the fine after exempting the five most expensive trees.¹ The city did not object. CP at 15. The Sleasmans appealed to Thurston County Superior Court. On January 30, 2004, the trial court affirmed the hearings examiner and denied the Sleasmans' equal protection claim.² After requesting additional briefing on the remaining claims, the

¹ After exemptions and deducting the Sleasmans' revegetation plan, the final fine was \$625, plus the city charged a forester's fee of \$546 for a total of \$1,171. Sleasman v. City of Lacey, No. 31775-3-II, slip op. (unpublished portion) at 10 (Wash. Ct. App. July 26, 2005).

² A third hearing was held in front of a different trial judge concerning a procedural

matter unrelated to this appeal. The superior court found the Sleasman's petition did not have to be dismissed because they failed to set an initial hearing date within seven days of their petition as required by RCW 36.70C.040(2). Verbatim Report

2

No. 77590-7

trial court concluded the Sleasman property was "partially developed," and the ordinance was not unconstitutionally vague. *Id.* The Sleasman's appealed again. The Court of Appeals affirmed the trial court.³ *Sleasman v. City of Lacey*, 128 Wn. App. 617, 619, 116 P.3d 446 (2005). The Sleasman's obtained review in our court to dispute the Court of Appeals' construction of "partially developed," its deference to the city's interpretation, and to argue alternatively the ordinance is void for vagueness. *Sleasman v. City of Lacey*, 156 Wn.2d 1031 (2006). Both the Sleasman's and Lacey seek reasonable attorney fees.

II

The Court of Appeals held this ordinance was clear and unambiguous. We agree but find it unambiguously inapplicable.

Statutory construction is a question of law and our review is *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Under Lacey's municipal code:

No person, corporation, or other legal entity shall engage in timber harvesting or cause land clearing in the city without having complied with one of the following:

Proceedings (Aug. 1, 2003) at 19. The Court of Appeals, in the published portion of its opinion, affirmed the superior court ruling. *Sleasman v. City of Lacey*, 128 Wn. 617, 619, 116 P.3d 446 (2005). The city did not appeal.

³ The Court of Appeals denied the Sleasman's equal protection and vagueness claims. The Sleasman's did not seek review on equal protection grounds but do seek review on vagueness.

3

No. 77590-7

- A. Received a land clearing permit from the director;
- B. Having obtained approval of the proposed work under the processes described in Section 14.32.050A;
- C. Having received an exemption from the director under the provisions of Section 14.32.050.

LMC 14.32.040. The code defines land clearing as "direct and indirect removal of trees and/or ground cover from any undeveloped or partially developed lot, public lands or public right-of-way." Former LMC 14.32.030(C) (emphasis added). Lacey argues property is "partially developed" when additional improvements of any kind are allowed under the zoning code, asserting chapter 16.12 LMC permits the Sleasman's to build additional structures on up to 50 percent of their lot and improve

65 percent of their lot with structures, driveways, or roads. LMC 16.12.050(F), (G). The ordinance does not define undeveloped, partially developed, or developed property.

A. The Sleasman property is developed.

We interpret local ordinances the same as statutes. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). An unambiguous ordinance will be applied by its plain meaning, *State v. Villarreal*, 97 Wn. App. 636, 641-42, 984 P.2d 1064 (1999), while only ambiguous ordinances will be construed. *Food Servs. of Am. v. Royal Heights, Inc.*, 123 Wn.2d 779, 784-85, 871 P.2d 590 (1994).

The Lacey ordinance is unambiguous. Under the term's plain meaning, the

4

No. 77590-7

Sleasman property is "developed." 4 The Court of Appeals appropriately cited Webster's Third New International Dictionary to define the plain meaning:

Webster's Third International Dictionary defines "partial" as "of, involving, or affecting a part rather than the whole." Webster's defines the term "develop" as "to convert (as raw land) into an area suitable" for "building" or "residential or business purposes." Reading these definitions together supports the City's definition -- that land is partially developed where it is converted in part to commercial, residential, or some other specific purpose.

Sleasman v. City of Lacey, No. 31775-3-II, slip op. (unpublished portion) at 18 (Wash. Ct. App. July 26, 2005). The court held that because the Sleasman cut down 18 trees, their property was "converted" in part, and therefore only "partially developed." *Id.*

But despite accurately quoting the definitions, the Court of Appeals misapplies them. According to Webster's, one "develops" property by converting raw land into an area suitable for building or residential or business purposes. The most obvious example of "development" is the platting process where building lots are made ready

4 If former LMC 14.32.030(C) was ambiguous, then it must be construed in favor of the Sleasman because land-use ordinances must be strictly construed in favor of the landowner. As we held in *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956):

It must also be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose.

See *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 385, 739 P.2d 668 (1987) (noting to apply *Morin* when the ordinance is ambiguous).

5

No. 77590-7

for sale or use for future improvement. To be "partially" developed, property must

either be an area where part is raw land that is unsuitable for building or where the area as a whole is not yet finally developed so it is not yet a lawful building site. Under the plain meaning, the Sleasman property is "developed" because it is a lawful building site ready for sale or use.

Lacey confuses "developed" with "improved." After land is developed it may then be improved. An improvement is generally understood as adding any structure to the land. See *Verna v. Comm'r of Revenue Servs.*, 261 Conn. 102, 108-09, 801 A.2d 769 (2002) ("[W]e have little difficulty in concluding that an 'improvement to real property,' as commonly understood in the law, '[g]enerally has reference to buildings, but may also include any permanent structure" (quoting Black's Law Dictionary 757 (6th ed. 1990))). Lacey asserts land is only developed when one can no longer improve it. But one cannot build on or improve upon a lot unless it is developed. The Sleasmans can add to their improvements only because their lot is developed as a lawful building site.

Our precedent also supports reading "developed property" to mean a lawful building site made suitable for sale or use. Hogue described land where "'people and their families or predecessors have had farms, small businesses and homes . . . in a rural atmosphere'" as "well-developed agricultural and residential lands." *Hogue v. Port of Seattle*, 54 Wn.2d 799, 826, 341 P.2d 171 (1954) (quoting trial court).

6

No. 77590-7

Certainly this rural, agricultural land could be improved upon, but it was developed because no part was raw land needing further development to be made suitable for sale or improvement. Also, in *B&W Construction, Inc. v. City of Lacey*, 19 Wn. App. 220, 226, 557 P.2d 583 (1978), the Court of Appeals described the costs of developing land: "The price of developed lots usually includes expenses of subdivision sales and promotion, sewers, streets, utilities, and perhaps sidewalks." A developer must plat land, add sewers, streets, and utilities, etc., to convert raw land to make it suitable for final plat approval and possible improvement. In *B&W Construction*, the developer had not yet obtained a final plat of the land so it was then not yet suitable for building: "Although the comparable property had been engineered and platted on paper, no further steps had been taken to develop it, i.e., no utilities or roads had been laid and no lots had been staked out." *Id.* Hence that land was only partially developed.⁵

B. Lacey's and the Court of Appeals' reading contradicts the plain meaning of "partially developed."

Lacey and the Court of Appeals both read "partially developed" so broadly it

includes nearly every piece of property. Every house would be at most "partially developed" if it could be added to, altered, or if the owner is allowed to change the property's use -- such as to a day care. Sleasman, No. 31775-3-II, slip op. (unpublished portion) at 20 n.18. Because some change can always be made to improvements on property or its use, all lots under this broad reading are only

7

No. 77590-7

"partially developed."

But this reading belies the plain meaning of the terms. If the city council intended the ordinance to reach all property, it could have simply required a permit for undeveloped or developed land. 6 Full effect must be given to the legislature's language, with no part rendered meaningless or superfluous. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). By limiting the ordinance to partially developed land, the city council obviously intended to exclude "developed property."

5 Other state courts also define "developed" as converting raw land to an area suitable for sale or use as a building site. See *Kenai Peninsula Borough v. Cook Inlet Region*, 807 P.2d 487, 497 (Alaska 1991) ("Cases dealing with the term 'developed' in the context of land confirm that 'develop' connotes conversion into an area suitable for use or sale."). *Kenai Peninsula* cites the following cases to support its holding:

Winkelman v. City of Tiburon, 32 Cal.App.3d 834, 108 Cal.Rptr. 415, 421 (1973) ("The term 'developed' connotes the act of converting a tract of land into an area suitable for residential or business uses."); *Muirhead v. Pilot Properties, Inc.*, 258 So.2d 232, 233 (Miss. 1972) (same holding); *Prince George's County v. Equitable Trust Co.*, 44 Md.App. 272, 408 A.2d 737, 742 (1979) ("Develop [is defined as] the conversion of raw land into an area suitable for residential or business uses."); *Best Building Co. v. Sikes*, 394 S.W.2d 57, 63 (Tex.App. 1965) (court approved trial court finding based in part on extrinsic evidence that "developed" included subdividing, building streets, and installing utilities).

Id. (alteration in original) (citation omitted).

6 On July 26, 2006, the city council passed Ordinance 1269, which changed the language to now read "undeveloped, partially developed, or developed lot, public lands or public right-of-way." LMC 14.32.030(J).

8

No. 77590-7

C. The city's interpretation is not entitled to deference.

Although the Court of Appeals held the ordinance was plain on its face, it nonetheless gave deference to the city's construction. Ordinances with plain meanings are not subject to construction. Only ambiguous ordinances may be construed. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). However, even if the ordinance were ambiguous, Lacey's interpretation would not be entitled to deference. Lacey's claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation. Often when an agency or

executive body is charged with an ordinance's administration and enforcement, it will interpret ambiguous language within that ordinance. But the agency must show it adopted its interpretation as a "matter of agency policy." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). While the construction does not have to be memorialized as a formal rule, it cannot merely "bootstrap a legal argument into the place of agency interpretation," but must prove an established practice of enforcement. *Id.*

Lacey bears the burden to show its interpretation was a matter of preexisting policy. *Id.* It tries to meet this burden by showing it applied the ordinance to the Sleasman's neighbors, Nathan and Stacey Magee, who had a similar improvement on a similarly sized lot. CP at 90. The Magees were fined \$15,966 on August 8, 2002 for cutting down 25 trees.⁷ CP at 87. But this was after the Sleasman cut down their

9

No. 77590-7

trees in May 2002. The tree removal ordinance was originally passed in 1975; Lacey needs more than two nearly simultaneous examples of its application to single-family residences to demonstrate this was city policy because a nonexistent enforcement policy cannot provide notice to the Sleasman. Moreover, the city testified the ordinance was originally designed for large-scale development (as Sleasman claim) and did not proffer its current construction until the trial court asked for further briefing. These facts are similar to *Cowiche Canyon* where this court refused to credit an agency interpretation where it was applied only "one or two instances in 14 years." *Cowiche*, 118 Wn.2d at 815. Here Lacey applied this interpretation to only one or two instances in 30 years, and the Sleasman were the first.

III

The Sleasman also argue former LMC 14.32.030(C) is unconstitutionally vague. Constitutional challenges are also reviewed *de novo*. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 731, 57 P.3d 611 (2002). When possible, this court resolves disputes without reaching constitutional arguments. By holding the Sleasman property is developed and the ordinance does not apply, we need not reach the question of whether former LMC 14.32.030(C) is unconstitutionally vague.

IV

⁷ After exempting the five most expensive trees and considering the Magees' revegetation plan, the city agreed to waive the remaining balance of \$1,488. CP at 90.

10

No. 77590-7

Both parties claim they are entitled to attorney fees. The Sleasmans claim attorney fees pursuant to 42 U.S.C. § 1988 for violation of their due process rights if the ordinance is unconstitutionally vague.⁸ But by its plain meaning, the Sleasmans' property is not "partially developed." Therefore, there is no deprivation of a constitutional right, and the Sleasmans are not entitled to attorney fees under this statute.

Lacey claims attorney fees under RCW 4.84.370 as a prevailing party.⁹ But it isn't.

⁸ 42 U.S.C. § 1988(b) provides:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs

⁹ RCW 4.84.370(1) provides:

Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. . . .

No. 77590-7

We reverse the Court of Appeals and award costs to the petitioners.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Tom Chambers

Justice Charles W. Johnson

Justice Susan Owens

Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Justice James M. Johnson

Justice Bobbe J. Bridge

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY Cym
DEPUTY

JAMES A. DENSLEY,)
Appellant,)
v.)
DEPARTMENT OF RETIREMENT)
SYSTEMS,)
and)
THE ATTORNEY GENERAL FOR)
THE STATE OF WASHINGTON,)
Respondents.)

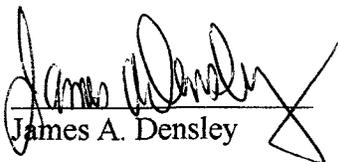
No. 35568-0

DECLARATION OF SERVICE

James Densley declares that on Tuesday, February, 27, 2007 he served by United States Mail his Appeal Reply Brief upon the attorneys of record for the respondents. He deposited with the post office said Appeal Reply Brief, first class postage paid, return receipt requested. Copies were mailed to Johnna Craig, Assistant Attorney General, PO Box 40108, 7141 Clearwater Dr. SW, Olympia, Washington 98504 -0108 and to Tim Ford, Deputy Solicitor General, 1125 Washington Street, Olympia, Washington.

I declare that the forgoing is true and signed under the penalties of perjury.

Signed this 27th Day of February, 2007, in Tacoma, Washington.


James A. Densley