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STATE OF WASHINGTON

No. 81187-3

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DAVID McALLISTER and
KEN McALLISTER, Appellants,

vs.

CITY OF BELLEVUE FIREMEN'S
PENSION BOARD, Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Procedurally and substantively, Appellants David and Ken McAllisters (the McAllisters) Petition for Review does not meet the standards in RAP 13.4 for Supreme Court Review. This case involves the appropriate calculation of the McAllisters' pension under the 1955 Firemen's Pension Act (55 Act), RCW 41.18 et. seq., by the City of Bellevue Firemen's Pension Board (Bellevue Pension Board).

The Law Enforcement Officers and Fire Fighters Retirement System (LEOFF), RCW 41.26 et seq., succeeded the 55 Act.¹ All 55 Act members employed on March 1, 1970 had their membership transferred to LEOFF. In enacting LEOFF, the Legislature recognized the Supreme Court precedent in *Bakenhus v. City of Seattle*, 48 Wn. 2d 695, 296 P.2d 536 (1956) requiring reasonable modifications of pension benefits. LEOFF guaranteed former 55 Act members receipt of at least the pension they would have received under the 55 Act. LEOFF requires the Bellevue Pension Board to calculate former 55 Act members pensions under the 55 Act as if LEOFF did not exist. If the 55 Act calculation is more than the LEOFF pension, the Bellevue Pension Board pays the difference (the Excess Payment) from the Bellevue Firemen's Pension Fund.

¹ As explained more fully below, unlike the 55 Act, LEOFF is administered by the State Department of Retirement Systems, and contributions to the LEOFF plan are made to the State, not to the local Firemen's Pension Fund.

For a number of years, the Bellevue Pension Board overpaid the McAllisters because it failed to cap their pension calculation at the salary of a battalion chief as plainly required by RCW 41.18.010(4). In 2004, the Bellevue Pension Board corrected this error **prospectively**. No one disputes that since 2004 the Bellevue Pension Board has calculated the Excess Payment according to the unambiguous language of RCW 41.18.010(4). However, the McAllisters want more.

Below, the McAllisters claimed that LEOFF was constitutional so as not to jeopardize the generous LEOFF benefits they enjoy, such as fully paid health care. However, they further claimed below that because they were required to pay greater contributions to LEOFF, the Bellevue Pension Board must utilize a pension calculation that conflicts with the 55 Act. The Bellevue Pension Board is only authorized to administer this Act.

The Court of Appeals correctly concluded that 1) the unambiguous language of the 55 Act supported the Board correcting the McAllisters' pension calculation; 2) the Board's corrected pension calculation does not violate the *Bakenhus* line of cases; and 3) if the gravamen of their complaint is the increased contributions under LEOFF, their claim is against the State not the Bellevue Pension Board. Now for the first time in their Petition for Review, the McAllisters are challenging LEOFF's

constitutionality. The McAllisters' Petition For Review does not meet the criteria of RAP 13.4. Therefore, the Supreme Court should deny McAllisters' Petition.

II. ISSUES

1. Both substantively and procedurally, does the McAllisters' constitutional challenge to LEOFF fail because the Supreme Court lacks jurisdiction to hear a constitutional challenge to LEOFF where the Attorney General was not served as required under RCW 7.24.110 and the State Department of Retirement Systems was not named as a party?

2. If the Supreme Court has jurisdiction to consider the McAllisters' constitutional claims, do those claims fail substantively because the McAllisters have failed to prove their LEOFF pension violates *Bakenhus*?

3. Is the Court of Appeals decision upholding the Bellevue Pension Board's action in reducing the McAllisters' pension consistent with prior Supreme Court and Court of Appeals precedent?

4. Are there issues of substantial public importance where the issues here are very narrow and apply to only a handful of people?

III. STATEMENT OF THE CASE

A. Facts:

City of Bellevue firefighters who worked for Bellevue prior to March 1, 1970 were covered by the 1955 Act. (Clerk's Papers, p. 218, lines 29-30, hereafter CP-218:29-30). Prior to March 1, 1970, Bellevue firefighters contributed 6% of their basic salary as defined under RCW 41.18.010(4) to the Firemen's Pension Fund (Fund) administered by the Bellevue Pension Board. RCW 41.18.030. The 55 Act **capped the contribution at the rate of 6% of a battalion chief's salary**². The pension benefit formula for disability retirees under the 55 Act was 50% of the basic salary of a current firefighter in the rank that the retiree held at retirement **up to the rank of battalion chief**³. Therefore, prior to March 1, 1970, a firefighter who held a rank higher than battalion chief contributed no more than 6% of a battalion chief salary⁴. After retirement, under the calculation dictated by the 55 Act, the 50% calculation was

² RCWA 41.18.010(4) states: "Basic salary" means the basic monthly salary, including longevity pay, attached to the rank held by the retired firefighter at the date of his or her retirement, without regard to extra compensation which such firefighter may have received for special duties assignments not acquired through civil service examination: PROVIDED, That such basic salary shall not be deemed to exceed the salary of a battalion chief.

³ RCWA 41.18.060 provides in part: "... If the board finds at the expiration of six months that the firefighter is unable to return to and perform his or her duties, the firefighter shall be retired at a monthly sum equal to fifty percent of the amount of his or her basic salary at any time thereafter attached to the rank which he or she held at the date of retirement:..."

⁴ The McAllisters do not contend they contributed more than 6% of a battalion chief salary to the Fund prior to March 1, 1970.

capped at a current battalion chief salary.⁵ CP 138:3-5, RCW 41.18.010, RCW 41.18.060.

LEOFF went into effect on March 1, 1970. As of that date, current fire fighters such as the McAllisters, were no longer members of the 55 Act and were no longer making contributions to the Bellevue Firemen's Pension Fund. Instead, LEOFF contributions were made to the State Department of Retirement Systems (DRS). RCW 41.26.040(2)⁶. DRS administered the LEOFF pension.⁷ Under LEOFF, current fire fighters contributed 6% of their basic salary as defined under LEOFF. LEOFF's basic salary definition had no cap associated with a rank⁸. Similarly, under RCW 41.26.130, the formula for calculating a LEOFF disability pension had no cap.⁹ LEOFF also provided additional retiree benefits not

⁵ Prior to March 1, 1970, the Bellevue Pension Board calculated the pensions to be paid to retiree's under the 55 Act, and the full benefit was paid from the Fund. RCW 41.18.020.

⁶ See page 11 infra for full citation of RCW 41.26.040(2).

⁷ When LEOFF was originally enacted there was only one tier of membership. Starting in October 1977, the legislature created a second tier of LEOFF membership (LEOFF 2) and the originally created tier became known as LEOFF 1. Since this Answer only involves LEOFF 1 membership, it will be referred to as LEOFF throughout this Answer.

⁸ RCW 41.26.030(13)(a) defines basic salary for LEOFF as: "Basic salary" for plan 1 members, means the basic monthly rate of salary or wages, including longevity pay but not including overtime earnings or special salary or wages, upon which pension or retirement benefits will be computed and upon which employer contributions and salary deductions will be based.

⁹ RCW 41.26.130(1) provides: "Upon retirement for disability a member shall be entitled to receive a monthly retirement allowance computed as follows: (a) A basic amount of fifty percent of final average salary at time of disability retirement, and (b) an additional five percent of final average salary for each child as defined in RCW 41.26.030(7), (c) the combined total of (a) and (b) of this subsection shall not exceed a maximum of sixty percent of final average salary".

provided under the 55 Act, including fully paid retiree health care and enhanced survivor benefits for disability retirees. RCW 41.26.030(22) and 41.26.160, respectively.

Although LEOFF created a different pension formula, it preserved the right of former 55 Act members to receive no less a retirement benefit than they would have received if LEOFF was not created. RCW 41.26.040(2) requires that the Bellevue Pension Board compare the LEOFF pension of a former 55 Act firefighter with the benefit he would have received under the 55 Act. If the LEOFF benefit is less than the 55 Act benefit, the Bellevue Pension Board pays the Excess Payment out of the Bellevue Firemen's Pension Fund.

The City of Bellevue Fire Department hired David McAllister in 1965. He disability retired in 1975 as a Fire Chief. The City of Bellevue hired Ken McAllister in 1968. He disability retired as a Deputy Fire Chief in 1983. CABR Hearing Examiner Record G 04-01-0012, lines 15-20. Prior to 2004, the Bellevue Pension Board erroneously calculated the McAllisters' pensions by failing to include the battalion chief salary cap in calculating the Excess Payment. In 2004 the Bellevue Pension Board corrected this error prospectively. CP:138:6-13. It is this correction that the McAllisters seek to avoid by asserting theories not supported by law or any case precedent.

B. Procedure:

In their brief to the Court of Appeals (Brief), at page 1, the McAllisters assigned error to the Bellevue Pension Board conclusions that 1) LEOFF did not repeal the 55 Act battalion chief cap on basic salary; 2) the Board's actions did not violate *Bakenhus*; and 3) the Board did not err in reducing the McAllisters' Excess Payment consistent with the battalion chief cap under RCW 41.18.010(4). However, before the Court of Appeals, the McAllisters disclaimed any constitutional challenge to LEOFF:

The McAllister case differs from the *Bakenhus* case, as the McAllisters are not arguing that the LEOFF legislation cannot be constitutionally applied to them. To the contrary, adhering to the statutory language and legislative purpose, the statute can be constitutionally applied. It is only the Pension Board's application that would violate constitutional requirements and ignore the language of RCW 41.26.

Brief, at p. 7.

On November 19, 2007, the Court of Appeals issued an unreported decision upholding the Bellevue Pension Board. The Court of Appeals found the 55 Act definition of basic salary to be clear and unambiguous. It held there was no basis for the McAllisters' claim that the Bellevue Pension Board's calculation utilizing the battalion chief salary cap violated *Bakenhus* and its progeny. Further, the Court of Appeals rejected

the McAllisters' argument that a version of LEOFF that never went into effect and that would have continued the same pension contribution as existed under the 55 Act had any relevance to the McAllisters' challenge. Upon the Bellevue Pension Board's motion, on December 17, 2007, the Court of Appeals published its decision in this matter.

The McAllisters' Supreme Court Petition now for the first time challenges LEOFF's constitutionality.

The Court of Appeals' analysis seems to miss the point and in so doing, frames the constitutional question. It is not what the Legislature did that is controlling, but, instead did the Legislature act within the restrictions imposed by Article 1, Section 23 and Bakenhus? Clearly, uncapping the McAllisters' contributions falls outside those restrictions....

Petition for Review, at p. 13-14.

IV. ARGUMENT

A. THE SUPREME COURT LACKS JURISDICTION TO CONSIDER THE McALLISTERS' CHALLENGE TO LEOFF'S CONSTITUTIONALITY

There is no court record evidencing that the McAllisters have timely notified the Attorney General that they are challenging LEOFF's constitutionality. Therefore under RCW 7.24.110, a court lacks jurisdiction to consider the McAllisters' claim. RCW 7.24.110 states:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the *attorney general shall also be served* with a copy of the proceeding and be entitled to be heard.

RCW 7.24.110 requires that a plaintiff who seeks to have a statute declared unconstitutional must provide the Attorney General with notice of the action. Further, this is a prerequisite to the court's jurisdiction.

Camp Finance, LLC v. Brazington, 133 Wash.App. 156, 160-162, 135 P.3d 946, 948-949 (2006).

Without appropriate notice to the Attorney General that the McAllisters are claiming LEOFF is unconstitutional, the Department of Retirement Systems (DRS) has had no opportunity to defend the constitutionality of a statute it administers. DRS obviously has an interest in a claim that LEOFF cannot exact the statutory pension contribution that has been in existence for almost 50 years from those former 55 Act members whose rank at retirement was higher than battalion chief. Prior to the McAllisters' Petition for Review, the Attorney General would have had no reason to be concerned about this litigation. Openly, the McAllisters affirmed they were not seeking to have LEOFF declared unconstitutional. By limiting their challenge, the McAllisters sought to continue to receive their LEOFF retirement benefits, while at the same

time arguing, albeit erroneously, that the constitutional LEOFF statute required the Bellevue Pension Board to apply a definition of basic salary not found in the 55 Act. RCW 7.24.110 requires that the McAllisters' constitutional challenges to LEOFF not be heard by the Washington Supreme Court.¹⁰

B. THE APPELLATE COURT'S DECISION IS CONSISTENT WITH THE HOLDINGS OF THE SUPREME COURT ESTABLISHING THE STANDARDS FOR CONSTITUTIONALITY OF PUBLIC PENSION MODIFICATIONS.

Below, the McAllisters argued that when LEOFF went into effect, *Bakenhus v. City of Seattle*, 48 Wn. 2d 695, 296 P.2d 536 (1956) required the Bellevue Pension Board to calculate the McAllisters' pension without the battalion chief salary cap. This claim is directly contrary to both the 55 Act definition of basic salary and the unambiguous language of RCW 41.26.040(2) requiring the Board to calculate the Excess Payment using the 55 Act as it existed prior to LEOFF. The McAllisters argue that their

¹⁰ If jurisdiction exists, the Court should still find that the McAllisters are estopped from claiming LEOFF is unconstitutional. The McAllisters claimed the Board's corrected pension calculation violated *Bakenhus* because LEOFF increased the McAllisters' contributions and this necessitated lifting the salary cap under RCW 41.18.010(4). However, they did not challenge LEOFF's constitutionality. Now, using precisely the same theory, the McAllisters claim that the Appellate Court's holding violates the Washington State Constitution, Article 1, Section 23. Similar to the invited error doctrine, [See *City of Seattle v. Patu* 147 Wash.2d 717, 720-721, 58 P.3d 273, 274 (2002)], the McAllisters should not now be permitted to claim the Appellate Court's decision somehow raises a question of LEOFF's constitutionality when that argument was precisely waived before the Appellate Court.

increased contributions to LEOFF and a version of LEOFF that never went into effect support this claim. The Court of Appeals correctly concluded that *Bakenhus* requires no such thing.

Bakenhus v. Seattle, supra, and *Dailey v. Seattle*, 54 Wash.2d 733, 344 P.2d 718 (1959) applied a contract analogy to public pension systems. These cases held that employees, who accept positions with retirement systems, contract “for a substantial pension” and are entitled to receive that pension when they have “fulfilled the prescribed conditions.” *Vallet v. City of Seattle*, 77 Wash.2d 12, 20, 459 P.2d 407 (1969) (quoting *Bakenhus*, 48 Wash.2d at 701-02, 296 P.2d 536, citing *Dailey*, 54 Wash.2d at 738-39, 344 P.2d 718). In so contracting, public employees are deemed to accept any reasonable and equitable legislative modifications to the pension plan that are enacted for the purpose of maintaining the flexibility and integrity of the plan. *Bakenhus*, 48 Wash.2d at 701-02, 296 P.2d 536; *Dailey*, 54 Wash.2d at 738-39, 344 P.2d 718). To be found reasonable, any modification operating to the detriment of the employee should be coupled with a comparable benefit. (*Bakenhus*, 48 Wash.2d at 701-02, 296 P.2d 536) Based on these principles, if the modifications are reasonable and equitable, “the pensioner derives his right to a pension from the latest law and he must retire thereunder.” *Vallet*, at 21, 459 P.2d 407.

The Court of Appeals correctly concluded that consistent with *Bakenhus*, LEOFF preserved the McAllisters' benefits they would have received under the 55 Act through the Excess Payment calculation contained in RCW 41.26.040(2). It provides:

RCW 41.26.040(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. If the employee's prior retirement system was the Washington public employees' retirement system, payment of such excess shall be made by that system; if the employee's prior retirement system was the statewide city employees' retirement system, payment of such excess shall be made by the employer which was the member's employer when his transfer of membership occurred: PROVIDED, That any death in line of duty lump sum benefit payment shall continue to be the obligation of that system as provided in RCW 41.44.210; in the case of all other prior retirement systems, payment of such excess shall be made by the employer which was the member's employer when his transfer of membership occurred.

Since LEOFF did not change the benefit the McAllisters receive under the 55 Act, the Court of Appeals concluded correctly the Bellevue Pension Board must calculate the McAllisters' 55 Act benefit using the battalion chief salary cap. The unambiguous language of RCW 41.18.010(4) and *Bakenhus* did not require a different result.

Also consistent with *Bakenhus*, the Court of Appeals rejected on procedural and substantive grounds the McAllisters' argument that their increased contributions under LEOFF necessitated the Bellevue Pension Board use a different Excess Payment calculation. Substantively, nowhere in the record have the McAllisters presented any evidence that the additional advantages LEOFF members received over the 55 Act such as fully paid health benefits, and 100% survivor benefits, do not constitute a corresponding benefit making the LEOFF pension modification reasonable.

Procedurally, if LEOFF is not a reasonable modification to the 55 Act, and therefore unconstitutional, the remedy under *Bakenhus* is not a change in the definition under the 55 Act to something the Legislature never adopted. Under *Bakenhus* and its progeny, if a public pension statute is unconstitutional, then the latest act which could constitutionally be applied to a retiree would control. In this case, that would be the 55 Act since this is the only other Act to which the McAllisters ever made

contributions. *Dailey v. City of Seattle*, 54 Wash.2d 733, 739, 344 P.2d 718, 721 (1959).

For obvious reasons, the McAllisters have not sought this result. This result would provide them with the identical benefit preserved under RCW 41.26.040. Further, as noted above, under this result, if the LEOFF contribution increase violates *Bakenhus*, the remedy for this violation rests with the State, not the Bellevue Pension Board. The Board never had any authority over the contributions made under LEOFF. The McAllisters have not named the State as a party. The Court of Appeals decision is not inconsistent with Supreme Court or Appellate court precedent.

The Court of Appeals was also correct in rejecting the McAllisters' claim that a former version of LEOFF that never went into effect and under which the McAllisters never made contributions requires the Board utilize a different Excess Payment. This former version of LEOFF has no relevance to the issues presented here. The only pension plans to which the McAllisters contributed is the LEOFF plan that went into effect on March 1, 1970 and the 55 Act in existence when they started employment.

The former version of the LEOFF statute presents no important constitutional issues for the McAllisters¹¹.

C. THERE ARE NO COURT OF APPEALS DECISIONS IN CONFLICT WITH THE APPELLATE COURT'S RULING BELOW

The McAllisters acknowledge that there are no other appellate court decision that conflict with the Court of Appeal's ruling below. One inconsistent trial court ruling does not meet the criteria for review. There is no evidence with the precedent of Division 1 in the matter below that Division 2 would not hold similarly.

D. NO SUBSTANTIAL PUBLIC INTEREST ISSUES ARE RAISED BY THE McALLISTERS' PETITION

As shown above, there are no constitutional issues, the Court of Appeals decision is consistent with Supreme Court precedent and there are no conflicting decisions among Courts of Appeals. The Petition presents a very narrow issue affecting a handful of people.¹² LEOFF has been in existence for almost 50 years. After all this time there appear to be only two other cases purportedly raising similar issues. The petitioners in these two other cases are represented by the same legal counsel who brought

¹¹ The former version of LEOFF does not give the McAllisters the relief they are seeking – a 55 Act calculation without a battalion chief salary cap. The only relief it would provide to the McAllisters is a rebate in contributions. Again, this is a claim that should have been made to the State in seeking to declare LEOFF unconstitutional – something they failed to do.

¹² The Bellevue Pension Board requested that this decision be published to aid the two other jurisdictions who are dealing with the same issue.

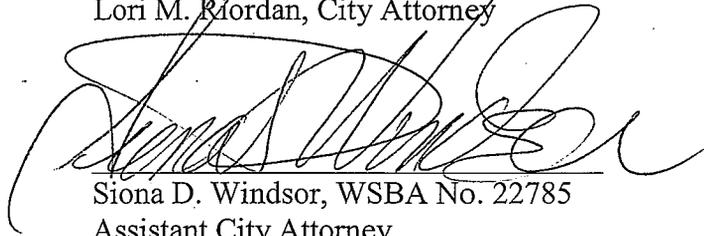
this action and they were all filed close in time to each other. This leads to a reasonable conclusion that very few individuals are impacted by the issues raised by the McAllisters.

V. CONCLUSION

The McAllisters' Petition for Review does not meet the criteria for review under RAP 13.4. The McAllisters may not challenge LEOFF's constitutionality for the first time in their Petition for Review. Under RCW 7.24.110, the Court lacks jurisdiction to consider such a challenge. The McAllisters provided no notice to the Attorney General of its constitutional challenge. The McAllisters have not named the State as a party to this action. The Court of Appeals correctly followed Supreme Court precedent in holding that the Bellevue Pension Board's correction to the McAllisters' pension does not violate *Bakenhus*. There are no conflicting decisions among Courts of Appeals. The McAllisters have presented no issues of substantial public importance. The McAllisters' Petition should be denied.

RESPECTFULLY SUBMITTED this 14th day of February, 2008.

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

A large, stylized handwritten signature in black ink, appearing to read 'Siona D. Windsor', is written over the text of the City Attorney's name.

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DECLARATION OF SERVICE

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DECLARATION OF SERVICE

I Diane Jackson, declare under penalty of perjury under the Laws of the state of Washington that on February 14, 2008, I caused to be served on the persons listed below the following:

ANSWER TO PETITION FOR REVIEW

By way of:

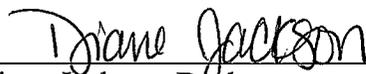
Legal Messenger on February 14, 2008.

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The original Answer to Petition For Review is being filed this date
In The Supreme Court of the State of Washington.

DATED at Bellevue, Washington this 14th day of February, 2008.



Diane Jackson, Declarant