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No. 57869-3-I

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DAVID McALLISTER and KEN McALLISTER
Appellants

v.

CITY OF BELLEVUE FIREMEN'S PENSION BOARD
Respondent

REPLY BRIEF OF McALLISTERS

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A. Bellevue has Misread RCW 41.26.040(1), the Statute It Cites as Authority for Its Argument.

Bellevue's responsive arguments rest on a foundation made by a misreading of very clear statutory language contained in RCW 41.26.040. Bellevue begins, concludes and throughout its response argues that the McAllisters, as of March 1, 1970, became members of the LEOFF system "to the exclusion of any pension system existing under any prior act," and that "active firefighters were no longer members of the 55 pension plan (Pension Act) and could only retire under the LEOFF system," citing RCW 41.26.040(1). That proposition is incorrect. The statute upon which Bellevue relies states: (RCW 41.26.040(1))

(1) All fire fighters, policemen, deputy sheriffs and town marshals initially employed at that capacity on or after March 1, 1970, on a full time basis in this state shall be members of the retirement system established by this chapter, to the exclusion of any pension system existing under any prior act.

The McAllisters were not initially employed on or after March 1, 1970. They were initially employed in 1965 and as such, Bellevue's citation is not applicable to them. The McAllisters' rights were controlled by subsection (2) of RCW 41.26.040 that provides:

(2) Any employee who has made retirement contributions under any prior act shall have his membership transferred to the system established by this chapter on March 1, 1970: Provided, however, that for the purposes of

employee contribution rate, credibility of service, eligibility for service or disability retirement, and survivor and all other benefits, such employee shall also continue to be covered by the provisions of such prior act which relate thereto, as if this transfer of membership had not occurred. Upon retirement for service or for disability, or death, of any such employee, his retirement benefits earned under this chapter shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had continued to be a member of the retirement system covered thereby and these benefits, including survivor's benefits, offset by all benefits payable under this chapter, shall be paid to him by the county, city, town or district by which he was employed at the time of his retirement.

Prior to the LEOFF legislation reaching the governor, the debate on the floor of the House directly spoke to the legislature's intent. From the case of *Mulholland v. City of Tacoma*, 83 Wn.2d 782, 522 P.2d 1157 (1974), the court recalled the following dialogue:

Representative Kuehnle stated on a point of inquiry as follows:

This new law will transfer present members of police and firemen pension systems into the new system without any choice on their part. I wish you would clarify for me how their rights under the existing systems will be protected. *House Journal 1477 (1969).*

Representative Richardson responded:

It is the intent of the legislature that presently employed police officers and firefighters, now covered under chapter 41.20 and chapter 41.18 RCW who are to have their

membership transferred mandatorily from those existing acts to Engrossed Substitute Senate Bill No. 74 (LEOFF), will have all the rights and all benefits preserved completely as now provided by those prior acts. *House Journal 1477 (1969).* [Emphasis added]

While both the statute and legislative intent are clear, if more clarity is needed, the remarks of Governor Evans at the time he vetoed a portion of the LEOFF legislation are directly on point. Governor Evans stated:

. . . This bill creates a unified statewide retirement system for law enforcement officers and fire fighters. It is one of the significant accomplishments of the 1969 legislature and I heartily endorse the purposes of this legislation . . .

Sections 28 and 29 of the act contain amendments to the existing firemen's pension system. The intent of section 32 is to permit all firemen who are employed prior to March 1, 1970, the effective date of the new pension system, to participate in the benefits of the existing firemen's pension system. However, as drafted, section 32 will actually allow persons who become firemen subsequent to March 1, 1970, to participate in the benefits of the existing firemen's pension system. This is in direct conflict with section 4(1) of the bill, which specifically excludes all fire fighters employed subsequent to March 1, 1970, from any pension system existing under any prior act.

In order to conform section 32 to the clear intent of this legislation, I have vetoed two items in that section to make clear that firemen employed subsequent to March 1, 1970, will not participate in the existing firemen's pension system.

The remainder of the bill is approved.

While the original enactment has been amended, it continues to adhere to the original principle, that is, pre-March 1, 1970 Pension Act members retained their rights under the Pension Act. As first amended, RCW 41.26.040 provided:

The Washington law enforcement officers' and fire fighters' retirement system is hereby created for fire fighters and law enforcement officers.

(1) (a) Notwithstanding RCW 41.26.030 and except as provided in subsection (1)(b) of this section, all fire fighters and law enforcement officers employed as such on or after March 1, 1970, on a full time fully compensated basis in this state shall be members of the retirement system established by this chapter with respect to all periods of service as such, to the exclusion of any pension system existing under any prior act except as provided in subsection (2) of this section . . .

(2) Any employee serving as a law enforcement officer or fire fighter on March 1, 1970, who is then making retirement contributions under any prior act shall have his membership transferred to the system established by this chapter as of such date. Upon retirement for service or for disability, or death, of any such employee, his retirement benefits earned under this chapter shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had not transferred. For the purpose of such computations, the employee's creditability of service and eligibility for service or disability retirement and survivor and all other benefits shall continue to be as provided in such prior retirement act, as if transfer of membership had not occurred. The excess, if any, of the benefits so computed, giving full value to survivor benefits, over the benefits payable under this chapter shall be paid whether or not the employee has made application under the prior act.

The most recent amendment occurring in 1991 is also consistent, stating in relevant part as follows:

The Washington law enforcement officers' and fire fighters' retirement system is hereby created for fire fighters and law enforcement officers.

(1) Notwithstanding RCW 41.26.030(8), all fire fighters and law enforcement officers employed as such on or after March 1, 1970, on a full time fully compensated basis in this state shall be members of the retirement system established by this chapter with respect to all periods of service as such, to the exclusion of any pension system existing under any prior act.

(2) Any employee serving as a law enforcement officer or fire fighter on March 1, 1970, who is then making retirement contributions under any prior act shall have his membership transferred to the system established by this chapter as of such date. Upon retirement for service or for disability, or death, of any such employee, his retirement benefits earned under this chapter shall be computed and paid. In addition, his benefits under the prior retirement act to which he was making contributions at the time of this transfer shall be computed as if he had not transferred. For the purpose of such computations, the employee's creditability of service and eligibility for service or disability retirement and survivor and all other benefits shall continue to be as provided in such prior retirement act, as if transfer of membership had not occurred. The excess, if any, of the benefits so computed, giving full value to survivor benefits, over the benefits payable under this chapter shall be paid whether or not the employee has made application under the prior act.

From the debate on the floor of the House of Representatives to Governor Evans' remarks, through the latest amendment, it is clear that two classes of plan participants are being addressed by RCW 41.26.040.

Those hired on or after March 1, 1970, had LEOFF as their exclusive pension system. Those employed before March 1, 1970, transferred to LEOFF, yet retained their rights under the Pension Act, as if they had not transferred. McAllisters were employed before March 1, 1970 and therefore retained their Pension Act coverage.

Bellevue's failure to recognize the retention of any Pension Act rights by the McAllisters infects its remaining arguments and analysis with error. Nonetheless, McAllisters make the following response.

B. Reply to Constitutionality Argument – Contained Under B and C of Responsive Brief.

Bellevue argues that the case of *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956) has no application where there is no challenge to the constitutionality of legislation, as *Bakenhus* is only applicable to invalidate a later piece of legislation that impairs rights under earlier legislation. While McAllisters do not agree that *Bakenhus* is so restricted, had Bellevue recognized that the McAllisters' Pension Act rights continued, what occurred in the McAllister case falls directly within Bellevue's own interpretation of *Bakenhus*.

First, Bellevue admits there is a symmetry between contributions and benefits. (Responsive Brief, Page 15). Second, the McAllisters had a Pension Act right to make limited pension contributions after their rank

exceeded battalion chief. This limited contribution entitled them to a limited benefit. Third, the McAllisters retained their Pension Act rights after LEOFF's passage. Lastly, after March 1, 1970, McAllisters' contributions were increased and no longer limited by the Pension Act definition of "basic salary."

As is undeniably evident, if the analysis were to end here and the decision of the Pension Board affirmed, LEOFF has impaired the McAllisters' rights under the Pension Act. The cost of their pension has gone up yet their benefit remains limited. *Bakenhus* has been violated.

Fortunately, analysis of what occurred goes further and takes into consideration other applicable law. In the case of *Grant v. Spellman*, 99 Wn.2d 815, 664 P.2d 1227 (1983), the court cited that authority, holding as follows:

The duty of the court is to ascertain and give effect to the intent and purpose of the Legislature, as expressed in the act. *In re Lehman*, 93 Wn.2d 25, 27, 604 P.2d 948 (1980). Courts presume legislatures to act with integrity and with a purpose to keep within constitutional limits. *Tembruell v. Seattle*, 64 Wn.2d 503, 392 P.2d 453 (1964). When interpreting a statute, every presumption favors the validity of an act of the Legislature, all doubts must be resolved in support of the act, and it will not be declared unconstitutional unless it clearly appears to be so. *Lenci v. Seattle*, 63 Wn.2d 664, 388 P.2d 926 (1964). 1A C. Sands, *Statutory Construction* § 45.11 (4th ed. 1973). If, among alternative constructions, one or more would involve serious constitutional difficulties, the court, without doing

violence to the legislative purpose, will reject those interpretations in favor of a construction which will sustain the constitutionality of the statute. 1A C. Sands, *Statutory Construction* § 45.11 (4th ed. 1973) [Emphasis added].

Had Bellevue recognized that Pension Act rights continued for pre-LEOFF employees, it would have recognized dichotomy created by the right to a limited contribution under the Pension Act definition of “basic salary” with the unlimited contribution required under the LEOFF definition of “basic salary.” In resolving the inconsistency created by the two different definitions, Bellevue would need direction to choose one definition over the other, and this direction is contained in RCW 41.26.910 (now RCW 41.26.3902). It states:

Act to Control Inconsistencies

To the extent that the provisions of this 1969 amendatory act are inconsistent with the provisions of any other law, the provisions of this 1969 amendatory act shall be controlling.

Applying the foregoing, LEOFF’s definition of “basic salary” would apply and replace the inconsistent definition of “basic salary” contained in the Pension Act. This would justify the increased contributions collected by Bellevue from deputy chiefs and chiefs. It would also apply in similar vein to remove the cap on benefits. The disadvantage of increased contributions would be offset by increased benefits satisfying constitutional requirements. As such, the principles

contained in *Bakenhus* can apply even where unconstitutionality is not claimed.

C. Reply to Argument that the Pension Board is not Obligated to Pay a Higher Pension than that Specified in the Pension Act – Contained Under D of Responsive Brief.

Bellevue argues that *Bakenhus* only applies to cases where there has been a reduction in pension benefits caused by amending legislation, apparently making a distinction between a reduction in benefits and an increased cost for the same benefits. Conceptually, that is a distinction without a difference, made clear in the case of *Dailey v. City of Seattle*, 54 Wn.2d 733, 344 P.2d 718 (1955) and *Allen and Alger v. City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (1955) adopted by *Bakenhus*. The *Bakenhus* court reiterated:

An employee vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. (Citing cases.) Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employee should be accompanied by comparable new advantages. (Citing cases.)

It was held in these cases that an increase in the amount of an employee's contribution without a corresponding increase in benefits was unreasonable.

Clearly, *Bakenhus* does apply. In conceding that it might have application, Bellevue argues that the remedy would be to hold the LEOFF statute unconstitutional as applied to the McAllisters. Such an approach is not favored, as was previously discussed, and is not necessary in the McAllister case. The conflict can be resolved by application of the statutory language contained in LEOFF, making inconsistent provisions governed by the LEOFF legislation.

**D. Reply to Argument that 1969 Act Never Took Effect –
Contained Under E of Responsive Brief.**

Bellevue also argues that the 1969 legislation contained in Chapter 209 §10 of the 1969 Extra Session laws has no application as it never went into effect. No authority is cited for that proposition, and there is no basis for that argument. The bill establishing LEOFF was passed by both the House and Senate in April 1969, signed by the Governor and filed with the Secretary of State on May 8, 1969. By Washington State Constitution, Article 2 § 41, the LEOFF act became effective ninety days after the legislature's adjournment. Had it never gone into effect, there would have been no reason to amend it, which Bellevue admits occurred. From that point, there is no reason to exempt the amending legislation from the

requirements of *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956).

E. Reply to Argument that “Basic Salary” Definitions are not Inconsistent – Contained Under F of Responsive Brief.

Bellevue next argues that the “basis salary” provisions of the Pension Act and LEOFF are not inconsistent. Bellevue’s rationale appears to be that LEOFF replaced the Pension Act definition of “basic salary” and there is no need to compare the two. This again returns to Bellevue’s misreading of RCW 41.26.040(1) and (2). Had Bellevue recognized that the McAllisters retained their Pension Act rights, as though they never transferred to LEOFF, the inconsistency would be apparent. The retained right under the Pension Act is to a limited contribution in ranks above battalion chief. LEOFF required a contribution unlimited by rank. The McAllisters made a single contribution, yet the amount is different depending on which definition of “basic salary” is used. With such a result, there is no question the “basic salary” definitions are inconsistent.

F. Conclusion.

Bellevue began its analysis of McAllisters’ argument with the assumption that their transfer to LEOFF was exclusive, and they retained no rights under the Pension Act. Such a position has no support in the statute or in its history. The exclusivity provision cited by Bellevue relate

to individuals hired on or after March 1, 1970. The McAllisters began employment in 1965 and as such, under RCW 41.26.040(2) retained their Pension Act rights.

One of the retained rights was to have their contributions toward retirement benefits capped at 6% of a battalion chief's salary once their rank surpassed the battalion chief level. This limited contribution gave them a right to benefits capped at 50% of a battalion chief's salary upon retirement.

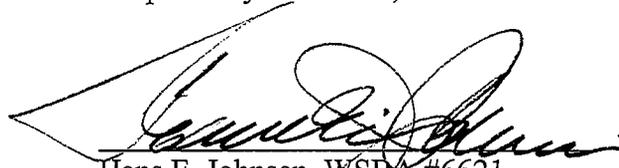
In March of 1970, LEOFF became effective, and although their Pension Act rights were retained, their pension contributions were raised to 6% of their full salary. When contributions are increased, the prohibitions of *Bakenhus* apply, such that the legislation mandating the increase cannot constitutionally be applied to an existing member unless a corresponding benefit is provided.

Control of both contributions and benefits under both the Pension Act and LEOFF is a function of the definition of "basic salary." These definitions are inconsistent. As such, LEOFF's definition is controlling and applies. By so doing, increasing the contribution amounts for those above the rank of battalion chief finds legal justification. With this justification also comes a non-capped benefit, as was applied by Bellevue to the McAllisters for 30 years of their retirement. The decision of the

Pension Board should be reversed, and it should be required to compute the McAllisters' Pension Act benefits based upon the rank they held at retirement.

DATED this 26th day of September, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Hans E. Johnsen", written over a horizontal line.

Hans E. Johnsen, WSEA #6621
Attorney for McAllisters

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

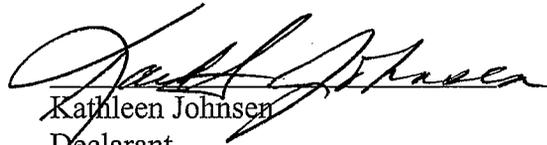
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DAVID McALLISTER and KEN)
McALLISTER,) NO. 57869-3-I
Appellants,)
v.)
DECLARATION)
OF SERVICE)
CITY OF BELLEVUE, FIREMEN'S)
PENSION BOARD,)
Respondent.)

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that on this day declarant caused to be delivered by ABC Legal Services a true and correct copy of REPLY BRIEF OF McALLISTERS in the above-captioned matter to the following at her last known address:

Cheryl A. Zakrzewski
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Bellevue, WA 98009-9012

DATED at Bellevue, Washington this 27th day of September, 2006.


Kathleen Johnsen
Declarant