

No. 81187-3

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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DAVID McALLISTER and  
KEN McALLISTER, Petitioners,

vs.

CITY OF BELLEVUE FIREMENS'  
PENSION BOARD, Respondent.

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PETITIONERS' RESPONSE TO AMICUS CURIAE BRIEF

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**ORIGINAL**

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**I.**  
**INTRODUCTION**

The McAllisters' rights to pension benefits under *RCW* 41.18 ("1955 Pension Act") are controlled by both that act and *RCW* 41.26 ("LEOFF"). It is the interrelation between those acts, as restricted by the holding in *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956), that is before this Court. Contrary to the assertion by the Washington State Association of Municipal Attorneys ("WSAMA"), favorable resolution of the McAllisters' claim does not necessitate any need to judicially draft legislation. Rather, following the statutory directive contained in LEOFF to resolve inconsistencies between the two acts requires payment under the 1955 Pension Act of a benefit equal to fifty percent (50%) of the current salary attached to the rank from which the McAllisters retired, not the limited benefit of fifty percent (50%) of the basic salary of a battalion chief provided for by that act.

**II.**  
**FACTS**

No additional facts are necessary for this response.

### III. ARGUMENT

#### A. Pre-LEOFF Definition of Basic Salary.

WSAMA's initial argument focuses on the limiting definition of "basic salary" under the 1955 Pension Act, arguing that the Court has no power to change or modify that restrictive language. In support of its argument, WSAMA cites authority focusing on statutory construction or interpretation. Specifically, unambiguous statutory language must be given its plain meaning. While good authority, it does not address any issue raised by the McAllisters. They believe the 1955 Pension Act statutory language is clear, although inconsistent with that of LEOFF. That inconsistency is resolved by clear statutory direction contained in LEOFF.

It is undisputed that the same language of the 1955 Pension Act limiting benefits also limits contributions. WSAMA asks this Court to adhere to the language only as it relates to the payment of benefits, and ignore it as it relates to contributions. McAllisters believe that benefits and contributions must be based upon the same formula, for the reasons set forth below.

While WSAMA argues that McAllisters' reliance on *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956) is misapplied, all

parties seem to agree that *Bakenhus* requires that any amendment to pension legislation creating a disadvantage to the pensioner's existing rights must be offset with a corresponding advantage.

When the legislature in 1969 passed LEOFF, codified in *RCW* 41.26, it was acutely aware of the *Bakenhus* requirements. The court in *Mulholland v. City of Tacoma*, 83 Wn.2d 782, 522 P.2d 1157 (1974), made mention that the LEOFF provisions contained in *RCW* 41.26 were in obvious recognition of the *Bakenhus* holding. Representative Richardson's statement from the House floor expressed the legislative intent to create no disadvantage:

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 his 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]

True to the expressed intent to preserve all rights and benefits completely, *RCW* 41.26.040 (1) & (2) provided:

(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.

(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 purposes of employee contribution rate, creditability 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. [Emphasis added]

As the McAllisters were not initially employed on or after March 1, 1970, subsection (2) applies to them. Their rights and benefits were retained, as was their membership in the 1955 Pension Act. Most importantly, their right to the 1955 Pension Act contribution rate was retained.

At some point in time following LEOFF's passage, the legislature determined that for the ranks above battalion chief, retaining the 1955 Pension Act contribution rate, capped at six percent (6%) of a battalion chief's salary based upon that act's definition of basic salary, *RCW* 41.18.010, was inconsistent with LEOFF's contribution rate of six percent

(6%) of actual salary, based upon LEOFF's definition of basic salary.

*RCW* 41.26.030. The two definitions could not be reconciled.

In February of 1970, the legislature amended *RCW* 41.26.020, removing the specific language relating to the prior Pension Act contribution rates. The McAllisters' contribution toward their pension was increased to six percent (6%) of their actual salary, using the LEOFF basic salary definition and disregarding the 1955 Pension Act basic salary limitation. This ability to disregard the contribution rate under the 1955 Pension Act is accomplished by applying the clear LEOFF provisions.

*RCW* 41.26.910 (now *RCW* 41.26.3902) 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 1955 Pension Act. This would justify the increased contributions collected by Bellevue from deputy chiefs and chiefs. However, in order to accomplish the increase, the same application of the LEOFF basic salary definition would also increase the benefits. The

disadvantage of increased contributions would be offset by increased benefits, satisfying *Bakenhus* and constitutional requirements.

**B. Vallet v. City of Seattle.**

WSAMA next argues that granting the McAllisters' their requested relief would effectively overrule the case of *Vallet v. City of Seattle*, 77 Wn.2d 12, 459 P.2d 407 (1969). The *Vallet* case is easily distinguishable.

The *Vallet* court held that the retiring plaintiff, who was covered during his tenure by two pension plans, was required to choose his pension under the last act that could constitutionally be applied. Unlike the McAllister case, neither of *Vallet's* pensions acts contained language that incorporated the other plan, or guaranteed that "all the rights and all the benefits" of the prior act would be preserved completely and would remain available to the pensioner. The *Vallet* court held that where succeeding pension modifications are reasonable and equitable, "the pensioner derives his right to a pension from the latest law and must retire thereunder." McAllisters' rights, by unambiguous statutory language, are not derived from the last act, but by both the 1955 Pension Act and LEOFF.

Finally, as a sub-argument under the *Vallet* holding, WSAMA argues that the increased contributions the McAllisters made were more

than offset by the additional benefits available under LEOFF. Careful analysis proves this to be incorrect.

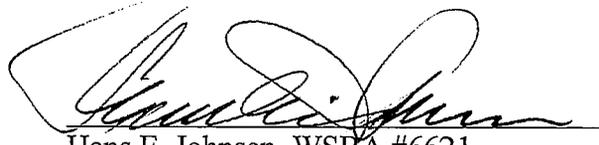
Every individual in the fire service that became a member of LEOFF, but retained their 1955 Pension Act rights and benefits, received the additional benefits outlined by WSAMA under the LEOFF system. This came with their contribution of six percent (6%) of their actual salary. Those pre-LEOFF members also had a right to receive the 1955 Pension Act benefits, to the extent they exceeded the LEOFF benefits. Those that paid six percent (6%) of their actual salary received benefits based upon their actual salary.

After March 1970, the McAllisters paid six percent (6%) of their actual salary toward their pension and like all other fire service members, received the available LEOFF benefits. However, while their 1955 Pension Act right and benefits were preserved, the McAllisters similarly contributed at a higher rate equal to six percent (6%) of their actual salary. As their 1955 Pension Act rights continued, the proper inquiry for the increased contribution is not what was received under LEOFF, but what corresponding benefit was received under the Pension Act.

**IV.  
CONCLUSION**

While agreeing that LEOFF forbids any construction that limits the pension a firefighter would have received if LEOFF had never been enacted, (WSAMA brief, page 9), WSAMA refuses to agree that an increase in the cost of a pension constitutes a limit on benefits. Assuming LEOFF had never been enacted, McAllisters would have paid six percent (6%) of a battalion chief's salary and received fifty percent (50%) of that salary at retirement. With LEOFF's enactment, they have contributed six percent (6%) of their full salary for fifty percent (50%) of a battalion chief's salary. Such a construction constitutes a limit that would not occur absent LEOFF. The limitation would also violate *Bakenhus*. Both of these problems are resolved by applying the LEOFF language to resolve inconsistencies. Such application preserves both constitutionality as well as LEOFF's intent. *Grant v. Spellman*, 99 Wn.2d 815, 664 P.2d 1227 (1983). In addition, it provides a proper answer to the question of whether the Court must use the pre-LEOFF definition of basic salary.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of February, 2009.

  
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